The Future of Single-Plaintiff Employment Discrimination Litigation: Are *Coleman, Vance*, EPL Insurance, and Commoditization Changing the Litigation Landscape?

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Laura A. Lindner

Laura A. Lindner is a shareholder with Littler Mendelson. She works out of the firm's Milwaukee, WI and Chicago, IL offices, and focuses her practice on employment and benefits litigation. She represents clients in state and federal trial and appellate courts, as well as before governmental agencies, including the EEOC. In her 20 years of practice, she has litigated every type of employment dispute, from class-based discrimination and wage claims to unfair competition TRO actions. Laura has extensive experience trying cases before juries, administrative law judges, and arbitrators. Drawing from her vast litigation experience, Laura counsels employers on employee leaves of absence and accommodation, termination, and litigation avoidance strategies, as well as on conducting investigations of employee misconduct and whistleblower complaints.

In addition to her private practice experience, Laura was senior counsel at a global telecommunications company where she handled its employment and benefits litigation for the Midwest Region.

Laura was named one of America's Leading Lawyers for Business by *Chambers USA* in 2012 and also received Chambers' 2012 "Up & Coming Employment Lawyer of the Year" Award. She received a 2013 Client Choice Award from Lexology and the International Law Office. Laura was named among *The Best Lawyers in America* in 2012 and 2013.

Deborah Widiss

Deborah Widiss is an Associate Professor of Law at the Indiana University Maurer School of Law. Her teaching and research focuses on employment law, family law, the legislative process, and the significance of gender and gender stereotypes in the development of law and government policy. Professor Widiss's scholarship has appeared in leading law reviews, including the University of Pennsylvania Law Review; the Texas Law Review; the Washington University Law Review; and the Harvard Journal of Law and Gender. In 2009, she won the Association of American Law Schools' annual scholarly papers competition for an article exploring the interpretive challenges posed by Congressional overrides of judicial precedents in employment discrimination law; in 2008, she was honored with a Dukeminier Award, from the Williams Institute at UCLA School of Law, which recognizes the best sexual orientation and gender identity law scholarship published in the previous year. Professor Widiss is currently the chair of the Association of American Law Schools' Employment Discrimination section.

Professor Widiss joined the Maurer faculty in 2009, after two years as a visiting assistant professor at Brooklyn Law School. Before beginning to teach, Professor Widiss was a staff attorney at Legal Momentum (formerly NOW Legal Defense and Education Fund), where she was a national expert on the intersection between domestic violence and employment. In this capacity, she litigated cases on behalf of individual victims of domestic violence, drafted federal and state legislation, and consulted regularly with employers. She also litigated pregnancy discrimination cases and authored several amicus briefs in support of marriage rights for same-sex couples. Earlier in her career, Widiss worked for Lawyers Alliance for New York, where she represented nonprofit employers in a range of employment-related and non-profit governance matters, and she worked for the Campaign for Fiscal Equity on reform of the financing of public schools. She clerked for Judge Allyne R. Ross of the U.S. District Court for the Eastern District of New York. Widiss has a J.D. and a B.A. from Yale University.

Thea E. Kelly

Thea E. Kelly, Sr. Counsel, Dow AgroSciences LLC, a division of the Dow Chemical Company focusing on sustainable agriculture, Dow AgroSciences employs more than 7,700 people worldwide, with global sales of over $6.4 billion (U.S.). Ms. Kelly, credited with first chair contract negotiation and drafting totaling over $1 Billion in sales is responsible for advising global manufacturing divisions and North American commercial units on business strategy to assess and mitigate risk including employee related matters. Prior to joining Dow, Ms. Kelly was an attorney at Ice Miller, LLP. Ms. Kelly earned her J.D from IU Robert H**.** McKinney School of Law, her Masters degree from Indiana University and her Bachelors degree from Michigan State University.

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Kimberly Jeselskis

Kimberly Jeselskis is the founder of the Jeselskis Law Offices. She advises and represents individuals in a wide range of employment law and benefits matters encompassing the areas of discrimination, harassment, retaliation, the Family and Medical Leave Act, wage and overtime issues, wrongful discharge, employment contracts, severance agreements, restrictive covenants, claims for short-term and long-term disability benefits, life insurance, and social security disability benefits. Jeselskis Law Offices also represents students and children with disabilities and parents of special needs children.

Ms. Jeselskis is a *cum laude* graduate of Ball State University where also received her Master of Arts degree. She holds a J.D. from the Valparaiso University School of Law.

Roberta Sabin Recker

Roberta Recker is a partner of Faegre Baker Daniels LLP in Indianapolis, Indiana. Ms. Recker began as a litigator and employment lawyer in 1974 at Morgan, Lewis & Bockius in Philadelphia, PA. She joined Baker & Daniels in Indianapolis in 1981 as a member of its labor and employment team. She represents employers in all aspects of their relationships with employees in non-union settings and also represents employers in arbitrations and litigation with unionized employees. Her practice emphasis is litigation and administrative adjudication of discrimination and other civil rights cases and cases involving wrongful termination, employment defamation, employment contracts and other employment-related issues. In more than 30 years of practice, Ms. Recker has represented employers in federal court, state courts and administrative agencies in more than a dozen states. She also counsels employers in decision making and assists them in developing and implementing policies, training supervisors and conducting investigations — all in ways designed to minimize the risk of litigation

Ms. Recker received her J.D. from the Dickinson School of Law, her master's degree from the Johns Hopkins University, and her bachelor's degree from Westminster College. Earlier in her career, she served as President of the Labor and Employment section of the Indianapolis Bar Association and as a regular NITA faculty member.

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DENISE COLEMAN, Plaintiff-Appellant, v. PATRICK R. DONAHOE, Postmaster General, Defendant-Appellee.

No. 10-3694

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

667 F.3d 835*; *2012 U.S. App. LEXIS 241*; *114 Fair Empl. Prac. Cas. (BNA) 160*; *95 Empl. Prac. Dec. (CCH) P44,384

September 14, 2011, Argued
January 6, 2012, Decided

PRIOR HISTORY: [**1]

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 1:09-cv-03824--David H. Coar, Judge.
Coleman v. Potter, 2010 U.S. Dist. LEXIS 111095 (N.D. Ill., Oct. 19, 2010)

COUNSEL: For DENISE COLEMAN, Plaintiff - Appellant: Tiana N. Evans, Attorney, WINSTON & STRAWN LLP, Chicago, IL.

For PATRICK R. DONAHOE, Postmaster General, Defendant - Appellee: Abigail L. Peluso, Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Chicago, IL.

JUDGES: Before WOOD, TINDER, and HAMILTON, Circuit Judges. WOOD, Circuit Judge, with whom TINDER and HAMILTON, Circuit Judges, join, concurring.

OPINION BY: HAMILTON

OPINION

[*840] HAMILTON, *Circuit Judge*. In 2006, the United States Postal Service terminated plaintiff Denise Coleman's 32 years of employment as a mail processing [*841] clerk. The Postal Service contends that it fired Coleman because she told her psychiatrist she was having thoughts of killing her supervisor, and it believed she posed a danger to her fellow employees. Coleman alleges that her termination was discriminatory (she is African-American and a woman) and retaliatory (she had previously complained, both formally and informally, of discriminatory treatment). In support of her disparate treatment claims under Title VII of the Civil Rights Act of 1964, Coleman presented evidence [**2] that two white male employees at the same facility had recently threatened another employee at knife-point, yet received only one-week suspensions from the same manager who fired her.

The district court found that these comparator employees were not similarly situated to Coleman because they had different direct supervisors and held different positions. Coleman therefore failed, in the district court's view, to establish a prima facie case of discrimination under the "indirect method" of proof derived from *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)*. The district court also held that Coleman had not provided any evidence that the Postal Service's stated reason for firing her -- that she violated its rule prohibiting workplace violence and threats -- was pre-textual. The district court therefore granted the Postal Service's motion for summary judgment on all claims. Coleman

appeals.

We reverse summary judgment on Coleman's discrimination claims and her retaliation claims. This appeal raises two recurring questions concerning comparator evidence in employment discrimination cases using the indirect method of proof: First, just how alike must comparators be to the plaintiff to be [**3] considered similarly situated? Second, can evidence that a similarly situated employee received better treatment serve not only as an element of the plaintiff's prima facie case, but also satisfy the plaintiff's burden to show that the employer's legitimate nondiscriminatory reason for its action was pretextual?

For the first question, we reiterate here that the similarly-situated inquiry is flexible, common-sense, and factual. It asks "essentially, are there enough common features between the individuals to allow a meaningful comparison?" *Humphries v. CBOCS West, Inc., 474 F.3d 387, 405 (7th Cir. 2007), aff'd, 553 U.S. 442, 128 S. Ct. 1951, 170 L. Ed. 2d 864 (2008)*. There must be "sufficient commonalities on the key variables between the plaintiff and the would-be comparator to allow the type of comparison that, taken together with the other prima facie evidence, would allow a jury to reach an inference of discrimination." *Id*. In other words, the proposed comparator must be similar enough to permit a reasonable juror to infer, in light of all the circumstances, that an impermissible animus motivated the employer's decision. Here, Coleman's two white, male co-workers were disciplined by the same decisionmaker, subject [**4] to the same code of conduct, and disciplined more leniently for violating the same rule as she. Their case is close enough to Coleman's to provide a "meaningful comparison" and to permit a reasonable jury to infer discrimination. *Id*.

The answer to the second question is yes. In *McDonnell Douglas* itself, the Supreme Court noted that comparator evidence would be "[e]specially relevant" at the pretext stage. *411 U.S. at 804*. Under our circuit precedents, too, an employment discrimination plaintiff may demonstrate pretext by providing evidence that a similarly situated employee outside her protected class received more favorable treatment. Coleman has done [*842] so. The evidence of selective application of the rule against violence and threats to Coleman -- whose confidential expressions of anger during inpatient psychotherapy were not direct threats at all, and who was discharged as stable before the Postal Service even heard about those thoughts -- undercuts the Postal Service's assertion that it was just neutrally enforcing its "no tolerance" policy. Together with other evidence calling into question the honesty of the Postal Service's rationale, Coleman's comparator evidence presents a jury [**5] question as to pretext.

I. *Factual and Procedural Background*

In assessing whether the Postal Service is entitled to summary judgment, we examine the record in the light most favorable to Coleman, the non-moving party, resolving all evidentiary conflicts in her favor and according her the benefit of all reasonable inferences that may be drawn from the record. *O'Leary v. Accretive Health, Inc., 657 F.3d 625, 630 (7th Cir. 2011)*. Our account of the facts therefore is not necessarily true in an objective sense, but reflects the standard that applies to motions for summary judgment.

Coleman began working for the Postal Service in 1974. She had a good employment record until January 2005, when her longtime supervisor retired. William Berry was selected as the replacement by William Sove, the plant's maintenance manager. Sove is white; Berry is black. Coleman believed Sove had passed over her for the promotion because she was female. She also felt Berry was treating her poorly in his new supervisory role. She related these complaints in an April 2005 email to Gregory Johnson, the head of the facility where she worked. The following month, Coleman emailed Sove, accusing him and Berry of discrimination [**6] and threatening to file a charge with the Equal Employment Opportunity Commission (EEOC).

On June 5, 2005, Coleman learned that she would soon undergo surgery. Two days later, she submitted a request to Johnson and Sove to advance her two weeks of future paid sick leave for her convalescence. The same day, Berry directed Coleman to clean an especially dingy area behind a storeroom and to move some heavy boxes -- tasks, she says, that were not among her regular duties. Coleman refused, telling Berry that she was unable to lift the boxes because of her upcoming surgery and that the storeroom's chemicals and dust would exacerbate her chronic asthma. Berry issued Coleman a "Letter of Warning" for failing to follow instructions. On June 9, 2005, Johnson denied her request for advanced sick leave.

As scheduled, Coleman had surgery on June 10, 2005. She returned to work on June 23, 2005, subject to the medical restriction that she avoid climbing stairs for two weeks. Because Coleman's usual work station was up one flight of stairs, Berry informed her that she could work in the ground-floor storeroom, but because of her asthma this was not an attractive alternative to Coleman. When she rejected [**7] it, Berry sent her home. She returned to the mail facility a week later with revised medical restrictions permitting her to climb stairs once or twice per day. But Berry then told Coleman that all employees had to clock in using a particular time-clock -- a change that would require her taking more than the maximum stairs she was advised to ascend. She again left work. The following week, Berry issued Coleman an absent-without-leave notice because she had not worked or announced her absence in five days. As this conflict unfolded, Coleman filed an EEO request for pre-complaint counseling on June 21, [*843] 2005, identifying Berry and Sove as the discriminating officials. She supplemented her request with additional information on July 1, 2005.

On July 12, 2005, Coleman checked herself into the psychiatric unit of a hospital complaining of depression, anxiety, and insomnia. In her admission interview, Coleman experienced "severe crying spells, helplessness, [and] hopelessness with suicidal ideation." The treating psychiatrist, Dr. Ofelia Ionescu, observed Coleman's "extremely paranoid/obsessional thinking about being harassed by her supervisor, Mr. Berry," and she described Coleman as "endorsing [**8] . . . homicidal ideation 'every time I'm talking about him [Berry].'" Coleman remained at the hospital for three weeks while she received talk therapy and various medication. The course of treatment did her good. When she was discharged on August 3, 2005, Coleman displayed "a marked reduction in depression and in particular the paranoid symptoms" and "a reasonable control for her anger and aggression." In her final report, Dr. Ionescu described Coleman as a "model patient" in "stable" condition: "Alert, awake, . . . oriented . . . cooperative, [and] pleasant . . . . No formal thought disorder. Affect was reactive, smiling. Mood was 'good.' There were no reports of delusions[,] . . . hallucinations[,] . . . [or] suicidal or homicidal ideation."

But on the day of Coleman's discharge, Dr. Ionescu returned a phone call from Berry, who had called to ask about Coleman's treatment. In her final report, Dr. Ionescu wrote: "I did inform Mr. Berry that I am not discussing with him about [sic] my patient; but it was considered to be my responsibility [sic] as the patient's physician to warn him that my patient had been expressing threats to his life in my presence." The content and form of these [**9] "threats" remain something of a mystery: the record contains no elaboration from Dr. Ionescu beyond the vague "homicidal ideation" language in the discharge report. Coleman claims she never formed any plan to harm Berry and that a "language barrier" caused Dr. Ionescu, whom she described as "a foreigner," to "take me literally." Coleman Dep. 82.

Berry immediately relayed the phone conversation with Dr. Ionescu to Sove and another upper-level manager, Charles Von Rhein. That same day, the day that Coleman was released, the three managers then decided to place her in "emergency off-duty status" without pay. Two weeks later, Berry notified the police. According to the police report, Berry explained that the Postal Service was "in the process of terminating Coleman," and Berry wanted to "document the threat." In October 2005, the Postal Service did an internal investigation. Berry told a postal inspector that "he hoped that Coleman would get better and maybe return to work one day." Although Berry would later claim that he was "frightened, afraid and scared" by what he took to be "a very credible threat," he did not express such fears to either the police or the Postal Service investigators. [**10] He also failed even to mention Coleman's supposed threat in an email about his conflict with her, though he sent it just days after his phone call with Dr. Ionescu.

While off-duty, Coleman filed two formal EEOC complaints. The first, lodged on August 13, 2005, alleged that Berry, Sove, and Von Rhein had discriminated against her on the basis of race and sex by refusing to accommodate her post-surgery medical restrictions and by denying her request for advanced sick leave. The second charge, filed on December 8, 2005, claimed that Berry and Von Rhein placed Coleman on off-duty status because of disability [*844] and sex-discrimination and to retaliate against her for her first EEOC complaint.

Meanwhile, the Postal Service's own investigation proceeded. According to the postal inspector's investigative memorandum of October 11, 2005, Coleman admitted she had told her psychiatrist that she felt suicidal and homicidal, but said she had never hurt anyone or formed any sort of plan to harm Berry. As part of the internal investigation, Coleman also participated in

a telephone interview with Von Rhein on December 13, 2005. She confirmed having had "homicidal thoughts" about Berry, but indicated that [**11] she was continuing in outpatient therapy and was ready to return to work. Von Rhein told Coleman that she had failed to provide documentation of her improved conditions. On December 20, 2005, a psychiatric resident then treating Coleman faxed Sove to confirm that she was "stable" and "able to return to her work duties," provided it was not "under the supervision of . . . Berry."

On January 13, 2006, Coleman was fired. Von Rhein and Sove both signed the "Notice of Removal," which stated that the termination was based on "unacceptable conduct, as evidenced by your expressed homicidal ideations toward a postal manager." The notice stated that by having voiced her threats toward Berry, Coleman had violated the Postal Service's ban on "Violent and/or Threatening Behavior." The rule provides: "it is the unequivocal policy of the Postal Service that there must be no tolerance of violence or threats of violence by anyone at any level of the Postal Service."

The notice also informed Coleman of her right to file a grievance challenging her removal, and she did so. The matter proceeded to arbitration a year later. In the hearing, her union challenged the Postal Service's characterization of Coleman's [**12] statements as "a true threat" and contended that the more appropriate action would have been to refer her for a fitness-for-duty examination. The arbitrator agreed, finding that the Postal Service had lacked "just cause" to terminate Coleman because it could not prove that she "actually had an intent to harm Mr. Berry." Considering that "psychological illness" was the cause of Coleman's "aberrant behavior," and given her "length of satisfactory employment," the arbitrator concluded that a fitness-for-duty examination "would have been a more reasonable course for the Service to follow." The arbitrator ordered Coleman reinstated, pending successful completion of a fitness-for-duty exam. The arbitrator declined to award back pay, however, because he could not determine when Coleman first became qualified to return to work.

Coleman passed her fitness-for-duty exam and resumed her duties at the Postal Service facility on September 1, 2007, roughly two years after she was suspended. During this period, Coleman pursued her two EEOC charges against the Postal Service. An administrative law judge denied both complaints, and the EEOC rejected Coleman's consolidated appeals on April 28, 2009. [**13] Coleman then filed this suit alleging that the Postal Service had discriminated against her on the basis of race, sex, and disability by placing her on off-duty status and terminating her, and had retaliated against her for reporting discrimination. Coleman also alleged that the Postal Service violated the Rehabilitation Act by failing to accommodate her disability.

Following discovery, the district court granted the Postal Service's motion for summary judgment in its entirety. Its judgment on Coleman's discrimination and retaliation claims rested on three grounds: First, the court held that Coleman had failed to establish a prima facie case under [*845] the *McDonnell Douglas* "indirect" method of proof because she had not identified any similarly situated employees outside of her protected classes who were treated more favorably. Second, the district court determined that Coleman had offered no evidence of pretext. Third, the district court held that Coleman had not presented sufficient direct or circumstantial evidence of discriminatory or retaliatory animus under Title VII's "direct" method of proof.

Coleman appeals from summary judgment on her Title VII claims of race and sex discrimination [**14] and retaliation. She does not seek review of summary judgment on her disability claims. We consider first the race and sex discrimination claims, and then the retaliation claims.

II. *Discrimination Claims*

Title VII makes it unlawful for an employer to discharge or discipline an employee because of that person's race or sex, among other grounds. *42 U.S.C. § 2000e*. In a disparate treatment case such as this one, a plaintiff may prove discrimination either directly or indirectly. See *Silverman v. Board of Educ. of the City of Chicago, 637 F.3d 729, 733 (7th Cir. 2011)*. Under the "direct method," the plaintiff may avoid summary judgment by presenting sufficient evidence, either direct or circumstantial, that the employer's discriminatory animus motivated an adverse employment action. Of course, "smoking gun" evidence of discriminatory intent is hard to come by. See *United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 716, 103 S. Ct. 1478, 75 L. Ed. 2d 403 (1983)* ("There will seldom be 'eyewitness' testimony as to the employer's mental processes."). So in a line of cases beginning with *McDonnell Douglas*, the Supreme Court developed a

burden-shifting framework known as the "indirect method" of proof, designed [**15] to "sharpen the inquiry into the elusive factual question of intentional discrimination." *Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255, n.8, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981)*. Coleman has attempted to establish discrimination through both the direct and indirect methods of proof. Because she presented sufficient evidence to survive summary judgment under the indirect method, there is no need to evaluate her discrimination claims under the direct method.

A. *The McDonnell Douglas Framework*

Under the indirect method, the plaintiff carries "the initial burden under the statute of establishing a prima facie case of . . . discrimination." *McDonnell Douglas, 411 U.S. at 802*. To establish a prima facie case of discrimination a plaintiff must offer evidence that: "(1) she is a member of a protected class, (2) her job performance met [the employer's] legitimate expectations, (3) she suffered an adverse employment action, and (4) another similarly situated individual who was not in the protected class was treated more favorably than the plaintiff." *Burks v. Wisconsin Dep't of Transportation, 464 F.3d 744, 750-51 (2006)*. Once a prima facie case is established, a presumption of discrimination is triggered. [**16] "The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason" for its action. *McDonnell Douglas, 411 U.S. at 802*; see *Burks, 464 F.3d at 751*. When the employer does so, the burden shifts back to the plaintiff, who must present evidence that the stated reason is a "pretext," which in turn permits an inference of unlawful discrimination. *McDonnell Douglas, 411 U.S. at 804*; see *Burks, 464 F.3d at 751*.

[*846] The Postal Service concedes for purposes of summary judgment that Coleman has satisfied the first three elements of her prima facie case: (1) she is a member of two protected classes (race and sex); (2) her job performance was satisfactory; and (3) the Postal Service subjected her to two adverse employment actions (placement on emergency off-duty status and then termination). The Postal Service disputes the fourth element, arguing that the white, male co-workers Coleman identified as receiving more favorable treatment were not similarly situated as a matter of law. The Postal Service has also offered a non-discriminatory reason for terminating Coleman -- it claims she violated its code of conduct -- but Coleman contends that this reason is pretextual.

B. [**17] *Similarly Situated Co-workers*

The similarly-situated analysis calls for a "flexible, common-sense" examination of all relevant factors. *Henry v. Jones, 507 F.3d 558, 564 (7th Cir. 2007)*. "All 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. The 'similarly situated' prong establishes whether all things are in fact equal." *Filar v. Board of Educ. of City of Chicago, 526 F.3d 1054, 1061 (7th Cir. 2008)* (internal citation omitted). Its purpose is to eliminate other possible explanatory variables, "such as differing roles, performance histories, or decision-making personnel, which helps isolate the critical independent variable" -- discriminatory animus. *Humphries, 474 F.3d at 405*.

Similarly situated employees "must be 'directly comparable' to the plaintiff 'in all material respects,'" but they need not be identical in every conceivable way. *Patterson v. Indiana Newspapers, Inc., 589 F.3d 357, 365-66 (7th Cir. 2009)*, quoting *Raymond v. Ameritech Corp., 442 F.3d 600, 610-11 (7th Cir. 2006)*. We are looking for comparators, not "clone[s]." *Chaney v. Plainfield Healthcare Center, 612 F.3d 908, 916 (7th Cir. 2010)*. [**18] So 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. *Humphries, 474 F.3d at 405*; see also *Crawford v. Indiana Harbor Belt R.R. Co., 461 F.3d 844, 846 (7th Cir. 2006)* (the question is whether "members of the comparison group are sufficiently comparable to [the plaintiff] to suggest that [the plaintiff] was singled out for worse treatment").

This flexible standard reflects the Supreme Court's approach to Title VII in *McDonnell Douglas* and its progeny. To offer a prima facie case of discrimination under the indirect method, the plaintiff's burden is "not onerous." *Burdine, 450 U.S. at 253*. The Supreme Court "never intended" the requirements "to be rigid, mechanized, or ritualistic . . . [but] merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco Construction Corp. v. Waters, 438 U.S. 567, 577, 98 S. Ct. 2943, 57 L. Ed. 2d 957 (1978)*. The Court has cautioned that "precise

equivalence . . . between employees is not the ultimate question." *McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 283 n.11, 96 S. Ct. 2574, 49 L. Ed. 2d 493 (1976)*. [**19] The touchstone of the similarly-situated inquiry is simply whether the employees are "comparable." *Id*., quoting *McDonnell Douglas, 411 U.S. at 804*.

Whether a comparator is similarly situated is "usually a question for the fact-finder," and summary judgment is appropriate only when "no reasonable fact-finder [*847] could find that plaintiffs have met their burden on the issue." *Srail v. Village of Lisle, 588 F.3d 940, 945 (7th Cir. 2009)*. There must be "enough common factors . . . to allow for a meaningful comparison in order to divine whether intentional discrimination was at play." *Barricks v. Eli Lilly and Co., 481 F.3d 556, 560 (7th Cir. 2007)*. The "number [of relevant factors] depends on the context of the case." *Radue v. Kimberly-Clark Corp., 219 F.3d 612, 617 (7th Cir. 2000)*. In the usual case a plaintiff must at least show that the comparators (1) "dealt with the same supervisor," (2) "were subject to the same standards," and (3) "engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their conduct or the employer's treatment of them." *Gates v. Caterpillar, Inc., 513 F.3d 680, 690 (7th Cir. 2008)*, quoting *Snipes v. Illinois Dep't of Corrections, 291 F.3d 460, 463 (7th Cir. 2002)*. [**20] This is not a "magic formula," however, and the similarly-situated inquiry should not devolve into a mechanical, "one-to-one mapping between employees." *Humphries, 474 F.3d at 405*.

With this legal standard in mind, we turn to Coleman's proposed comparators. According to Coleman's evidence, two white male employees, Frank Arient and Robert Pelletier, "held a knife to the throat of a black male co-worker" "while holding down his legs."[1] Arient's and Pelletier's direct supervisor, Brian Turkovich, learned of the incident a few days later and conducted an investigation. Von Rhein, who supervised all three men, participated in the investigation, personally interviewing the two attackers and several witnesses. Von Rhein and Turkovich concluded that the incident was just "horseplay," and Von Rhein suspended Arient and Pelletier without pay for fourteen days. Von Rhein and Turkovich later reduced these suspensions to seven days after objections by the union. According to Von Rhein, Sove approved their suspensions. Von Rhein Dep. 175. In his own deposition, Sove described Arient's and Pelletier's actions as "some stupid prank that they were playing with each other." Sove Dep. 121.

> 1 The Postal [**21] Service calls Coleman's version an "embellished" "misstatement of the facts" because they only "pulled" a knife and did not hold it to the victim's throat. We doubt that the difference between holding a knife to a man's throat and merely displaying it while holding him down is material for purposes of summary judgment.

The district court concluded that Arient and Pelletier could not serve as comparators because they "reported to a different supervisor" and "held a substantially different job than Coleman." Although the court acknowledged there was "at least some similarity in terms of the seriousness of the incident," it was "not enough" to overcome the other dissimilarities. We think that this analysis focused too much on minor differences and was too demanding for purposes of summary judgment.

1. *Same Supervisor*

The similarly-situated requirement "normally entails" the existence of a common supervisor. *Radue, 219 F.3d at 617*. When the same supervisor treats an otherwise equivalent employee better, one can often reasonably infer that an unlawful animus was at play. The inference of discrimination is weaker when there are different decision-makers, since they "may rely on different factors [**22] when deciding whether, and how severely, to discipline an employee." *Ellis v. United Postal Service, 523 F.3d 823, 826 (7th Cir. 2008)*; see also *Little v. Illinois Dep't of Revenue, 369 F.3d 1007, 1012 (7th Cir. 2004)* (discipline from a different supervisor "sheds no [*848] light" on the disciplinary decision). For this reason, this court generally requires a plaintiff to demonstrate at a minimum that a comparator was treated more favorably by the same decision-maker who fired the plaintiff. See *Ellis, 523 F.3d at 826*.

In this case, there was a common decision-maker for Coleman, Arient, and Pelletier: the facility's maintenance operations manager, Charles Von Rhein. Von Rhein approved Coleman's termination and the men's suspensions. The district court relied on the fact that Arient's and Pelletier's *direct* supervisor (Turkovich) was not the same as Coleman's (Berry). But this misses the point of the common supervisor factor. While we have

sometimes phrased the question ambiguously as whether the comparators "*dealt with* the same *supervisor*," *e.g., Gates, 513 F.3d at 690* (emphasis added), the real question is whether they were "*treated more favorably* by the same *decisionmaker*." *Ellis, 523 F.3d at 826* [**23] (emphasis added); see *Little, 369 F.3d at 1012* ("A similarly-situated employee must have been disciplined, or not, by the same decisionmaker who imposed an adverse employment action on the plaintiff."). This point follows logically from the cause of action itself, which requires proof "that the *decisionmaker* has acted for a prohibited reason." *Schandelmeier-Bartels v. Chicago Park Dist., 634 F.3d 372, 379 (7th Cir. 2011),* quoting *Rogers v. City of Chicago, 320 F.3d 748, 754 (7th Cir. 2003)* (emphasis in original). Under Title VII, a "decisionmaker is the person 'responsible for the contested decision.'" *Id.*, quoting *Rogers, 320 F.3d at 754*.

For both Coleman's termination and Arient's and Pelletier's suspensions, that person was Von Rhein. He signed the letters placing Coleman on off-duty status and terminating her, and he conducted the internal investigation of her in the interim period. Von Rhein also personally investigated Arient's and Pelletier's actions and testified that he made the decision to suspend them. The district court downplayed Von Rhein's supervisory role in the response to the knife incident, asserting he merely "sign[ed] off on Turkovich's decision" to suspend them. [**24] But, again, the issue is not only who proposed the suspension but who was "responsible" for the decision. *Schandelmeier-Bartels, 634 F.3d at 379*, quoting *Rogers, 320 F.3d at 754*. Only Von Rhein, and not Turkovich, had the authority to discipline Arient and Pelletier. For purposes of Title VII, he was the decision-maker.

2. *Same Standards of Conduct*

The Postal Service contends that because Arient and Pelletier had different job titles and duties, they cannot be considered situated similarly to Coleman. That is not correct. In the context of this case of differential discipline, it is irrelevant to the comparison that Arient and Pelletier are maintenance mechanics and Coleman is a maintenance support clerk. We have repeatedly made clear that a "difference in job title alone is not dispositive." *Boumehdi v. Plastag Holdings, LLC, 489 F.3d 781, 791 (7th Cir. 2007)*; see *Rodgers v. White, 657 F.3d 511, 518 (7th Cir. 2011)* ("Formal job titles and rank are not dispositive . . . .").

The question is not whether the employer classified the comparators in the same way, "but whether the employer subjected them to different employment policies." *Lathem v. Dep't of Children & Youth Services, 172 F.3d 786, 793 (11th Cir. 1999)*. [**25] Comparators need only be similar enough to enable "a meaningful comparison." *Humphries, 474 F.3d at 405*. Arient and Pelletier worked at the same job site as Coleman, were subject to the same standards of conduct, violated the same rule, [*849] and were disciplined by the same supervisor. Their different titles and duties do not defeat, as a matter of law, the probative value of their different disciplinary treatment.

The application of this "same standards" factor also depends on the specific facts of the case. In cases involving the quality of job performance, for example, a would-be comparator's professional role may be so different from the plaintiff's as to "render the comparison effectively useless." *Humphries, 474 F.3d at 405*; accord, *e.g., Senske v. Sybase, Inc., 588 F.3d 501, 510 (7th Cir. 2009)* (salesmen with "lower-ranking sales positions" were not similarly situated to the plaintiff, who was fired for performance reasons); *Burks, 464 F.3d at 751* (a receptionist and a supervisor were not similarly situated to the plaintiff, a program manager who was fired for performance reasons); *Keri v. Board of Trustees of Purdue University, 458 F.3d 620, 626 (7th Cir. 2006)* (tenured university [**26] professors were not similarly situated to untenured plaintiff professor who was not reappointed after "widespread complaints from both students and supervisors"). Where the issue is the quality of a plaintiff's work, a difference between the plaintiff's and comparators' positions can be important because this difference will often by itself account for the less favorable treatment of the plaintiff. Cf. *Senske, 588 F.3d at 510* ("the comparators must be similar enough that differences in their treatment cannot be explained by other variables, such as distinctions in their roles or performance histories").

In contrast, Arient's and Pelletier's different positions provide no such self-evident explanation for their more lenient punishment. The reason is obvious. Coleman and her comparators were disciplined not for bad performance but for violating a general workplace rule that applied to employees in all departments and of all ranks. In such misconduct cases (as opposed to

performance cases), comparisons between employees with different positions are more likely to be useful. See, *e.g., Rodgers, 657 F.3d at 513* (where plaintiff was punished more harshly than his supervisor for the same misconduct, [**27] the "general rule" that "employees of differing ranks usually make poor comparators . . . does not apply"). "[W]hen uneven discipline is the basis for a claim of discrimination, the most-relevant similarities are those between the employees' alleged misconduct, performance standards, and disciplining supervisor," rather than job description and duties. *Id. at 518*.

The real issue is whether Arient and Pelletier were subject to the same standards of conduct as Coleman, and of course they were. The Postal Service rules against workplace violence and threats apply equally to mechanics and clerks. The employee handbook frames the prohibition in all-encompassing terms: "it is the unequivocal policy of the Postal Service that there must be no tolerance of violence or threats of violence *by anyone at any level* of the Postal Service. Similarly, there must be no tolerance of harassment, intimidation, threats, or bullying *by anyone at any level*." (Emphases added.) Since the purpose of the rule is to ensure a "safe and humane working environment," there is no objective reason for it to apply with greater or lesser force to employees of certain positions.

Even if there might have been some theoretical [**28] basis for enforcing the rule differently based on job position, there is no evidence that the Postal Service actually took Arient's, Pelletier's, or Coleman's roles into account when it disciplined them. A proposed comparator's position or rank may be important, but only [*850] "*provided that the employer took these factors into account* when making the personnel decision in question." *Eaton v. Indiana Dep't of Corrections, 657 F.3d 551, 559 (7th Cir. 2011)* (emphasis in original), quoting *Patterson v. Avery Dennison Corp., 281 F.3d 676, 680 (7th Cir. 2002)*; see also *Peirick v. Indiana University-Purdue University Indianapolis, 510 F.3d 681, 689 (7th Cir. 2007)* ("we doubt that the [employer] took heed of employee classifications when doling out sanctions"). "A characteristic that distinguishes two employees, regardless of its significance when objectively considered, does not render the employees non-comparable if the employer never considered that characteristic . . . [because it] cannot provide any insight as to whether the employer's decision as motivated by discriminatory intent." *Eaton, 657 F.3d at 559*. Here, the record provides no indication that the Postal Service considered job titles [**29] at all significant when deciding on discipline for Arient, Pelletier, and Coleman.

There are a number of potential explanations for why Arient and Pelletier got off with such lighter punishments than Coleman. Perhaps it was because managers honestly perceived them as less culpable or dangerous. Perhaps it was because they were white or male. But it was surely not because they were mechanics.

3. *Conduct of Comparable Seriousness*

In a disparate discipline case, the similarly-situated inquiry often hinges on whether co-workers "engaged in comparable rule or policy violations" and received more lenient discipline. *Naik v. Boehringer Ingelheim Pharms., Inc., 627 F.3d 596, 600 (7th Cir. 2010)*, quoting *Patterson, 589 F.3d at 365-66*. The Supreme Court has made clear that "precise equivalence in culpability between employees is not the ultimate question: as we indicated in *McDonnell Douglas*, an allegation that other 'employees involved in acts against [the employer] of *comparable seriousness*'" received more favorable treatment "is adequate to plead an inferential case" of discrimination. *McDonald, 427 U.S. at 283 n.11*, quoting *McDonnell Douglas, 411 U.S. at 804*. Following this language, our circuit, [**30] like many others, has adopted this "comparable seriousness" standard. *E.g., Peirick, 510 F.3d at 689*; *Davis v. Wisconsin Dep't of Corrections, 445 F.3d 971, 978 (7th Cir. 2006)*; *Johnson v. Artim Transportation System, Inc., 826 F.2d 538, 543 (7th Cir. 1987)*.[2]

> 2 For cases from other circuits, see, for example, *Russell v. City of Kansas City, 414 F.3d 863, 868 (8th Cir. 2005)* (employing "com parable seriousness" standard); *Graham v. Long Island R.R., 230 F.3d 34, 40 (2d Cir. 2000)* (same); *Kendrick v. Penske Transportation Services, Inc., 220 F.3d 1220, 1230 (10th Cir. 2000)* (same); *Holbrook v. Reno, 196 F.3d 255, 261, 339 U.S. App. D.C. 4 (D.C. Cir. 1999)* (same); *Taylor v. Virginia Union University, 193 F.3d 219, 234 (4th Cir. 1999)* (en banc) (same), *abrogated in part on other grounds by Desert Palace, Inc. v. Costa, 539 U.S. 90, 92, 123 S. Ct. 2148, 156 L. Ed. 2d 84 (2003)*.

Comparators must have "engaged in similar -- not identical -- conduct to qualify as similarly situated."

Peirick, 510 F.3d at 691, 689 (reversing summary judgment in relevant part; university tennis coach "accused of using abusive language, unsafe driving, leaving students behind during a road trip, and pitting the students against the administration" was similarly situated [**31] to coaches who "did not engage in the exact same misconduct" but who "violated the very same rules"), quoting *Ezell v. Potter, 400 F.3d 1041, 1050 (7th Cir. 2005)* (reversing summary judgment in relevant part; mail carrier accused of taking too long a lunch was similarly situated to another carrier who had lost a piece of certified [*851] mail). To determine "whether two employees have engaged in similar misconduct, the critical question is whether they have engaged in conduct of comparable seriousness." *Peirick, 510 F.3d at 689*.

Again, the analysis is straightforward here. Arient and Pelletier violated the Postal Service rule that prohibits "Violent and/or Threatening Behavior" -- the same rule Coleman was accused of breaking. That they did not break the rule in precisely the same manner does not mean that summary judgment was appropriate. By directly threatening another employee with a knife in the workplace, Arient and Pelletier engaged in conduct that appears, at least for purposes of summary judgment, at least as serious as Coleman's indirect "threat" against Berry -- and arguably even more so.[3] Where a proposed comparator violated the same rule as the plaintiff in an equivalent or more [**32] serious manner, courts should not demand strict factual parallels. See *Lynn v. Deaconess Medical Center-West Campus, 160 F.3d 484, 488 (8th Cir. 1998)* ("To require that employees always have to engage in the exact same offense as a prerequisite for finding them similarly situated would result in a scenario where evidence of favorable treatment of an employee who has committed a different but more serious, perhaps even criminal offense, could never be relevant to prove discrimination."), *abrogated on other grounds, Torgerson v. City of Rochester, 643 F.3d 1031 (8th Cir. 2011)* (en banc).

> 3 Perhaps if the situation were reversed, if Coleman had threatened another employee with a weapon while Arient and Pelletier had only made alarming statements to a third-party, their conduct would be less serious. For example, the Tenth Circuit once found that a proposed comparator who had threatened a co-worker with assault and then arguably threatened his supervisor with physical violence "did not violate work rules of comparable seriousness" as the plaintiff, who had physically assaulted his supervisor by pushing him to the ground. See *Kendrick, 220 F.3d at 1232*.

The Postal Service argues that Arient [**33] and Pelletier are not appropriate comparators because the Postal Service viewed their behavior "as an 'isolated instance' where 'no particular threats were involved,'" while Coleman had made a "credible threat." The Postal Service may make that argument at trial, but it is not a winner on summary judgment. When two grown men hold a person down while brandishing a knife (whether at his throat or not), not only is a "particular threat[ ] . . . involved" -- a jury could reasonably conclude that it was a far more immediate one than an employee confiding in her psychiatrist in a private therapy session that she was having thoughts about killing her boss. To be sure, the Postal Service is right to take seriously all threats made by, and against, its employees. But at the summary judgment stage, the employer cannot defeat a plaintiff's prima facie case of discrimination on the theory that it applied its "no tolerance" policy on threats to some workers while dismissing dangerous acts of others as mere "horseplay." See *Gordon v. United Airlines, Inc., 246 F.3d 878, 891 (7th Cir. 2001)* ("It is not the province of this court to question an employer's decision to punish some conduct more harshly [**34] than other conduct. Nevertheless, we are not bound by the labels that an employer uses and must scrutinize the conduct behind those labels to determine if they are applied to similar conduct."). Such fact issues are the province of the jury.[4]

> 4 The Postal Service may mean simply that the Arient and Pelletier suspensions are not comparable to Coleman's termination because the plant leadership did not honestly regard them, but did regard Coleman, as presenting a serious ongoing threat. An employer's honest belief about its motives for disciplining a Title VII disparate treatment plaintiff is relevant, but at the pretext stage, not for the plaintiff's prima facie case. The similarly-situated inquiry is about whether employees are *objectively* comparable, while the pretext inquiry hinges on the employer's *subjective* motivations. As discussed below, however, there are reasons to doubt even that the Postal Service *subjectively* believed Coleman was dangerous. The Postal Service also cites *Bodenstab v. County of Cook, 569 F.3d 651, 657*

n.2 (7th Cir. 2009), for the proposition that fighting with other employees and bringing a gun to the workplace are not comparable to threatening to kill a supervisor. [**35] But *Bodenstab's* passing discussion of the similarly-situated prong in footnote 2 is dicta; the court chose to "skip over" the prima facie analysis, and its central holding was that the plaintiff had failed to establish pretext. *Id. at 657*.

We have noted with some concern the tendency of judges in employment discrimination [*852] cases "to require closer and closer comparability between the plaintiff and the members of the comparison group." *Crawford, 461 F.3d at 846*.[5] The purpose of the similarly-situated requirement is to "provide plaintiffs the 'boost' that the *McDonnell Douglas* framework intended." *Humphries, 474 F.3d at 406*, citing *Stone v. City of Indianapolis Public Utilities Div., 281 F.3d 640, 643 (7th Cir. 2002)*. Demanding nearly identical comparators can transform this evidentiary "boost" into an insurmountable hurdle. Coleman's proposed comparators (1) "dealt with the same supervisor," (2) "were subject to the same standards," and (3) "engaged in similar conduct" of comparable seriousness. *Gates, 513 F.3d at 690*. They are similar enough to permit a reasonable inference of discrimination, and that is all *McDonnell Douglas* requires.

5 For scholarly criticism of this phenomenon, see [**36] Suzanne B. Goldberg, *Discrimination by Comparison, 120 Yale. L.J. 728, 734 (2011)* ("The judicial demand for comparators continues largely unabated . . . , sharply narrowing both the possibility of success for individual litigants and, more generally, the very meaning of discrimination."); Charles A. Sullivan, *The Phoenix from the* Ash*: Proving Discrimination by Comparators, 60 Ala. L. Rev. 191, 216 (2009)* (criticizing the tendency of courts "to require the comparator to be the almost-twin of the plaintiff before the comparison is sufficiently probative"); Ernest F. Lidge III, *The Courts' Misuse of the Similarly Situated Concept in Employment Discrimination Law, 67 Mo. L. Rev. 831, 832 (2002)* (noting that courts find "that potential comparators are not similarly situated because of relatively minor, or irrelevant, distinctions between the comparators and the plaintiff").

C. *Pretext*

The Postal Service has offered a legitimate, non-discriminatory reason for terminating Coleman -- it claims she "posed a threat to kill her supervisor." To show this reason is pretextual, Coleman "must present evidence suggesting that the employer is dissembling." *O'Leary, 657 F.3d at 635*. "The question is not [**37] whether the employer's stated reason was inaccurate or unfair, but whether the employer honestly believed the reasons it has offered to explain the discharge." *Id.* "It is not the court's concern that an employer may be wrong about its employee's performance, or may be too hard on its employee. Rather, the only question is whether the employer's proffered reason was pretextual, meaning that it was a lie." *Naik, 627 F.3d at 601*, quoting *Ineichen v. Ameritech, 410 F.3d 956, 961 (7th Cir. 2005)*.

To meet this burden, Coleman must "identify such weaknesses, implausibilities, inconsistencies, or contradictions" in the Postal Service's asserted reason "that a reasonable person could find [it] unworthy of credence." *Boumehdi, 489* [*853] *F.3d at 792*. If the Postal Service terminated Coleman because it "honestly believed" she posed a threat to other employees -- even if this reason was "foolish, trivial, or baseless" -- Coleman loses. *Id.* On the other hand, "if the stated reason, even if actually present to the mind of the employer, wasn't what induced him to take the challenged employment action, it was a pretext." *Forrester v. Rauland-Borg Corp., 453 F.3d 416, 418 (7th Cir. 2006)*.

To show pretext, Coleman [**38] argues that the labor arbitrator who ordered her reinstated found that the Postal Service did not honestly believe she was a threat, and that the district court should have given his decision preclusive effect. We disagree on both points. On the merits, however, we agree that Coleman has presented enough evidence of pretext to avoid summary judgment. First, like the arbitrator, we question whether Coleman's statements about Berry rose to the level of a "true threat," and thus whether Coleman can fairly be said to have violated any workplace rule at all. Second, a number of background facts cast doubt on the assertion that Coleman was dangerous: her statements came in a private therapy session, the Postal Service learned of them the same day the psychiatrist discharged Coleman as stable, and it had options short of termination available to gauge her propensity for violence.

Third, Coleman's comparator evidence tends to show

that her Postal Service managers did not enforce this rule evenhandedly. This evidence of similarly situated co-workers is also relevant to the pretext inquiry. It suggests that the Postal Service decision-makers here did not take the rule against threats as seriously [**39] as they claimed. As the Supreme Court, this court, and other circuits have held, a discrimination plaintiff may employ such comparator evidence to discharge her burden at the pretext stage as well as to satisfy the fourth element of her prima facie case. Based on this evidence here, a reasonable jury could conclude that the Postal Service's stated reason for firing Coleman was pretextual.

1. *The Effect of the Arbitration*

The arbitration does not support issue preclusion on the issue of pretext for two independent reasons. First, the arbitrator did not decide the same issue of pretext. Second, Coleman's case is subject to the general rule under Title VII that arbitration decisions do not bind either side regarding statutory discrimination claims.

We consider first just what the arbitrator decided. Issue preclusion requires an identity of issues. Issue preclusion, also known as collateral estoppel, "bars 'successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the context of a different claim." *Taylor v. Sturgell, 553 U.S. 880, 892, 128 S. Ct. 2161, 171 L. Ed. 2d 155 (2008)*, quoting *New Hampshire v. Maine, 532 U.S. 742, 748, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001)*. [**40] In some cases, administrative adjudications may have preclusive effect. See, *e.g., University of Tennessee v. Elliott, 478 U.S. 788, 799, 106 S. Ct. 3220, 92 L. Ed. 2d 635 (1986)* ("when a state agency acting in a judicial capacity resolves disputed issues of fact properly before it which the parties had an adequate opportunity to litigate, federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts") (internal citation and quotation marks omitted). Whatever the original forum, however, the doctrine "applies only when (among other things) the same issue is involved in the two proceedings and the determination of that question [*854] is 'essential' to the prior judgment." *King v. Burlington Northern & Santa Fe Ry. Co., 538 F.3d 814, 818 (7th Cir. 2008)*.

Here the arbitrator did not examine whether the Postal Service honestly believed Coleman was a danger, but only whether Coleman really *was* a danger. Finding that Coleman's statements to her psychiatrist did not constitute a "true threat," the arbitrator ruled that the Postal Service lacked just cause to terminate her. This finding is not the same as a finding that the Postal Service decision-makers were lying [**41] about their motives. The most that Coleman can say is that the arbitrator was skeptical that Berry genuinely feared Coleman, suspecting he had "embellished" his story. Even if Berry exaggerated his reaction to news of the threat, that would not prove that Von Rhein and Sove, the supervisors who decided to terminate Coleman, were also disingenuous. The arbitrator acknowledged that Coleman's behavior raised "serious concerns about her fitness for duty, and under what conditions she might be able to work," and he ordered Coleman to undergo a psychiatric examination to ascertain whether she was ready to return. He did not determine that the Postal Service's concerns about Coleman were lies, but only that it had failed to meet its "burden of proving that [she] engaged in conduct warranting her removal." Issue preclusion therefore could not apply.

Second, whatever the arbitrator's findings, his decision could not trigger collateral estoppel in this action. In *Alexander v. Gardner-Denver Co., 415 U.S. 36, 59-60, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974)*, the Supreme Court held that arbitration decisions do not have preclusive effect in later litigation under Title VII. The Court explained that "Congress intended federal courts [**42] to exercise final responsibility for enforcement of Title VII; deferral to arbitral decisions would be inconsistent with that goal." *Id. at 56*. The only exception to this rule is where a clause in a collective bargaining agreement has explicitly mandated that "employment-related discrimination claims would be resolved in arbitration." *14 Penn Plaza v. Pyett, 556 U.S. 247, 129 S. Ct. 1456, 1464, 173 L. Ed. 2d 398 (2009)*. In *14 Penn Plaza*, the Supreme Court held that such clauses are enforceable, distinguishing *Gardner-Denver* on the grounds that, in that case, the "employee's collective-bargaining agreement did not mandate arbitration of statutory anti-discrimination claims." *Id. at 1467*. Yet the Court recognized the continuing vitality of *Gardner-Denver* in cases like this one, where the CBA did not "clearly and unmistakably require[ ] union members to arbitrate claims arising under" federal anti-discrimination laws: where the "collective-bargaining agreement [gives] the arbitrator 'authority to resolve only questions of contractual rights,' his decision could not prevent the employee from

bringing the Title VII claim in federal court 'regardless of whether certain contractual rights are similar to, or duplicative of, [**43] the substantive rights secured by Title VII.'" *Id. at 1461, 1467*, quoting *Gardner-Denver, 415 U.S. at 53-54*. Here, the collective bargaining agreement did not require submission of Title VII claims to labor arbitration. Under *Gardner-Denver*, then, even if the arbitrator had reached the pretext issue, his findings would not have preclusive effect here.

2. *Evidence of Pretext*

Without giving preclusive effect to the arbitral decision, however, we find that Coleman has offered evidence of pretext in the form of context. "[A]n evaluation of context is essential to determine whether an employer's explanation is fishy [*855] enough to support an inference that the real reason must be discriminatory." *Loudermilk v. Best Pallet Co., 636 F.3d 312, 315 (7th Cir. 2011)*. Much of Coleman's context evidence is recounted in the arbitrator's findings. She is not barred from relying on the these findings as evidence that the Postal Service's stated reason for terminating her was a pretext. As the *Gardner-Denver* Court stated: "The arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate." *415 U.S. at 60*. In this case, several of the arbitrator's findings provide support [**44] for Coleman's argument that the Postal Service's purported reasons for terminating her were pretextual.

First, the arbitrator concluded that Coleman's statements to Dr. Ionescu did not constitute a "true threat." We think this is a reasonable inference that is tantamount to a finding that Coleman did not actually violate the Postal Service's rule against threats of violence. Granted, even if Coleman broke no rule, the Postal Service may still have mistakenly *believed* she did -- and that's what counts in the pretext analysis. See *Forrester, 453 F.3d at 418*. Nevertheless, the Postal Service can be presumed to understand its own code of conduct. The incongruity between Coleman's non-violation and her termination casts at least some doubt on the Postal Service's motives. See, *e.g., Loudermilk, 636 F.3d at 315* ("The Civil Rights Act of 1964 does not require employers to have 'just cause' for sacking a worker, but an employer who advances a fishy reason takes the risk that disbelief of the reason will support an inference that it is a pretext for discrimination."). And there is inherent "fishiness" in an employer's proffered reason when it rests on a policy that does not legitimately apply [**45] to the employee who was terminated. See, *e.g., Gordon, 246 F.3d at 889* ("Here, an employer applied a rarely used label to sanction conduct that does not clearly fall within the chosen category. . . . [W]hen considered together with the inconsistency [in the employer's definition of the rule], it is sufficient evidence of pretext and, therefore, precludes summary judgment."); *Stalter v. Wal-Mart Stores, Inc., 195 F.3d 285, 290 (7th Cir. 1999)* (reversing summary judgment for employer where plaintiff had been fired supposedly for theft; eating a few corn chips from an open bag in a break room did not "fit within a reasonable understanding of the term 'theft'" and a "jury could certainly infer . . . that [the employer's] claim of theft was a pretext for [the plaintiff's] termination").

As the arbitrator also identified, there are real questions as to whether the Postal Service could have honestly considered Coleman dangerous. For one, he emphasized that Coleman made her statements in a private, confidential therapy session:

> [W]e have an employee who, after determining she could not deal with the stress and frustration of being unable to work following her surgery, voluntarily admits herself [**46] for psychiatric treatment. During this treatment, her psychiatrist probes the depth of [Coleman's] anger and finds that she is experiencing suicidal and homicidal ideations.

The special context in which Coleman expressed her anger cannot possibly have been lost on the Postal Service. The psychotherapeutic environment is one in which such extreme feelings would understandably arise -- and indeed, the one in which they should be most encouraged. As the Supreme Court has noted: "Effective psychotherapy . . . depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears." *Jaffee v.* [*856] *Redmond, 518 U.S. 1, 10, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996)*; see also *Tarasoff v. Regents of University of California, 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334, 347 (Cal. 1976)* ("We realize that the open and confidential character of psychotherapeutic dialogue encourages

patients to express threats of violence, few of which are ever executed. Certainly a therapist should not be encouraged routinely to reveal such threats; such disclosures could seriously disrupt the patient's relationship with his therapist and with the persons threatened.").

It would therefore be troubling [**47] to think that anyone who confides to her psychiatrist that she has fantasized about killing her boss could automatically be subject to termination for cause. To be sure, the situation changes when a patient expresses a genuine and ongoing intent to harm another person. That was the allegation in the canonical *Tarasoff* case. See *551 P.2d at 341* ("Poddar informed Moore, his therapist, that he was going to kill an unnamed girl, readily identifiable as Tatiana, when she returned home from spending the summer in Brazil."). In this case, however, the Postal Service had little reason to believe that Coleman posed a continuing threat -- and even more to the point, it appears to have made no effort to ascertain whether she did or not.

On the contrary, the Postal Service had good reason to believe that whatever danger Coleman ever posed had subsided by the time she sought to return to work, well after she expressed this thought to her therapist. Dr. Ionescu informed Berry of Coleman's statements the very same day she discharged Coleman in "stable" condition, describing her as a "cooperative, pleasant," "reactive," "smiling," "model patient."[6] As the arbitrator noted:

> It is obvious that any homicidal [**48] ideation [Coleman] may have had toward Mr. Berry was part and parcel of her psychiatric condition for which she sought treatment. At the time she expressed this ideation, she was hospitalized and, therefore, incapable of acting upon it. She was not released from the hospital until it had abated.

On summary judgment, Coleman is entitled to the reasonable inferences (a) that Dr. Ionescu would not have released her from treatment if she believed Coleman posed a danger to herself or others, and (b) that supervisors considering the matter should and would have realized as much before firing her.

6 In her report, Dr. Ionescu indicated that Coleman gave "verbal agreement" to the conversation she had with Berry. Such consent would negate what might otherwise raise a serious issue of physician-patient confidentiality. See *735 ILCS § 5/8-802* ("No physician or surgeon shall be permitted to disclose any information he or she may have acquired in attending any patient in a professional character, necessary to enable him or her professionally to serve the patient."). The Illinois Mental Health and Developmental Disabilities Confidentiality Act requires that "[a]ll records and communications" made in [**49] the course of therapy "shall be confidential and shall not be disclosed," with certain exceptions. *740 ILCS § 110/3(a)*. One such exception applies "when . . . a therapist, in his or her sole discretion, determines that disclosure is necessary to . . . protect the recipient or other person against a clear, imminent risk of serious physical or mental injury or disease or death." *740 ILCS § 110/11*. In light of the fact that Dr. Ionescu discharged Coleman as "stable" the very day she spoke with Berry, it seems highly unlikely that she considered Coleman a "clear imminent risk" to his safety at the time of their conversation.

Finally, if the Postal Service's real concern was Coleman's potential danger, why did it not simply order her to undergo a psychological evaluation? As the arbitrator noted, "Both Mr. Berry and Mr. Von Rhein . . . acknowledged that they could [*857] have referred [Coleman] for a fitness-for-duty examination." He concluded that, "[u]nder the unique circumstances attendant to this case, that would have been a more reasonable course for the Service to follow. With her length of satisfactory employment with the Postal Service, she deserved as much." The Postal Service's failure [**50] to take this seemingly natural step is further evidence suggesting that Coleman's mental stability was not its real motivation for firing her.

In short, while the arbitral decision is not binding, its factual predicates and analysis give some boost to Coleman's claim that the Postal Service's asserted reasons for terminating her were pretextual.

3. *Comparator Evidence to Show Pretext*

Coleman has also presented additional evidence of pretext: her evidence that similarly situated employees outside her protected classes received more favorable

treatment from the same decision-maker. As detailed above, Arient and Pelletier broke the same rule that Coleman allegedly did and did so, a jury could reasonably conclude, in a much more egregious manner. Such evidence of selective enforcement of a rule "calls into question the veracity of the employer's explanation." *Olsen v. Marshall & Ilsley Corp., 267 F.3d 597, 601 (7th Cir. 2001)*; accord, *e.g., Delli Santi v. CNA Ins. Cos., 88 F.3d 192, 202 (3d Cir. 1996)* (The plaintiff's "showing that the company did not enforce such a policy" is evidence from which the "jury . . . could rationally conclude that the legitimate non-retaliatory reason offered [**51] by [the employer] was a pretext for discharging [the plaintiff]."); *Williams v. City of Valdosta, 689 F.2d 964, 975 (11th Cir. 1982)* ("It is undisputed, however, that the City's adherence to its formal promotional policy was inconsistent and arbitrary at best. This inconsistency supports the conclusion that resort to the examination requirement was a pretext for singling out Williams for unfavorable treatment."). Combined with the additional circumstances discussed above, Coleman's evidence is sufficient to defeat summary judgment on the pretext issue.

The Supreme Court holds that comparator evidence is relevant at the pretext stage. In *McDonnell Douglas* itself, the Supreme Court taught that "evidence that white employees involved in acts . . . of comparable seriousness" received more favorable treatment would be "[e]specially relevant" to a showing that the employer's "stated reason for [the plaintiff's] rejection was in fact pretext." *411 U.S. at 804*. In *Burdine*, too, the Court made clear that in the pretext inquiry, "it is the plaintiff's task to demonstrate that similarly situated employees were not treated equally." *450 U.S. at 258*, citing *McDonnell Douglas, 411 U.S. at 804*. And [**52] in a closely related context, the Supreme Court has affirmed the value of qualifications evidence (that is, evidence that the employer hired a less qualified person outside the plaintiff's protected class) in the pretext inquiry. *Ash v. Tyson Foods, Inc., 546 U.S. 454, 457, 126 S. Ct. 1195, 163 L. Ed. 2d 1053 (2006)* ("qualifications evidence may suffice, at least in some circumstances, to show pretext"); *Patterson v. McLean Credit Union, 491 U.S. 164, 187-88, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989)* (plaintiff "might seek to demonstrate that [the employer]'s claim to have promoted a better qualified applicant was pretextual by showing that she was in fact better qualified than the person chosen for the position"), *superseded on other grounds by 42 U.S.C. § 1981(b)*.

Our precedents also teach that the similarly-situated inquiry and the pretext [*858] inquiry are not hermetically sealed off from one another. We have often noted that "the prima facie case and pretext analyses often overlap." *Scruggs v. Garst Seed Co., 587 F.3d 832, 838 (7th Cir. 2009)*; accord, *Adelman-Reyes v. St. Xavier University, 500 F.3d 662, 665, (7th Cir. 2007)*; *Olsen, 267 F.3d at 600*. Where the plaintiff argues that an employer's discipline is meted out in an uneven manner, the similarly-situated [**53] inquiry dovetails with the pretext question. Evidence that the employer selectively enforced a company policy against one gender but not the other would go to both the fourth prong of the prima facie case and the pretext analysis. Thus, the "same inquiry into similarly situated employees has been made at the pretext stage." *Morrow v. Wal-Mart Stores, Inc., 152 F.3d 559, 561 (7th Cir. 1998)*; accord, *e.g., Buie v. Quad/Graphics, Inc., 366 F.3d 496, 508 (7th Cir. 2004)* ("The disparate treatment of similarly-situated employees who were involved in misconduct of comparable seriousness, but did not have a similar disability, could establish pretext."); *O'Regan v. Arbitration Forums, Inc., 246 F.3d 975, 985 (7th Cir. 2001)* ("to show pretext (as well as the fourth element of a prima facie case) the inquiry remains the same: the plaintiff must show that similarly situated employees were treated more favorably than the plaintiff"), citing *Morrow, 152 F.3d at 561*; *Hiatt v. Rockwell Int'l Corp., 26 F.3d 761, 770 (7th Cir. 1994)* ("In order to demonstrate pretext under the *McDonnell Douglas* analysis, a plaintiff may put forth evidence that (1) employees outside of the protected class . . ., (2) [**54] who were involved in acts of comparable seriousness, (3) were nevertheless retained or rehired (while the plaintiff was not).").

A good example is *Gordon v. United Airlines*, where the airline fired an African-American male flight attendant after he deviated from his flight schedule without authorization. *246 F.3d at 880*. The district court granted summary judgment for United. We reversed: "Our review of the record reveals inconsistencies in definition and disparities in application [of the unauthorized deviation rule] that calls into question United's proffered justification . . . ." *Id. at 889*. As evidence of pretext, the court pointed to Gordon's showing that a similarly situated employee had been disciplined less harshly: "[T]he weakness of the proffered justification for the termination is further emphasized by the fact that the only other time that United has categorized an action as an unauthorized deviation, the

involved employee, a white female, was not terminated." *Id. at 892*. We explained: "A showing that similarly situated employees belonging to a different racial group received more favorable treatment can also serve as evidence that the employer's proffered legitimate, [**55] nondiscriminatory reason for the adverse job action was a pretext for racial discrimination." *Id.*, quoting *Graham v. Long Island R.R., 230 F.3d 34, 43 (2d Cir. 2000)*. The reasoning and result in *Gordon* confirm what we have stated in many other cases: that comparator evidence can do "double-duty" at both the prima facie and pretext stages.

Several other circuits agree. See, *e.g., Hawn v. Executive Jet Management, 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)* (same); *EEOC v. Horizon/CMS Healthcare Corp., 220 F.3d 1184, 1195 n.6 (10th Cir. 2000)* ("while evidence that a defendant 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 [*859] legitimate, nondiscriminatory reason for the adverse employment action"); see also *Rodgers v. U.S. Bank., N.A., 417 F.3d 845, 852-53 (8th Cir. 2005)* (finding comparator evidence relevant to both the prima facie and pretext phases, [**56] but imposing a more "rigorous" standard at the pretext stage), *abrogated on other grounds, Torgerson, 643 F.3d at 1058*; *Simpson v. Kay Jewelers, Div. of Sterling, Inc., 142 F.3d 639, 646 (3d Cir. 1998)* (same).[7]

> 7 Other circuit courts, hewing more closely to *McDonnell Douglas*, channel comparator evidence into the pretext phase of the sequence. See, *e.g. Rioux v. City of Atlanta, 520 F.3d 1269, 1277 (11th Cir. 2008)* ("We, too, address the sufficiency of any comparator evidence in our examination of pretext, rather than as an element of Rioux's prima facie case . . . ."); *Conward v. Cambridge Sch. Comm., 171 F.3d 12, 19 (1st Cir. 1999)* ("the time to consider comparative evidence in a disparate treatment case is at the third step of the burden-shifting ritual, when the need arises to test the pretextuality vel non of the employer's articulated reason for having acted adversely to the plaintiff's interests"). This approach makes sense because the probative value of a proposed comparator depends largely on the specific non-discriminatory reason the employer has put forward. As one commentator argues: "It makes no sense . . . to require the plaintiff to choose comparison cases based on their [**57] relevance to the employer's not-yet-'articulated' justification. It would make far more sense for courts to consider the presence or absence of good comparative data as part of a review of the evidence as a whole . . . ." Deborah C. Malamud, *The Last Minuet: Disparate Treatment after* Hicks, *93 Mich. L. Rev. 2229, 2293 (1995)*.

In this case, Coleman has offered evidence sufficient to support a finding that Arient and Pelletier were situated similarly to her, are outside her protected classes, and received more lenient punishment for a comparably serious violation of the same rule. Together with the evidence identified by the arbitrator concerning the seriousness of the supposed threat and the Postal Service's response to it, this evidence of selective enforcement was enough to create a genuine issue of fact as to whether the Postal Service's asserted reason for terminating Coleman was pretextual. We must reverse summary judgment for the Postal Service on Coleman's claims of sex and race discrimination.

III. *Retaliation Claims*

Coleman also appeals the district court's grant of summary judgment to the Postal Service on her Title VII retaliation claims. Like discrimination, retaliation may [**58] be established by either the direct or indirect methods of proof. See *Weber v. Universities Research Ass'n, 621 F.3d 589, 592 (7th Cir. 2010)*. In the district court and in her appellate briefs, Coleman relied on both methods. In oral argument, however, Coleman's counsel conceded that she lacked sufficient evidence to show a prima facie case of retaliation under the indirect method. We therefore consider Coleman's retaliation claims under only the direct method of proof.

To establish retaliation under the direct method, Coleman must show that: (1) she engaged in activity protected by Title VII; (2) the Postal Service took an adverse employment action against her; and (3) there was a causal connection between her protected activity and the adverse employment action. See *Leitgen v. Franciscan Skemp Healthcare, Inc., 630 F.3d 668, 673 (7th Cir. 2011)*. The first two elements are not disputed.

Her formal EEOC charges were "the most obvious form of statutorily protected activity." *Silverman v. Board of Educ. of City of Chicago, 637 F.3d 729, 740 (7th Cir. 2011)*; see *42 U.S.C. § 2000e-3(a)*. She also offered evidence that she had complained of race and sex discrimination to her supervisors as [**59] early as May 2005, and her requests for pre-complaint counseling before filing EEO charges also qualify as protected [*860] activity. Coleman's placement on unpaid off-duty status and termination were both adverse employment actions. The parties dispute only whether Coleman has evidence supporting an inference that her protected activity caused the Postal Service's adverse actions. Coleman can show causation by showing that her complaints and EEO filings were a "substantial or motivating factor" in the Postal Service's decisions to place her in off-duty status and/or to fire her. *Gates, 513 F.3d at 686*, quoting *Culver v. Gorman & Co., 416 F.3d 540, 545 (7th Cir. 2005)*. This may be done via direct evidence, which would "entail something akin to an admission by the employer ('I'm firing you because you had the nerve to accuse me of sex discrimination!')." *O'Leary, 657 F.3d at 630*. It may also be done by presenting a "'convincing mosaic' of circumstantial evidence" that would permit the same inference without the employer's admission. *Rhodes v. Illinois Dep't of Transportation, 359 F.3d 498, 504 (7th Cir. 2004)*, quoting *Troupe v. May Dep't Stores Co., 20 F.3d 734, 737 (7th Cir. 1994)*. Coleman [**60] has presented no direct evidence of retaliation, so she relies on a mosaic of circumstantial evidence.

In both retaliation and discrimination cases, we have recognized three categories of circumstantial evidence available to a plaintiff using the "convincing mosaic" approach. See, *e.g., Volovsek v. Wisconsin Dep't of Agriculture, Trade & Consumer Protection, 344 F.3d 680, 689 (7th Cir. 2003)*. One includes "suspicious timing, ambiguous statements oral or written, . . . and other bits and pieces from which an inference of [retaliatory] intent might be drawn." *Silverman, 637 F.3d at 734*, quoting *Troupe, 20 F.3d at 736*. Another is "evidence, but not necessarily rigorous statistical evidence, that similarly situated employees were treated differently." *Volovsek, 344 F.3d at 689*. Another type is "evidence that the employer offered a pretextual reason for an adverse employment action." *Dickerson v. Board of Trustees of Community College Dist. No. 522, 657 F.3d 595, 601 (7th Cir. 2011)*; *Diaz v. Kraft Foods Global, Inc., 653 F. 3d 582, 586-87 (7th Cir. 2011)*.[8] "Each type of evidence is sufficient by itself (depending of course on its strength in relation to whatever other evidence is in the [**61] case) to support a judgment for the plaintiff; or they can be used together." *Troupe, 20 F.3d at 736*.

8 The latter two categories are similar to required elements under the indirect method, so that "our analyses overlap." *Egonmwan v. Cook County Sheriff's Dep't, 602 F.3d 845, 851 (7th Cir. 2010)*. The mosaic approach provides parties and courts with a little more flexibility and room for common sense than the indirect method sometimes allows. See *Hasan v. Foley & Lardner LLP, 552 F.3d 520, 529 (7th Cir. 2008)* ("under the indirect method of proof, a plaintiff must produce evidence of how the employer treats similarly situated employees," while "the direct method of proof imposes no such constraints").

Coleman has offered evidence of suspicious timing and pretext, and that evidence is sufficient to present a genuine issue of fact as to the Postal Service's motives in suspending and then firing her.

Timing: We have often invoked the general rule that "temporal proximity between an employee's protected activity and an adverse employment action is rarely sufficient to show that the former caused the latter." *O'Leary, 657 F.3d at 635*, citing *Leitgen, 630 F.3d at 675*. When temporal proximity is [**62] one among several tiles in an evidentiary mosaic depicting retaliatory motive, however, "[s]uspicious timing . . . can sometimes raise an inference of a causal connection." *Magyar v. St. Joseph Regional Medical Center, 544 F.3d 766, 772 (7th Cir. 2008)*; see *Scaife v. Cook County, 446 F.3d 735, 742 (7th Cir. 2006)* ("Close temporal proximity provides [*861] evidence of causation and may permit a plaintiff to survive summary judgment provided that there is other evidence that supports the inference of a causal link."), quoting *Lang v. Illinois Dep't of Children & Family Services, 361 F.3d 416, 419 (7th Cir. 2004)*. Our cases reject any bright-line numeric rule, but when there is corroborating evidence of retaliatory motive, as there is here, an interval of a few weeks or even months may provide probative evidence of the required causal nexus. See *Magyar, 544 F. 3d at 772* ("This court has found a month short enough to reinforce an inference of retaliation."), citing *Lang, 361 F.3d at 419*. "Deciding when the inference is appropriate cannot be resolved by a

legal rule; the answer depends on context . . . . A jury, not a judge, should decide whether the inference is appropriate." *Loudermilk, 636 F.3d at 315*.

Coleman's [**63] protected activity began with informal complaints of race and sex discrimination that reached Sove, one of the relevant decision-makers, in May 2005. In June, Coleman received a new and unpleasant work assignment, which she refused, resulting in discipline. Then, after her request for advance sick leave was denied, she filed an EEO request for counseling, she was asked to work in a storeroom, she checked herself into the hospital, and she was suspended--all within a span of about six weeks. The suspension came on August 3, 2005. That was the day she was released from the hospital and the day her psychiatrist told Berry of Coleman's homicidal thoughts. But the suspension also occurred a few weeks after the friction between Coleman and Berry, which followed her complaints of discrimination, had built up to the point that she checked herself into the hospital. Later in August 2005, she filed her first formal EEOC charge. She filed her second formal EEOC charge in December 2005. Five weeks after that, she was fired.

Even if the sequence of events alone would not be enough by itself, this sequence of protected activity and punitive action could lend some support to a reasonable juror's inference [**64] of retaliation. See, *e.g., Hunt-Golliday v. Metropolitan Water Reclamation Dist., 104 F.3d 1004, 1014 (7th Cir. 1997)* ("Interpreting the facts in [the plaintiff's] favor, she can show a pattern of criticism and animosity by her supervisors following her protected activities . . . [that] supports the existence of a causal link.").

Pretext: Coleman's timing evidence does not stand alone. She has also presented evidence that the employer's stated reason for acting was pretextual, which also tends to support an inference of retaliation. The Postal Service's explanation for both the suspension on August 3, 2005 and the termination on January 13, 2006 is Coleman's supposed violation of the rule against threats and violence. If that explanation were beyond reasonable dispute, we would agree with the district court and affirm summary judgment on the retaliation claims. As we explained above in detail, however, Coleman has offered substantial evidence that the supposed rule violation was only a pretext for unlawful motives. A jury could reasonably conclude (though of course it would not be required to conclude) that the Postal Service acted for reasons other than its stated reason. Without repeating [**65] that discussion in detail, we conclude that when combined with the fairly close sequence of Coleman's protected activity and the actions taken against her, that evidence of pretext could support a reasonable inference of retaliatory intent, thus precluding summary judgment.[9]

> 9 In making her argument for retaliation based on circumstantial evidence, Coleman also offers Arient and Pelletier, the white men involved in the knife incident, as comparators who were outside her protected class. Such comparator evidence can be relevant in showing retaliation under the "mosaic" approach. See *Volovsek, 344 F.3d at 689*. But this record is simply silent as to whether either of these two white men ever complained of unlawful discrimination. Even without the use of those comparators, Coleman has enough evidence to avoid summary judgment. We will not speculate further on the matter, but note only that it should be fairly easy for a plaintiff in such a case to serve an interrogatory asking whether the relevant decision-makers had any knowledge of protected activity on the part of the proposed comparators.

[*862] Under the convincing mosaic approach, a retaliation case can "be made by assembling a number of pieces [**66] of evidence none meaningful in itself, consistent with the proposition of statistical theory that a number of observations each of which supports a proposition only weakly can, when taken as a whole, provide strong support if all point in the same direction." *Cole v. Illinois, 562 F.3d 812, 815 n.2 (7th Cir. 2009)*, quoting *Sylvester v. SOS Children's Villages Illinois, 453 F.3d 900, 903 (7th Cir. 2009)*. On their own, Coleman's evidence of suspicious timing and pretext might not be enough to show a causal connection between her protected activities and her suspension or termination. Together, however, they are sufficient to withstand summary judgment and create a question for the jury.

IV. *Conclusion*

In adjudicating claims under federal employment discrimination statutes, a court does not sit as a "super-personnel department," second-guessing an employer's "business decision as to whether someone should be fired or disciplined because of a work-rule violation." *Ptasznik v. St. Joseph Hosp., 464 F.3d 691,*

697 (7th Cir. 2006), quoting *Ballance v. City of Springfield, 424 F.3d 614, 621 (7th Cir. 2005)*. But we must also resist the temptation to act as jurors when considering summary judgment [**67] motions. Plaintiff Coleman has offered enough evidence of race and sex discrimination and retaliation to withstand summary judgment. The judgment of the district court is therefore REVERSED and the case is REMANDED for further proceedings consistent with this opinion.

CONCUR BY: WOOD

CONCUR

WOOD, *Circuit Judge*, with whom TINDER and HAMILTON, *Circuit Judges*, join, concurring. The lead opinion carefully analyzes Denise Coleman's claims that the Post Office's decision to fire her violated Title VII's prohibitions against discriminatory employment decisions (here, on grounds of race and sex) and retaliatory actions. See *42 U.S.C. §§ 2000e-2(a)(1)* (discrimination), *2000e-3(a)* (retaliation). For the discrimination claim, the opinion meticulously applies the so-called indirect method of proof, which originated with the Supreme Court's 1973 decision in *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)*; for the retaliation claim the opinion turns to the so-called direct method of proof, and more particularly to the indirect (or "mosaic") way of directly proving retaliation. It concludes succinctly that Coleman managed to put enough in the record to defeat the defendant's motion for summary judgment. A jury [**68] *might* find in Coleman's favor, given the inconsistencies in the Post Office's treatment of other workers who also violated the violence rule, even though the odds may be against Coleman here. Summary judgment, however, is not about odds, once a threshold has been crossed. I agree with my colleagues that Coleman has presented enough on both theories to move forward with her case.

[*863] I write separately to call attention to the snarls and knots that the current methodologies used in discrimination cases of all kinds have inflicted on courts and litigants alike. The original *McDonnell Douglas* decision was designed to clarify and to simplify the plaintiff's task in presenting such a case. Over the years, unfortunately, both of those goals have gone by the wayside. We now have, for both discrimination and retaliation cases, two broad approaches--the "direct" and the "indirect." But the direct approach is not limited to cases in which the employer announces "I have decided to fire you because you are a woman [or a member of any other protected class]." Instead, the direct method permits proof using circumstantial evidence, as we acknowledged in *Troupe v. May Dep't Stores Co., 20 F.3d 734 (7th Cir. 1994)*. [**69] Like a group of Mesopotamian scholars, we work hard to see if a "convincing mosaic" can be assembled that would point to the equivalent of the blatantly discriminatory statement. If we move on to the indirect method, we engage in an allemande worthy of the 16th century, carefully executing the first four steps of the dance for the *prima facie* case, shifting over to the partner for the "articulation" interlude, and then concluding with the examination of evidence of pretext. But, as my colleagues correctly point out, evidence relevant to one of the initial four steps is often (and is here) equally helpful for showing pretext.

Perhaps *McDonnell Douglas* was necessary nearly 40 years ago, when Title VII litigation was still relatively new in the federal courts. By now, however, as this case well illustrates, the various tests that we insist lawyers use have lost their utility. Courts manage tort litigation every day without the ins and outs of these methods of proof, and I see no reason why employment discrimination litigation (including cases alleging retaliation) could not be handled in the same straightforward way. In order to defeat summary judgment, the plaintiff one way or the other [**70] must present evidence showing that she is in a class protected by the statute, that she suffered the requisite adverse action (depending on her theory), and that a rational jury could conclude that the employer took that adverse action on account of her protected class, not for any non-invidious reason. Put differently, it seems to me that the time has come to collapse all these tests into one. We have already done so, when it comes to the trial stage of a case. See, *e.g., EEOC v. Bd. of Regents of the Univ. of Wis. Sys., 288 F.3d 296, 301 (7th Cir. 2002)*. It is time to finish the job and restore needed flexibility to the pre-trial stage.

With those observations, I concur in my colleagues' opinion.

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STANDLEY BRADY, APPELLANT v. OFFICE OF THE SERGEANT AT ARMS, UNITED STATES HOUSE OF REPRESENTATIVES, APPELLEE

No. 06-5362

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

520 F.3d 490*; *380 U.S. App. D.C. 283*; *2008 U.S. App. LEXIS 6460*; *102 Fair Empl. Prac. Cas. (BNA) 1815*; *91 Empl. Prac. Dec. (CCH) P43,156

November 19, 2007, Argued
March 28, 2008, Decided

PRIOR HISTORY: [***1]

Appeal from the United States District Court for the District of Columbia. (No. 02cv00802).
Brady v. Livingood, 456 F. Supp. 2d 1, 2006 U.S. Dist. LEXIS 74800 (D.D.C., 2006)

COUNSEL: Lenore C. Garon argued the cause for appellant. With her on the briefs were Joseph D. Gebhardt and Charles W. Day, Jr.

Victoria L. Botvin, Attorney, Office of House Employment Counsel, argued the cause for appellee. With her on the brief was Gloria J. Lett, Attorney, Office of House Employment Counsel.

JUDGES: Before: GINSBURG and KAVANAUGH, Circuit Judges, and EDWARDS, Senior Circuit Judge. Opinion for the Court filed by Circuit Judge KAVANAUGH.

OPINION BY: KAVANAUGH.

OPINION

[*491] [**284] KAVANAUGH, *Circuit Judge*: Seeking to punish and deter sexual harassment, the U.S. House Office of the Sergeant at Arms demoted Brady, a supervisor within the office, because it concluded that Brady grabbed his crotch in front of three employees. Brady sued under federal anti-discrimination laws, contending that he was demoted because of his race. The District Court granted summary judgment to the Sergeant at Arms on the ground that Brady had not made out a prima facie case of racial discrimination. In the alternative, the District Court ruled that Brady failed to present evidence sufficient for a reasonable jury to find that the Sergeant at Arms' stated [***2] reason for demoting Brady was not the actual reason and that the Sergeant at Arms intentionally discriminated against Brady on account of his race. We affirm based on that [*492] [**285] alternative ground. In doing so, we emphasize that the question whether the plaintiff in a disparate-treatment discrimination suit actually made out a prima facie case is almost always irrelevant when the district court considers an employer's motion for summary judgment or judgment as a matter of law. *See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 514-15, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993)*; *U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714-16, 103 S. Ct. 1478, 75 L. Ed. 2d 403 (1983)*.

I

Brady worked as an assistant shift supervisor in House Garages & Parking Security, an entity within the Office of the Sergeant at Arms of the U.S. House of Representatives. In early 2001, two employees -- one man and one woman -- accused Brady of improper behavior in the workplace. They alleged that Brady grabbed his crotch in front of the two of them and another female employee. After learning of the incident, House Sergeant at Arms Wilson Livingood asked two supervisors to investigate. In the ensuing internal investigation, the two accusers claimed that Brady grabbed his crotch [***3] while discussing his need to use the restroom. The other employee who was present initially refused to discuss the incident, saying she did not want to be involved. After being required to give a statement, she said that Brady did not "present any offensive actions towards [her]." Joint

Appendix ("J.A.") 214. She explained that Brady had acted "in a very joking manner," but she did not deny that Brady had grabbed his crotch in the way described by the other two employees. *Id.*

The two investigating supervisors found that the crotch-grabbing incident had likely occurred and that Brady violated the office's sexual harassment policy. One supervisor recommended demoting Brady. The other recommended firing him. Sergeant at Arms Livingood then determined that Brady "might have done it jokingly, but . . . even in a joking manner, it offended two of his employees." Livingood Deposition Transcript (Nov. 10, 2005), J.A. 92. Particularly because Brady was a supervisor, Livingood concluded that "some action needed to be taken." *Id.* Livingood demoted Brady but did not fire him.

Brady asked Livingood to reconsider his decision. Livingood agreed to do so and hired a Washington, D.C., law firm to investigate. [***4] The law firm reviewed documents produced during the original investigation and interviewed 13 current and former employees. The firm concluded that it was "likely that an incident occurred that was most accurately described" by Brady's two initial accusers. Relman Report (June 28, 2001), J.A. 199. After receiving the law firm's report, Livingood affirmed Brady's demotion.

Brady sued, alleging racial discrimination in violation of Title VII of the Civil Rights Act, *42 U.S.C. § 2000e-2*, a law that applies to offices in the Legislative Branch as a result of the Congressional Accountability Act, *2 U.S.C. §§ 1302(a)*, *1311(a)*. The District Court granted summary judgment to the Office of the Sergeant at Arms, finding that Brady failed to make out a prima facie case of racial discrimination because he could not show that a similarly situated employee outside his racial group was treated differently. *Brady v. Livingood, 456 F. Supp. 2d 1, 7-8 (D.D.C. 2006)*. In the alternative, the District Court stated that "even if plaintiff were able to establish a prima facie case of discrimination, defendant's Motion for Summary Judgment would still be granted because defendant's personnel actions were [***5] in fact undertaken for legitimate, non-discriminatory reasons." *Id. at 9 n.9*.

Brady appeals; our review of the summary judgment is de novo.

[*493] [**286] II

Title VII of the Civil Rights Act makes it unlawful for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." *42 U.S.C. § 2000e-2(a)(1)*. This statutory text establishes two elements for an employment discrimination case: (i) the plaintiff suffered an adverse employment action (ii) because of the employee's race, color, religion, sex, or national origin.

The District Court concluded that Brady had not made out a "prima facie case" under *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)*. [1] The court's focus on the prima facie case was not atypical: When resolving an employer's motion for summary judgment or judgment as a matter of law in employment discrimination cases, district courts often wrestle with the question whether the employee made out a prima facie case.

1 In a refusal-to-hire or refusal-to-promote discrimination [***6] case, the *McDonnell Douglas* prima facie factors are that: (i) the employee "belongs to a racial minority" or other protected class; (ii) the employee "applied and was qualified for a job for which the employer was seeking applicants"; (iii) despite the employee's qualifications, the employee "was rejected"; and (iv) after the rejection, "the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)*. In firing, demotion, or other adverse-action cases, the factors sometimes have been articulated as: (i) the employee belongs to a protected class; (ii) the employee was still qualified for the position; (iii) despite still being qualified, the employee was fired, demoted, or otherwise adversely acted upon; and (iv) if the employee was removed, either someone else filled the position or the employer sought other applicants. *See Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000)*. Some of our decisions have allowed or required plaintiffs to present other evidence to satisfy the test and occasionally phrased the test more generally to require evidence that "the [***7] unfavorable action gives rise to an inference of discrimination." *Brown v. Brody, 339 U.S. App. D.C. 233, 199 F.3d 446, 452 (D.C. Cir. 1999)*; *see also Czekalski v. Peters, 374 U.S. App. D.C. 351, 475 F.3d 360, 364 (D.C. Cir. 2007)*; *George v. Leavitt, 366 U.S. App. D.C. 11, 407 F.3d 405, 412 (D.C. Cir. 2005)*. Disagreement and uncertainty over the content, meaning, and purpose of the *McDonnell Douglas* prima facie factors have led to a plethora of problems; as we underscore today, however, the factors are usually irrelevant.

But judicial inquiry into the prima facie case is usually misplaced. In the years since *McDonnell Douglas*, the Supreme Court's decisions have clarified that the question whether the employee made out a prima facie case is almost always irrelevant. At the motion to dismiss stage, the district court cannot throw out a complaint even if the plaintiff did not plead the elements of a prima facie case. *Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510-11, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002)*. And by the time the district court considers an employer's motion for summary judgment or judgment as a matter of law, the employer ordinarily will have asserted a legitimate, non-discriminatory reason for the challenged decision-for example, through a declaration, deposition, or other [***8] testimony from the employer's decisionmaker. That's important because once the employer asserts a legitimate, non-discriminatory reason, the question whether the employee actually made out a prima facie case is "no longer relevant" and thus "disappear[s]" and "drops out of the picture." *St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510, 511, 113 S. Ct. 2742, 125 L. Ed. 2d* [*494] [**287] *407 (1993)*; *Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000)*. As the Supreme Court explained a generation ago in *Aikens*: "Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant. The district court has before it all the evidence it needs to decide whether the defendant intentionally discriminated against the plaintiff." *U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715, 103 S. Ct. 1478, 75 L. Ed. 2d 403 (1983)* (internal quotation marks omitted). The *Aikens* principle applies, moreover, to summary judgment as well as trial proceedings. *See Dunaway v. Int'l Bhd. of Teamsters, 354 U.S. App. D.C. 36, 310 F.3d 758, 762 (D.C. Cir. 2002)*; *Wells v. Colorado Dep't of Transp., 325 F.3d 1205, 1227-28 (10th Cir. 2003)* (Hartz, J., concurring); *see also Vickers v. Powell, 377 U.S. App. D.C. 213, 493 F.3d 186, 195 (D.C. Cir. 2007)*; [***9] *Holcomb v. Powell, 369 U.S. App. D.C. 122, 433 F.3d 889, 896-97 (D.C. Cir. 2006)*; *George v. Leavitt, 366 U.S. App. D.C. 11, 407 F.3d 405, 411-12 (D.C. Cir. 2005)*; *Aka v. Washington Hosp. Ctr., 332 U.S. App. D.C. 256, 156 F.3d 1284, 1289 (D.C. Cir. 1998)* (en banc).

Much ink has been spilled regarding the proper contours of the prima-facie-case aspect of *McDonnell Douglas*. But as we read the Supreme Court precedents beginning with *Aikens*, the prima facie case is a largely unnecessary sideshow. It has not benefited employees or employers; nor has it simplified or expedited court proceedings. In fact, it has done exactly the opposite, spawning enormous confusion and wasting litigant and judicial resources.

Lest there be any lingering uncertainty, we state the rule clearly: In a Title VII disparate-treatment suit where an employee has suffered an adverse employment action and an employer has asserted a legitimate, non-discriminatory reason for the decision, the district court need not -- *and should not* -- decide whether the plaintiff actually made out a prima facie case under *McDonnell Douglas*. Rather, in considering an employer's motion for summary judgment or judgment as a matter of law in those circumstances, the district court must resolve one central question: [***10] Has the employee produced sufficient evidence for a reasonable jury to find that the employer's asserted non-discriminatory reason was not the actual reason and that the employer intentionally discriminated against the employee on the basis of race, color, religion, sex, or national origin? *See Hicks, 509 U.S. at 507-08, 511*; *Aikens, 460 U.S. at 714-16*. [2]

2 For those rare situations where it still matters whether the employee made out a prima facie case -- namely, those cases in which the defendant does not assert *any* legitimate, non-discriminatory reason for the decision -- establishing a prima face case is "not onerous." *Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981)*. For example, to make out a prima facie case, a plaintiff need not demonstrate that he or she was treated differently from a similarly situated employee or that the position was filled by a person outside the plaintiff's group. *See O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 312-13, 116 S. Ct. 1307, 134 L. Ed. 2d 433 (1996)*; *Wiley v. Glassman, 379 U.S. App. D.C. 122, 511 F.3d 151, 156 (D.C. Cir. 2007)*; *Czekalski, 475 F.3d at 365-66*; *Mastro v. Potomac Elec. Power Co., 371 U.S. App. D.C. 68, 447 F.3d 843, 850-51 (D.C. Cir. 2006)*; *Chappell-Johnson v. Powell, 370 U.S. App. D.C. 162, 440 F.3d 484, 488 (D.C. Cir. 2006)*; [***11] *George, 407 F.3d at 412-13*; *Teneyck v. Omni Shoreham Hotel, 361 U.S. App. D.C. 214, 365 F.3d 1139, 1150-51 (D.C. Cir. 2004)*; *Dunaway v. Int'l Bhd. of Teamsters, 354 U.S. App. D.C. 36, 310 F.3d 758, 762-63 (D.C. Cir. 2002)*; *Stella v. Mineta, 350 U.S. App. D.C. 300, 284 F.3d 135, 145-46 (D.C. Cir. 2002)*. Rather, such evidence (or the lack of such evidence) may be relevant to the determination at summary judgment or trial whether intentional discrimination occurred.

III

In this case, the employer Sergeant at Arms asserted a legitimate, non-discriminatory [*495] [**288] reason for the adverse employment action -- namely, that Brady committed sexual harassment. Under *Aikens* and

related Supreme Court precedents, the question whether Brady actually made out a prima facie case is therefore irrelevant. So we turn directly to the central issue: whether Brady produced evidence sufficient for a reasonable jury to find that the employer's stated reason was not the actual reason and that the employer intentionally discriminated against Brady based on his race. When determining whether summary judgment or judgment as a matter of law is warranted for the employer, the court considers all relevant evidence presented by the plaintiff and defendant. *See Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 148-49, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000)*; [***12] *see also Czekalski v. Peters, 374 U.S. App. D.C. 351, 475 F.3d 360, 364 (D.C. Cir. 2007)*; *Aka v. Washington Hosp. Ctr., 332 U.S. App. D.C. 256, 156 F.3d 1284, 1289 (D.C. Cir. 1998)* (en banc).

The employer produced deposition testimony from its decisionmaker Livingood that Brady was demoted because he grabbed his crotch in front of three other employees. The employer submitted additional supporting evidence: that two employees saw and complained about the incident; that the initially reluctant third witness did not deny that Brady had grabbed his crotch; that the incident was thoroughly and independently investigated; and that Brady's actions violated the office's sexual harassment policy.

A plaintiff such as Brady may try in multiple ways to show that the employer's stated reason for the employment action was not the actual reason (in other words, was a pretext). Often, the employee attempts to produce evidence suggesting that the employer treated other employees of a different race, color, religion, sex, or national origin more favorably in the same factual circumstances. *See* 1 LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 8.04, at 8-66 (2d ed. 2007) ("Probably the most commonly employed method of demonstrating that an employer's explanation [***13] is pretextual is to show that similarly situated persons of a different race or sex received more favorable treatment."); 1 BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 73 (4th ed. 2007) ("In most cases the key to proving pretext is comparative evidence."). Alternatively, the employee may attempt to demonstrate that the employer is making up or lying about the underlying facts that formed the predicate for the employment decision. If the employer's stated belief about the underlying facts is reasonable in light of the evidence, however, there ordinarily is no basis for permitting a jury to conclude that the employer is lying about the underlying facts. *See George v. Leavitt, 366 U.S. App. D.C. 11, 407 F.3d 405, 415 (D.C. Cir. 2005)* ("[A]n employer's action may be justified by a reasonable belief in the validity of the reason given even though that reason may turn out to be false."); *Fischbach v. D.C. Dep't of Corr., 318 U.S. App. D.C. 186, 86 F.3d 1180, 1183 (D.C. Cir. 1996)* (employer prevails if it "honestly believes in the reasons it offers"); 1 *LARSON § 8.04*, at 8-73 ("[A]n employer's action may be based on a good faith belief, even though the reason may turn out in retrospect to be mistaken or false."). [3]

> 3 Employees [***14] often try to cast doubt on an employer's asserted reason in other ways as well, such as pointing to: changes and inconsistencies in the stated reasons for the adverse action; the employer's failure to follow established procedures or criteria; the employer's general treatment of minority employees; or discriminatory statements by the decisionmaker. *See* 1 *LARSON § 8.04*, at 8-74 to-75; 1 LINDEMANN & GROSSMAN at 89; 1 ABIGAIL COOLEY MODJESKA, EMPLOYMENT DISCRIMINATION LAW § 1.9, at 1-134 to-39 (3d ed. 2007).

Brady's only argument for discrediting the employer's asserted non-discriminatory [*496] [**289] reason is his contention that the underlying sexual harassment incident never occurred; he raises the specter that the original accusers were racially motivated and made up the incident. Brady further says it's the jury's job to decide factual and credibility questions of this kind. But Brady misunderstands the relevant factual issue. The question is not whether the underlying sexual harassment incident occurred; rather, the issue is whether *the employer honestly and reasonably believed* that the underlying sexual harassment incident occurred. *See George, 407 F.3d at 415*; *Fischbach, 86 F.3d at 1183*. Brady [***15] himself acknowledges that Livingood believed the incident occurred. *See* Brady Deposition Transcript, J.A. 70 ("Q: Is it your understanding that Mr. Livingood believed that you grabbed yourself? A: Yes."). Although Brady asserts that the accusations and ensuing investigation were racially tainted and the incident did not occur, he did not produce evidence sufficient to show that the Sergeant at Arms' conclusion was dishonest or unreasonable. *Cf. Mastro v. Potomac Elec. Power Co., 371 U.S. App. D.C. 68, 447 F.3d 843, 855-57 (D.C. Cir. 2006)*. Therefore, summary judgment for the Sergeant at Arms was proper. [4]

> 4 Even if Brady showed that the sexual harassment incident was not the actual reason for his demotion, he still would have to demonstrate that the actual reason was a racially discriminatory reason. *See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 514, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993)*. Of course, discrediting an employer's asserted reason is often quite probative of discrimination. *See Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000)*.

Allowing Brady to end-run summary judgment in these circumstances would create significant practical problems. Employers obviously have to resolve factual disagreements all the time [***16] in order to make employment decisions regarding hiring, promotion, discipline, demotion, firing, and the like. In many situations, employers must decide disputes based on credibility assessments, circumstantial evidence, and incomplete information. But Brady's argument would mean that every employee who is disciplined, demoted, or fired for alleged misconduct could sue for employment discrimination based on race, color, religion, sex, or national origin and -- merely by denying the underlying allegation of misconduct -- *automatically* obtain a jury trial. Brady cites no support for that proposition, which would wreak havoc on district courts' orderly resolution of employment discrimination cases and improperly put employers in a damned-if-you-do, damned-if-you-don't posture when addressing disciplinary issues in the workplace.

Brady also implies that the Office of the Sergeant at Arms overreacted and adopted a hair-trigger approach to the reported incident. But many employers today aggressively react to sexual harassment allegations; an employer does not engage in discrimination on the basis of *race* by strictly and uniformly enforcing a policy against any remote hint or suggestion of [***17] sexual harassment in the workplace. It is not the Judiciary's place to micro-manage an employer's sexual harassment policies when resolving a claim of racial discrimination. As the Supreme Court has stated, "[c]ourts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it." *Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578, 98 S. Ct. 2943, 57 L. Ed. 2d 957 (1978)*.

In sum, the Office of the Sergeant at Arms produced evidence of a legitimate, non-discriminatory reason for Brady's demotion: that Brady engaged in sexual [*497] [**290] harassment in the workplace in violation of office policy. Brady failed to put forward sufficient evidence for a reasonable jury to find that the employer's legitimate, non-discriminatory reason was not the actual reason and that the employer intentionally discriminated against him on the basis of race.

* * *

We affirm the judgment of the District Court granting summary judgment to the Office of the Sergeant at Arms.

So ordered.

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DISCRIMINATION

Despite judicial misgivings about the *McDonnell Douglas* framework, it remains alive and well in employment discrimination litigation, according to Littler Mendelson's Adam C. Wit. In this BNA Insights article, Wit examines the reasoning behind the courts' application of this standard and asks whether the *McDonnell Douglas* framework still has a place in analyzing discrimination claims. He concludes that the framework, ''perhaps in truncated form, still has value.''

Coleman v. Donahoe: Should McDonnell Douglas Framework Be Put to Rest?

BY ADAM C. WIT, LITTLER MENDELSON P.C.

Employment litigators can recite in their sleep the all-too-familiar ''burden-shifting'' scheme laid out by the U.S. Supreme Court for Title VII[1] and most other employment discrimination litigation, originally in *McDonnell Douglas Corp. v. Green*,[2] and refined in several later cases, including *Texas Department of Community Affairs v. Burdine*,[3] *U.S. Postal Service Board of Governors v. Aikens*,[4] and *St. Mary's Honor Center v. Hicks*.[5]

Essentially, the scheme was designed to provide a framework within which to assess discrimination claims where the plaintiff does not have ''direct'' evidence of discrimination. It is a three-part process, requiring the plaintiff to first establish a prima facie case of discrimination by showing that (1) he or she is a member of the protected class, (2) he or she is meeting the employer's legitimate expectations, (3) he or she suffered an adverse employment action, and (4) other similarly situated individuals who were not in the protected class were treated more favorably.[6]

[1] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq.

[2] 411 U.S. 792, 5 FEP Cases 965 (1973).

[3] 450 U.S. 248, 25 FEP Cases 113 (1981).

[4] 460 U.S. 711, 31 FEP Cases 609 (1983).

[5] 509 U.S. 502, 62 FEP Cases 96 (1993).

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[6] This is but one articulation of the fourth prong of the prima facie case and the one most pertinent to this article. The original fourth prong, as set forth in *McDonnell Douglas*, was whether, after the plaintiff's application for employment was rejected, the position for which he had applied remained open and the employer continued to seek applicants from persons of the plaintiff's qualifications. Of course, the complained-of adverse action in *McDonnell Douglas* was a ''failure to hire.'' The Supreme Court recognized that the facts of each case would ''vary, and the specification . . . of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations.'' Thus, courts have adopted a number of ''fourth prongs'' to suit the adverse employment action before them. See, e.g., *Petts v. Rockledge Furniture*, 534 F.3d 715, 103 FEP Cases 1348 (7th Cir. 2008) (fourth element in RIF is whether employee's job duties are absorbed by other employees outside the protected class); *Pantoja v. American NTN Bearing Mfg. Corp.*, 495 F.3d 840, 846, 101 FEP Cases 235 (7th Cir. 2007) (151 DLR AA-1, 8/7/07) (''Once an employee can show (in the sense of raising an issue of material fact at the summary judgment stage) that he is meeting his employer's legitimate expectations (the second element), then the fact that the employer needs to find another person to perform that job after the employee is gone raises the same inference of discrimination that the continuation of a search does in the hiring situation.''); *Vaughn v. Watkins Motor Lines Inc.*, 291 F.3d 900, 906 7 WH Cases2d 1478, 88 FEP Cases 1723, (6th Cir. 2002) (105 DLR AA-1, 5/31/02) (in discharge claim, fourth element is that plaintiff was replaced by,

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If the plaintiff establishes a prima facie case, the burden of production, not persuasion, shifts to the defendant to provide a legitimate, nondiscriminatory reason for the adverse employment action. Once that is accomplished, the plaintiff must establish that the reason articulated by the defendant is a pretext for discrimination.

Characterizing this process as a ''burden-shifting'' scheme is somewhat of a misnomer, given that the burden of proof remains with the plaintiff throughout.

In *Coleman v. Donahoe*,[7] the U.S. Court of Appeals for the Seventh Circuit recently reviewed the *McDonnell Douglas* framework in detail in reversing a district court's decision to grant the employer summary judgment in a sex and race discrimination and retaliation case brought under Title VII. In a concurring opinion, Judge Wood, joined by Judges Tinder and Hamilton, called for the death of the *McDonnell Douglas* framework, arguing that it had lost its ''utility'' and had, in essence, overcomplicated the assessment of discrimination claims.

This is not the first time a judge or practitioner has sounded this call. For example, in *Wells v. Colorado Department of Transportation*,[8] Judge Hartz of the Tenth Circuit wrote a dissent condemning *McDonnell Douglas* and calling for its abolishment. This is ironic, given that Judge Hartz also wrote the majority opinion in the *Wells* case, in which he applied the *McDonnell Douglas* framework to the facts at hand.

These judicial misgivings notwithstanding, the *McDonnell Douglas* framework remains alive and well in employment discrimination litigation. This article examines the reasoning behind Judge Wood's concurrence and asks the question: Does the *McDonnell Douglas* framework still have a place in analyzing discrimination claims?

***Coleman* Raises 'Similarly Situated' Issue.** The plaintiff in *Coleman* was an African American clerk for the U.S. Postal Service who was terminated after 32 years of service because, the Postal Service contended, she had threatened to kill her supervisor and posed a danger to her co-workers. The plaintiff alleged, in part, that her termination was the result of race discrimination in violation of Title VII, and most pertinent to this discussion, offered evidence that two white employees at the same facility had only been suspended after threatening an employee at knife point.

The district court granted summary judgment for the Postal Service, finding that the plaintiff had failed to establish a prima facie case because the two white employees in question were not similarly situated to the plaintiff.

The Seventh Circuit reversed this decision, ostensibly because it found (among other reasons) that there *were* sufficient similarities between the plaintiff and the two comparators to create a genuine issue of material fact. The court defined the two questions before it as:

> First, just how alike must comparators be to the plaintiff to be considered similarly situated? Second, can evidence that a similarly situated employee received better treatment serve not only as an element of the plaintiff's prima facie case, but also satisfy the plaintiff's burden to show that the employer's legitimate nondiscriminatory reason for its action was pretextual?

The court answered the second question in the affirmative. Quoting *McDonnell Douglas*, the court noted that comparator evidence was ''especially relevant'' to the issue of pretext. The court further explained:

> Where the plaintiff argues that an employer's discipline is meted out in an uneven manner, the similarly situated inquiry dovetails with the pretext question. Evidence that the employer selectively enforced a company policy against one gender but not the other would go to both the fourth prong of the prima facie case and the pretext analysis.

The Seventh Circuit determined that the plaintiff had offered evidence to support a finding that she was sufficiently similar to the comparators whom she identified. This finding, coupled with other evidence, was enough to create a genuine issue of material fact about whether the Postal Service's articulated reason for terminating the plaintiff was pretextual.

The *McDonnell Douglas* framework, perhaps in truncated form, still has value.

In her concurrence, Judge Wood seized on the overlap in the ''similarly situated'' analysis between the prima facie case and pretext to argue that *McDonnell Douglas* no longer served a useful purpose, and that employment discrimination litigation should be handled in a similarly ''straightforward way'' as tort litigation. Judge Wood explained:

> In order to defeat summary judgment, the plaintiff one way or the other must present evidence showing that she is in a class protected by the statute, that she suffered the requisite adverse action (depending on her theory), and that a rational jury could conclude that the employer took that adverse action on account of her protected class, not for any noninvidious reason.

Thus, Judge Wood suggested that all of the *McDonnell Douglas* tests simply be ''collapsed into one,'' as had already been done for the trial stage of litigation, so as to ''restore needed flexibility to the pre-trial stage.'' While much of what Judge Wood suggested makes sense, the author believes that the *McDonnell Douglas* framework, perhaps in truncated form, still has value.

First, it is worth noting that the district court in *Coleman* did not wrongly decide the case because it misapplied the *McDonnell Douglas* framework. Rather, the district court incorrectly concluded that the plaintiff and the two comparators were dissimilar.

In that regard, the district court reasoned that the three employees had different direct supervisors and held different positions.

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or his work given to, those outside the protected class); *White v. Thyssenkrupp Steel USA*, 743 F. Supp. 2d 1340, 1345, 110 FEP Cases 1052 (S.D. Ala. 2010) (204 DLR A-4, 10/22/10) (fourth element in pay claim is whether the employee is qualified to receive the higher wage).

[7] ___ F.3d ___, 114 FEP Cases 160 (7th Cir. Jan. 6, 2012) (4 DLR AA-1, 1/6/12).

[8] 325 F.3d 1205, 91 FEP Cases 1114 (10th Cir. 2003) (79 DLR A-3, 4/24/03).

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However, as the Seventh Circuit noted in reversing the decision, regardless of whom the comparators' supervisors were, the decision maker in all three instances was the same person, and all three employees were subject to the same standards of conduct, regardless of their job responsibilities. Thus, the Seventh Circuit reasoned, the district court had drawn hollow distinctions in finding the three were not similarly situated.

Case Highlights Both Flaws and Utility. In any event, the case still highlights the flaws, but also the utility of the *McDonnell Douglas* framework. The Supreme Court in the *Aikens* decision described the *McDonnell Douglas* framework as: ''merely a sensible orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.''[9] There is logic to the notion that there are certain threshold (i.e., ''prima facie'') showings a plaintiff must make before she can proceed with a discrimination claim.

True to this definition, the ''prima facie'' case is intended to be comprised of factors that are self-evident and capable of determination without resort to a detailed analysis of the evidence. These principles clearly apply to the first and third prongs of the prima facie case. In other words, it should be relatively self-evident whether the plaintiff is a member of the protected class and whether she has suffered an adverse employment action.[10]

Equally true, a plaintiff should not be able to proceed with a discrimination claim unless these factors are established—i.e., that she can claim protection under Title VII and has suffered an injury. Thus, it makes sense to require that a plaintiff establish these factors—however simple it may be to do so—before requiring that the employer provide the reason for the adverse action and assessing whether that reason is a pretext for discrimination.

The second and fourth prongs of the prima facie case—as articulated in *Coleman*—are more problematic.[11] The second prong requires the plaintiff to establish that she was meeting her employer's legitimate expectations. In *Coco v. Elmwood Care*, 128 F.3d 1177, 1180, 75 FEP Cases 513 (7th Cir. 1997), the Seventh Circuit defined ''legitimate expectations'' in this context as ''meaning simply bona fide expectations, for it is no business of a court in a discrimination case to decide whether an employer demands 'too much' of [its] workers.'' Interpreted as such, this prong has no real utility as part of the prima facie case.

For example, as a matter of course, employers generally argue that an employee who has been terminated for misconduct was *not* meeting legitimate expectations. It is equally likely that there will be disagreement between the employer and the employee about what the employer's legitimate expectations are when an employee is terminated for performance reasons.

Thus, too often this prong is so deeply linked to the employer's reason for taking adverse action, and the employee's argument about why she has been discriminated against, that assessing it simply as part of the prima facie case runs directly counter to the principles behind this initial stage of the plaintiff's burden of proof.

As a matter of course, employers generally argue that an employee who has been terminated for misconduct was *not* meeting legitimate expectations.

Recognizing this overlap, the Seventh Circuit has more than once decided to skip this prong of the prima facie case altogether and address it during the pretext phase. The theory behind the court's approach is that if the evidence is insufficient to establish that the employer's reason for taking adverse action is a pretext for discrimination, it surely could not be used to satisfy the prima facie case.[12] Of course, this practice defeats the idea that the prima facie case acts as the gatekeeper before a detailed analysis of the facts is necessary.

The ''similarly situated'' fourth prong is also too intertwined with the ultimate question to be decided—whether the plaintiff was discriminated against—to be easily included as part of the prima facie case. This is evident from the struggles of the Seventh Circuit in *Coleman* to explain how the ''similarly situated'' issue differed between the prima facie and pretext analyses.

In that regard, part of the Postal Service's argument was that the plaintiff and the white employees were not comparable because they considered the plaintiff's conduct a credible threat, while they believed that the other two employees were engaged in ''horseplay.'' The Seventh Circuit reasoned that this issue of motivation was not part of the prima facie analysis:

> An employer's honest belief about its motives for disciplining a Title VII disparate treatment plaintiff is relevant, but at the pretext stage, not for the plaintiff's prima facie case. The similarly-situated inquiry is about whether employees are *objectively* comparable, while the pretext inquiry hinges on the employer's *subjective* motivations.

Of course, this begs the question: What does it mean to be ''objectively comparable?''

Earlier in its opinion, the Seventh Circuit described the factors a plaintiff must show in the ''usual case'' to demonstrate sufficient similarity to a comparator: ''(1) dealt with the same supervisor, (2) were subject to the

[9] 460 U.S. at 715.

[10] There is, of course, a body of case law addressing the issue of what is, and what is not, an ''adverse employment action,'' but this is more a matter of law than an issue dependent upon detailed factual analysis.

[11] As discussed above, the fourth prong has been articulated in other cases in such a way that it *could* be relatively self-evident, such that it might be of more value in the prima facie case. Thus, using *McDonnell Douglas* itself as an example, it should be fairly self-evident whether the job for which the plaintiff was rejected remained open, and the employer continued to seek applicants of the plaintiff's qualifications. By the same token, it should be fairly self-evident whether the plaintiff was replaced by someone not in the protected class (which is another articulation of the fourth prong).

[12] See, e.g., *Hague v. Thompson Distrib. Co.*, 436 F.3d 816, 823, 97 FEP Cases 545 (7th Cir. 2006) (28 DLR A-2, 2/10/06); *Rummery v. Ill. Bell Tel. Co.*, 250 F.3d 553, 556, 85 FEP Cases 1188 (7th Cir. 2001) (103 DLR A-2, 5/29/01).

same standards, and (3) engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their conduct or the employer's treatment of them.''

At least with respect to the third factor, it would seem that there usually will be a ''subjective'' component to whether there were ''mitigating'' circumstances or whether employees' circumstances ''differed'' to some degree or another. Plus, it is difficult to determine whether there are differing or mitigating circumstances between employees' conduct without first knowing what the reason was for the employer's decision. Yet, the employer need not articulate this reason until *after* the plaintiff has established a prima facie case.

Seventh Circuit: No 'Magic Formula.' Indeed, the factors to be considered in determining whether employees are similarly situated likely will differ from case-to-case. Thus, the Seventh Circuit in *Coleman* stated that there is no ''magic formula'' to the ''similarly situated'' analysis; that the inquiry ''should not devolve into a mechanical, one-to-one mapping between employees.''

In any case, if courts are going to parse ''objective'' versus ''subjective'' analyses into two separate parts of the inquiry, it makes more sense to collapse both steps into the pretext analysis, as courts have done with respect to the second prong of the prima facie case.

Ultimately, there are three basic questions posed by the bulk of discrimination cases: (1) Is the plaintiff protected by the statute?; (2) Did the plaintiff suffer an injury (i.e., an adverse employment action)?; and (3) Was the injury caused by discrimination?

Given the ''ins and outs'' involved in answering these questions, it makes sense to break the inquiry down as *McDonnell Douglas* prescribed. However, as Judge Wood suggests, perhaps it is time to stop paying lip service to certain components of the prima facie case just to maintain the form. Having said that, the prima facie case still serves a purpose of forcing plaintiffs to satisfy the threshold burden of establishing that they have a cause of action worthy of analysis. For that reason, the *McDonnell Douglas* framework still serves a purpose.

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MAETTA VANCE, Plaintiff-Appellant, v. BALL STATE UNIVERSITY, et al., Defendants-Appellees.

No. 08-3568

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

646 F.3d 461*; *2011 U.S. App. LEXIS 11195*; *112 Fair Empl. Prac. Cas. (BNA) 582*; *94 Empl. Prac. Dec. (CCH) P44,194

November 29, 2010, Argued
June 3, 2011, Decided

SUBSEQUENT HISTORY: Related proceeding at *Vance v. Ball State Univ., 2012 U.S. Dist. LEXIS 1628 (S.D. Ind., Jan. 5, 2012)*
Later proceeding at *Vance v. Ball State Univ., 132 S. Ct. 1619, 182 L. Ed. 2d 158, 2012 U.S. LEXIS 1630 (U.S., 2012)*
US Supreme Court certiorari granted by *Vance v. Ball State Univ., 2012 U.S. LEXIS 4685 (U.S., June 25, 2012)*

PRIOR HISTORY: [**1]

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. No. 1:06-cv-1452?Sarah Evans Barker, Judge.
Vance v. Ball State Univ., 2008 U.S. Dist. LEXIS 69288 (S.D. Ind., Sept. 10, 2008)

DISPOSITION: The judgment of the district court was affirmed.

COUNSEL: For MAETTA VANCE, Plaintiff - Appellant: Diamond Z. Hirschauer, Attorney, Indianapolis, IN; Tae Sture, Attorney, STURE LEGAL SERVICES, Indianapolis, IN.

For BALL STATE UNIVERSITY, WILLIAM KIMES, in his individual and official capacity as General Manager of Ball State University's Banquet and Catering Department, SAUNDRA DAVIS, in her individual and official capacity as a supervising employee of Ball State University's Banquet and Catering Department, KAREN ADKINS, in her individual and official capacity as the Assistant Director of Administration/Personnel/Marketing for residence Hall Dining Service at Ball State University, CONNIE MCVICKER, Defendants - Appellees: Scott E. Shockley, Attorney, DEFUR VORAN LLP, Muncie, IN.

JUDGES: Before BAUER, WOOD, and SYKES, Circuit Judges.

OPINION BY: WOOD

OPINION

[*465] WOOD, *Circuit Judge*. Maetta Vance was the only African- American working in her department at Ball State University ("Ball State") when racially charged discord erupted. In 2005, Vance began filing complaints with Ball State about her coworkers' offensive conduct, which [**2] included the use of racial epithets, references to the Ku Klux Klan, veiled threats of physical harm, and other unpleasantries. In 2006 she filed two complaints with the Equal Employment Opportunity Commission ("EEOC") for race discrimination and, later, retaliation. After getting her right-to-sue letter, she filed this action in federal court alleging a range of federal and state discrimination claims. The district court granted

summary judgment for the defendants and dismissed the case. On appeal, Vance pursues only her hostile work environment and retaliation claims against Ball State based on asserted violations of Title VII of the Civil Rights Act of 1964 ("Title VII"), *42 U.S.C. §§ 2000e et seq.* Because she has not established a basis for employer liability on the hostile work environment claim or put forth sufficient facts to support her retaliation claim, we affirm.

I

Ball State prevailed on summary judgment, and so we recite the facts in the light most favorable to Vance, the non-moving party. Vance began working for Ball State in 1989 as a substitute server in the Banquet and Catering Department of University Dining Services. In 1991, Ball State promoted Vance to a part-time [**3] catering assistant position, and in January 2007 Vance applied and was selected for a position as a full-time catering assistant. Between 1991 and 2007, Vance gained expertise as a baker and enjoyed the challenge of baking items from scratch. After she began work as a full-time employee, a position that included a modest raise and a significant increase in benefits, her assignments changed. Her new work consisted of preparing food, including dinners for formal events, boxed lunches for casual engagements, and sides and salads, for the catering department's clients.

For many years things progressed uneventfully. But in 2001, Saundra Davis, a coworker, hit Vance on the back of the head without provocation. The two were discussing a work-related duty when Davis became aggressive, shouted at Vance, and slapped Vance as she turned away. Vance orally complained to her supervisors, but because Davis soon transferred to another department Vance did not pursue the matter. Also around that time, Bill Kimes became Vance's supervisor. According to Vance, Kimes gave her the cold shoulder, [*466] made her feel unwelcome at work, and treated other employees to lunch when she was not around. He refused to [**4] shake her hand when they first met in 2001, and he routinely used a gruff tone of voice with her.

Things took a turn for the worse in 2005. Davis returned to Vance's department, and on September 23, 2005, the two had an altercation in the elevator. Davis stood in Vance's way as she tried to get off the elevator and said, "I'll do it again," which Vance took to be a reference to the slap in 2001. A few days later, Vance heard from a fellow employee that another coworker, Connie McVicker, used the racial epithet "nigger" to refer to Vance and African-American students on campus. McVicker also boasted that her family had ties to the Ku Klux Klan. On September 26, 2005, Vance complained orally to her supervisor about McVicker's statements, and on October 17, 2005, she called University Compliance to request a complaint form. While requesting the document, Vance again complained about McVicker's racially offensive comments and, for the first time, informed Ball State that Davis had slapped her four years earlier. In early November, Vance submitted a written complaint detailing McVicker's comments and the elevator incident with Davis.

Ball State began investigating Vance's complaint regarding [**5] McVicker immediately. Once Vance spoke to University Compliance on October 17, 2005, two supervisors, Lisa Courtright and Kimes, met to discuss how to handle the matter. Courtright sent Vance a letter to inform her that they were investigating. In the meantime, several people from Employee Relations became involved. Kimes's investigation corroborated Vance's account of what McVicker said, although the witnesses could not recall whether McVicker used the epithet generally or directed it at Vance. The Assistant Director of Employee Relations sent an email to the Director, stating: "I know we don't have the specifics on exactly what and when these utterances were . . . but we need to make a strong statement that we will NOT tolerate this kind of language or resulting actions in the workplace." Ball State used a four-step process to handle employee discipline, starting with a verbal warning for the first infraction, followed by a written warning for the second, with escalating consequences for further violations. Within this context, the Assistant Director concluded, "I think we can justify going beyond our limited prior past history and issue a written warning . . . we should also strongly [**6] advise her verbally when we issue this that it must stop NOW and if the words/behavior are repeated, we will move on to more serious discipline up to an[d] including discharge."

Following this recommendation, Kimes gave McVicker a written warning on November 11, 2005, for "conduct inconsistent with proper behavior." The warning explained that McVicker was being disciplined for using offensive racial epithets, discussing her family's relationship with the KKK, and also "looking intently" and "staring for prolonged periods at coworkers." Kimes

advised McVicker that additional violations would lead to further disciplinary action. Days later, Courtright met with McVicker to discuss the warning; Courtright reiterated that racially offensive comments would not be tolerated. She also suggested that McVicker should consider avoiding Vance and transferring to another department.

That same day, Vance complained to Courtright that McVicker referred to her as a "porch monkey." Courtright advised Vance to tell Kimes, which Vance did. Kimes investigated by speaking to another coworker whom Vance said witnessed the [*467] incident, but that coworker did not corroborate Vance's allegation. In turn, Kimes told [**7] Vance that without any witnesses he could not discipline McVicker, who denied making the comment. Kimes said that further action on this issue would devolve into a "she said-she said" exchange. Kimes did not discipline McVicker for the "monkey" comment, nor does the record suggest that Courtright mentioned it when she spoke to McVicker later that week. Kimes did, however, try unsuccessfully to schedule McVicker and Vance to work on alternating days. Over a year later, McVicker voluntarily transferred to another department.

In response to Vance's complaint about the September 23, 2005, elevator incident with Davis, Ball State investigated but found conflicting accounts of what had happened. Before Vance filed her written complaint on November 7, 2005, Davis had filed a complaint alleging that Vance said to Davis: "Move, bitch . . . you are an evil f---- bitch." Kimes discussed the situation with his supervisor, and they decided that counseling both employees about respect in the workplace was the best path to follow. Kimes spoke with Vance about how to communicate respectfully in the workplace, but it is unclear whether he had a similar conversation with Davis. No one was disciplined [**8] for the incident. Around this time, though the record is not clear about the date, Davis made references to "Sambo" and "Buckwheat" while having a conversation with another coworker in Vance's presence. Vance understood these words to be used in a racially derogatory way and thus felt offended by them, but she did not complain to Ball State at that time.

Conditions were not improving for Vance, and on December 22, 2005, she informed Kimes that she felt threatened and intimidated by her coworkers. The following week Vance filed a charge with the EEOC alleging race, gender, and age discrimination. Vance also complained that, throughout this period, Davis and McVicker gave her a hard time at work by glaring at her, slamming pots and pans around her, and intimidating her. In 2006, Vance filed a complaint identifying a variety of other instances where she felt harassed, including being "blocked" on the elevator by Davis who "stood there with her cart smiling"; being left alone in the kitchen with Davis, who smiled at her; and being around Davis and McVicker, who gave her "weird" looks. She also filed a complaint alleging that Karen Adkins, a supervisor, "mean-mugged" her. Ball State investigated [**9] these incidents but found no basis to take disciplinary action.

On May 10, 2006, Vance filed a complaint with Ball State against her supervisor, (still) Kimes, alleging that he forced her to work through breaks. Ball State investigated but found no factual basis for the allegation. In August 2006, Vance filed a second complaint with the EEOC alleging that Ball State retaliated against her by assigning her diminished work duties, forcing her to work through breaks, denying her the chance to work overtime hours, and unequally disciplining her. She filed this lawsuit on October 3, 2006.

While her case was pending before the district court, Ball State promoted Vance to the position of a full-time catering assistant. Still, the strife did not abate. In April 2007, Vance filed a grievance against McVicker for saying "payback" to her. Three supervisors, including Kimes, investigated; McVicker countered that Vance had said to her: "Just the beginning bitch-you better watch your house." Both women denied the allegations against them, and Ball State did not discipline anyone. In August 2007, Davis said to Vance, "are you scared," in a Southern [*468] accent. Ball State investigated and warned Davis verbally [**10] not to engage in such behavior. That same month, Vance complained that during a routine day of work Kimes aggressively approached her while repeatedly yelling the same question at her. When Ball State investigated, the witness identified by Vance did not corroborate her account of the incident. Instead, the witness supported Kimes's version of what had occurred and added that it was common for Kimes to repeat himself until he was sure the other person had heard him. In September 2007, Davis complained that Vance splattered gravy on her and slammed pots and pans around her. Vance denied the allegation but, even though no witnesses corroborated the

event, Ball State warned Vance about its policies.

Vance also complains that Ball State retaliated against her for complaining about the racial harassment. Although she was promoted in 2007, Vance argues that Ball State reassigned her to menial tasks such as cutting vegetables, washing fruit, and refilling condiment trays. In her view, Ball State made her into a "glorified salad girl" even though she possessed a range of advanced skills that could have been better utilized baking or cooking complete meals.

II

A

Before reaching the merits of Vance's [**11] claim, we must resolve an evidentiary issue. After all dispositive motion deadlines had passed and both parties had submitted their summary judgment briefs, Vance sought to supplement the record with evidence of two incidents that took place in early 2008. The evidence included two affidavits testifying to a verbally abusive encounter with Davis's daughter and husband. During that incident, Davis's kin insulted Vance and another coworker with racial epithets and physically threatened them on university property. The affidavits document this episode and Kimes's alleged failure to respond when Vance complained. Vance also submitted two articles published in an on-line Ball State forum that discussed Vance's discrimination claims against the university, along with scores of "comments," some racially offensive, posted in response to the articles. One of the articles was written by one of Vance's coworkers.

Vance submitted the evidence on March 12, 2008, and Ball State moved to strike. Ball State argued before the district court that Vance was attempting "an end run" around *Federal Rule of Civil Procedure 15(d)* by styling her submission as a supplement to the summary judgment record rather [**12] than a supplemental pleading. The district court concluded that Vance's supplemental evidence fell within the purview of *Rule 15(d)*, analyzed it as if Vance had filed a Rule 15 motion, and granted Ball State's motion to strike. On appeal, Vance asserts that the court should have permitted her to supplement the record, while Ball State defends the district court's ruling on the ground that the contested evidence presents new factual allegations against persons not party to this lawsuit.

In our view, these materials are best viewed as supplemental to the summary judgment record rather than as a disguised *Rule 15(d)* submission. When a plaintiff initiates a hostile work environment lawsuit, as opposed to a suit claiming discrimination based on discrete acts, she usually complains of an employer's continuing violation of Title VII "based on the cumulative effect of individual acts." See *National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 115, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002)* (recognizing that [*469] hostile environment claims by their very nature involve repeated conduct). The continuing violation doctrine is usually invoked to defeat a statute of limitations bar for conduct that falls outside the relevant period, see [**13] *Dandy v. UPS, Inc., 388 F.3d 263, 270 (7th Cir. 2004)*, but we think the general concept is instructive in this context as well. That is, a Title VII hostile work environment claim is against the employer for the aggregate conduct of one or more of its employees. By adding more "individual acts" as evidence of a hostile work environment claim, a plaintiff does no more than strengthen her evidentiary record; this is not enough to allege a discrete new claim. See *Morgan, 536 U.S. at 115* ("Hostile environment claims are different in kind from discrete acts.").

Thus, Ball State misses the mark when it contends that these materials implicate persons not named as defendants in this lawsuit. Title VII regulates the conduct of employers, not individual employees. See *42 U.S.C. § 2000e-2(a)*. If admitted, Vance's supplemental evidence might have cast some light on her hostile work environment claim against Ball State. Whether Ball State is liable for the conduct of an employee's family member or statements in a university publication is a separate question we need not resolve, because the district court did not abuse its discretion in excluding the evidence. Vance moved to supplement the record [**14] after the deadlines for discovery and dispositive motions had "long passed." We regularly affirm a district court's decision to exclude supplemental evidence in the interest of keeping cases moving forward. See, *e.g., Pfeil v. Rogers, 757 F.2d 850, 858 (7th Cir. 1985)*.

B

Turning to the merits, we apply the well-known *de novo* standard of review to Vance's case. See *Chaney v. Plainfield Healthcare Center, 612 F.3d 908, 912 (7th Cir. 2010)*. Vance argues that the facts she has alleged and supported are sufficient to get her case before a jury,

which would then determine whether her hostile work environment and retaliation claims are meritorious. We examine each of her arguments in turn.

Title VII prohibits employers from discriminating against a person with respect to her "compensation, terms, conditions, or privileges of employment, because of such individual's race . . . ." *42 U.S.C. § 2000e-2(a)(1)*. Ball State, however, is not liable to Vance under Title VII for a hostile work environment unless Vance can prove (1) that her work environment was both objectively and subjectively offensive; (2) that the harassment was based on her race; (3) that the conduct was either severe or pervasive; [**15] and (4) that there is a basis for employer liability. See *Dear v. Shinseki, 578 F.3d 605 (7th Cir. 2009)*; *Cerros v. Steel Technologies, Inc., 288 F.3d 1040, 1045 (7th Cir. 2002)* ("Cerros I"). We emphasize, as we have before, that the third element of the plaintiff's *prima facie* case is in the disjunctive--the conduct must be *either* severe or pervasive. See *Cerros v. Steel Technologies, Inc., 398 F.3d 944, 950 (7th Cir. 2005)* ("Cerros II"). The question whether there is a basis for employer liability depends on whether the alleged harassment was perpetrated by supervisors or coworkers. See *Williams v. Waste Mgmt. of Ill., 361 F.3d 1021, 1029 (7th Cir. 2004)*; see generally *Faragher v. City of Boca Raton, 524 U.S. 775, 807-08, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998)*, and *Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764-65, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998)*. Employers are "strictly liable" for harassment inflicted by supervisors, but they can [*470] assert an affirmative defense when the harassment does not result in a tangible employment action. *361 F.3d at 1029* (citing *Ellerth, 524 U.S. at 756* and *Faragher, 524 U.S. at 807-08*). If only coworkers were culpable for making a work environment hostile, the plaintiff must show that the employer has "been [**16] negligent either in discovering or remedying the harassment." *Id*. (internal citations omitted).

Vance argues that three supervisors, Kimes, Adkins, and Davis, harassed her on account of her race. To begin, Vance argues that there are disputed facts regarding whether Davis was her supervisor, making summary judgment inappropriate on this issue. We find no such ambiguity. Under Title VII, "[a] supervisor is someone with power to directly affect the terms and conditions of the plaintiff's employment." *Rhodes v. Ill. Dep't of Transp., 359 F.3d 498, 506 (7th Cir. 2004)*. That authority "primarily consists of the power to hire, fire, demote, promote, transfer, or discipline an employee." *Hall v. Bodine Elec. Co., 276 F.3d 345, 355 (7th Cir. 2002)* (internal quotation marks and citations omitted). We have not joined other circuits in holding that the authority to direct an employee's daily activities establishes supervisory status under Title VII. See *Rhodes, 359 F.3d at 509* (Rovner, J., concurring) (arguing for a broader standard of supervisor liability based on EEOC guidelines). We conclude that Vance has not revealed a factual dispute regarding Davis's status by asserting that Davis had the [**17] authority to tell her what to do or that she did not clock-in like other hourly employees. This means that we must evaluate her claim against Davis under the framework for coworker conduct.

We can also summarily dispose of Vance's allegations against supervisor Adkins. Vance's brief says little about what Adkins may have done to make her work environment hostile. Before the district court, Vance argued that Adkins "mean-mugged" her and stared at her when they were in the kitchen together. Making an ugly face at someone and staring, while not the most mature things to do, fall short of the kind of conduct that might support a hostile work environment claim.

Vance's complaints about Kimes require a closer look, but this reveals that she has failed to establish that Kimes's conduct had a racial "character or purpose." See *Luckie v. Ameritech Corp., 389 F.3d 708, 713 (7th Cir. 2004)*. Although there is some indication in the record that Kimes was generally difficult to work with, we assume, favorably to Vance, that he picked on her. Still, even in that light, Vance's allegations do not establish that Kimes's unkind or aggressive conduct was motivated by Vance's race. Although a plaintiff [**18] does not need to identify an explicitly racial dimension of the challenged conduct to sustain a Title VII claim, she must be able to attribute a racial "character or purpose" to it. See *Hardin v. S.C. Johnson & Son, Inc., 167 F.3d 340, 345 (7th Cir. 1999)*. Vance has not put forth any facts to establish that any of Kimes's conduct was motivated by, or had anything to do with, race. To the contrary, in her deposition Vance conceded that she never heard Kimes say anything suggesting ill will towards her because of her race, nor did any other employee report to Vance that Kimes had uttered racially derogatory comments. The undisputed facts establish that there are no grounds for employer liability for violation of Title VII based on the conduct of Vance's supervisors.

This leaves Vance's treatment at the hands of her two coworkers, Davis and McVicker. When evaluating a hostile work environment claim, we consider "the [*471] entire context of the workplace," see *Cerros I , 288 F.3d at 1046*, not the discrete acts of individual employees. The district court analyzed Vance's allegations against Davis and McVicker separately, finding that summary judgment was proper based on the conduct of each woman [**19] independently. We stress that a hostile work environment claim requires a consideration of all the circumstances, because in the end it is the employer's liability that is at issue, not liability of particular employees. Thus, for example, if we had found that Vance's supervisors had contributed to a racially hostile work environment, that conduct would form part of the context for Vance's claim against Ball State, just as the actions of her coworkers would. The only reason we have divided our analysis between the conduct of supervisors and employees is to ensure that we are respecting the standards for vicarious liability that apply. See *Williams, 361 F.3d at 1029*.

Assuming without deciding that Vance's allegations against her coworkers satisfy the first three elements of a Title VII hostile work environment claim, we conclude nonetheless that Vance cannot prevail because there is no basis for employer liability. See *Tutman v. WBBM-TV, Inc./CBS, Inc., 209 F.3d 1044, 1048-49 (7th Cir. 2000)* ("We do not decide whether a hostile work environment existed because the question whether [the employer] took prompt and effective action is dispositive here."). For Ball State to be liable, Vance [**20] must put forth sufficient facts to establish that it was negligent in failing to "take reasonable steps to discover and remedy the harassment." *Cerros II, 398 F.3d at 953*. Once aware of workplace harassment, "the employer can avoid liability for its employees' harassment if it takes prompt and appropriate corrective action reasonably likely to prevent the harassment from recurring." *Wyninger v. New Venture Gear, Inc., 361 F.3d 965, 978 (7th Cir. 2004)* (internal citations omitted). While it is unfortunate that Ball State's remedial measures did not persuade Davis or McVicker to treat Vance with respect, and we have nothing but condemnation for the type of conduct Vance has alleged, we find that Ball State satisfied its obligation under Title VII by promptly investigating each of Vance's complaints and taking disciplinary action when appropriate. See *Porter v. Erie Foods Int'l Inc., 576 F.3d 629, 636 (7th Cir. 2009)* ("Our focus, therefore, is on whether [the employer] responded promptly and effectively to the incident.").

Between October 2005 and October 2007, Vance filed numerous complaints about her troublesome encounters with Davis and McVicker. Ball State took reasonable corrective [**21] action as Vance lodged each complaint. In response to Vance's complaint that McVicker used the racial epithet "nigger" and bragged about her family connections with the Ku Klux Klan, Ball State promptly investigated, involved the appropriate supervisory personnel, and issued a written reprimand to McVicker. According to Ball State policy, McVicker technically should have received a stage-one oral warning because she had no prior complaints on her record, yet the university concluded that a more serious measure was in order. The written warning conveyed to McVicker that her racially offensive language would not be tolerated, and two supervisors met with McVicker separately to discuss the matter. Meanwhile, a supervisor remained in contact with Vance and assured her that they were investigating her complaint.

Vance lodged two additional complaints against McVicker during this period, one in November 5, 2005, for referring to her as a "porch monkey" and one in April 2007 [*472] for saying "payback." In response to the 2005 complaint, Ball State again promptly investigated, but a witness identified by Vance could not corroborate that McVicker used the offensive term to refer to Vance. Similarly, [**22] Ball State uncovered competing versions of what took place in connection with Vance's 2007 "payback" complaint. When Ball State questioned McVicker about the incident, she counter-complained that Vance said: "Just the beginning bitch--you better watch your house."

Again, we are taking the view of these facts that favors Vance; we express no opinion about what "really" happened. From that perspective, we assume that McVicker made the alleged statements. On the issue of employer liability, however, we must look at the employer's response in light of the facts it found in its investigation. See *Porter, 576 F.3d at 636* (observing that, "taken as a whole," the employer "took appropriate steps to bring the harassment to an end"). It may be commonplace that an employee accused of verbally abusing or intimidating a coworker denies the allegation. But Ball State did what it could and did not stop by accepting a simple denial. Moreover, the record does not reflect a situation in which all ties went to the

discriminator; if it did, we would be inclined to send this case to a jury. Ball State, however, calibrated its responses depending on the situation. Sometimes when it was unsure who was at fault [**23] it counseled both employees; sometimes it warned alleged wrongdoers to take care or desist.

Vance complained to her supervisors several times about Davis's conduct. The two most serious allegations relate to the elevator incident in 2005 and the "are you scared" comment in 2007. We note that Vance conceded at her deposition that she did not complain to Ball State about Davis's use of the terms "Sambo" and "Buckwheat." We take Vance at her word that, in context, the terms "Sambo" and "Buckwheat" were used as explicit racial slurs that would require remedial measures from an employer under Title VII. See *Daniels v. Essex Group, Inc., 937 F.2d 1264, 1266 (7th Cir. 1991)* (noting "Buckwheat" is a racial taunt); *Boyd v. State Farm Ins. Co., 158 F.3d 326 n.1 (5th Cir. 1998)* ("[I]n the context of employment discrimination law, the term 'Buckwheat' is generally considered to be a racial slur or epithet."). Under Title VII, however, an employer's liability for coworker harassment is not triggered unless the employee notifies the employer about an instance of racial harassment.

Ball State first learned of the September 23, 2005, altercation from Davis, when she filed a complaint against Vance for [**24] saying, "Move, bitch . . . you are an evil f---- bitch." Later, Vance complained that Davis had said, "I'll do it again," referring to, according to Vance, the time in 2001 when Davis slapped her. Ball State investigated, but both women stuck to their stories and denied saying anything offensive to the other. Ball State's response to this altercation was reasonable. We have said that Title VII is "'not . . . a general civility code' and we will not find liability based on the 'sporadic use of abusive language.'" *Ford v. Minteq Shapes and Services, Inc., 587 F.3d 845, 848 (7th Cir. 2009)* (quoting *Faragher v. City of Boca Raton, 524 U.S. 775, 788, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998))*. Faced with competing complaints, the first of which was lodged against Vance, Ball State pursued a reasonable course of action by counseling *both* employees about civility in the workplace. Finally, after Vance complained that Davis said "are you scared" to her in a Southern accent, Ball State again investigated. Although Davis denied making the statement, Ball State again formally [*473] warned Davis orally to refrain from such actions. This response was reasonable in light of the circumstances.

The catering department was undoubtedly an unpleasant [**25] place for Vance between 2005 and 2007. Yet the record reflects that Ball State promptly investigated each complaint that she filed, calibrating its response to the results of the investigation and the severity of the alleged conduct. As we have said before, prompt investigation is the "hallmark of reasonable corrective action." *Cerros II, 398 F.3d at 954*. This is not a case where the employer began to ignore an employee's complaints as time went on. Ball State investigated Vance's complaint against Davis in 2007 with the same vigor as it did her complaint in 2005. Of course, the ideal result of an employee's complaint would be that the harassment ceases. But Title VII does not require an employer's response to "successfully prevent[] subsequent harassment," though it should be reasonably calculated to do so. *Cerros II, 398 F.3d at 954* (quoting *Savino v. C.P. Hall Co., 199 F.3d 925, 933 (7th Cir. 1999))*. In this case, we conclude that the undisputed facts demonstrate that there is no basis for employer liability.

C

Vance also alleges that Ball State retaliated against her for complaining about the racial harassment by reassigning her to menial tasks, denying her overtime hours, and unequally [**26] disciplining her. Employers may not punish employees for complaining about workplace conduct that even arguably violates Title VII. *42 U.S.C. § 2000e-3(a)*; *Sitar v. Indiana Dep't of Transp., 344 F.3d 720, 727 (7th Cir. 2003)*. To establish a *prima facie* case of retaliation, a plaintiff may use either the direct or indirect method of proof. Vance is proceeding only under the indirect method, which requires her to show that (1) she engaged in a statutorily protected activity; (2) she performed her job according to the employer's expectations; (3) she suffered an adverse employment action; and (4) she was treated less favorably than a similarly situated employee. *Stephens v. Erickson, 569 F.3d 779, 787 (7th Cir. 2009)*. Once the plaintiff establishes her *prima facie* case, the burden shifts to the defendant to establish a non-invidious reason for the action. The burden then shifts back to the plaintiff to show that the defendant's reason was pretextual. *Id*. Ball State concedes that Vance engaged in a protected activity and does not claim Vance's work performance was sub-par. Our focus is thus on the final two elements of Vance's *prima facie* case.

It is possible for a plaintiff to establish [**27] a claim of retaliation based on a change of work responsibilities, "depend[ing] on how much of a change, and how disadvantageous a change, took place." *Sitar, 344 F.3d at 727*; see also *Herrnreiter v. Chi. Hous. Auth., 315 F.3d 742, 744-45 (7th Cir. 2002)* (listing cases). In order to succeed, "'a plaintiff must show that a reasonable employee would have found the challenged action materially adverse.'" *Lapka v. Chertoff, 517 F.3d 974, 985 (7th Cir. 2008)* (quoting *Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006))*. Generally, if the challenged action would discourage other employees from complaining about employer conduct that violates Title VII, it constitutes an adverse employment action. See *Burlington, 548 U.S. at 57, 68*.

Vance's strongest argument depicts an unusual instance of retaliation, in which Ball State simultaneously promoted her and assigned her to diminished work duties in 2007. The district court observed that whether Vance suffered a materially [*474] adverse employment action was a close call, but it concluded that a jury could conclude that her reassignment was materially adverse. Still, the district court concluded that Vance's theory fails because she did [**28] not establish that she was treated less favorably than a similarly situated employee. We agree with the district court, and conclude in addition that Vance cannot show that she suffered a materially adverse employment action.

Vance concedes that her promotion included a modest pay raise and a significant increase in benefits. She argues, however, that once promoted she was assigned to more menial tasks. In particular, she asserts that Ball State assigned her to cut vegetables and refill condiments, while entrusting her coworker, Brad Hutson, with more complicated tasks such as preparing complete meals. We recognize that it is possible for an employer to retaliate clandestinely against an employee while formally promoting her, but the record cannot be stretched to support such a theory here. Vance personally sought out the new full-time position; it was her choice to leave the part-time position where she baked often and was generally content with her work assignments. Her new job included some of the tasks about which she is complaining, but it also included a range of other tasks including preparing more complicated dishes. While Vance may have been disappointed with her new assignments, [**29] considering the entire context of her promotion we conclude that no rational jury could find that she experienced a materially adverse employment action.

Put another way, we find that a reasonable person would not be dissuaded from complaining about race discrimination by witnessing the treatment Vance received: a promotion to a full--time position with accompanying benefits, a raise in pay, and--taking all of Vance's allegations as true-a change in work assignments that included basic salad preparation. This case does not present the problem we encountered in *Washington v. Illinois Dep't of Revenue, 420 F.3d 658 (7th Cir. 2005)*, where we reversed a grant of summary judgment based on the notion that a change in work schedule that did not affect salary or duties could not constitute an adverse employment action. In *Washington*, we observed that while a reassignment that does not affect pay or opportunities for promotion will "by and large" not be actionable for a retaliation claim under Title VII, "'by and large' differs from 'never.'" *Id. at 662*. [**30] When, as in that case, the employer exploits a known vulnerability of an employee-the plaintiff there relied on her previously established flex--time schedule so she could care for her son, who had Down syndrome--an altered work schedule can constitute an adverse work action. *Id*. Even though a change in assignments, like an altered work schedule, conceivably might amount to an adverse employment action, Vance must allege more than a dislike for her new assignments or a preference for her old ones for her case to go forward.

Approaching the issue as the district court did, by asking whether there was a similarly situated employee, leads to the same result. Only two employees held the position of a full-time catering assistant at the time of this dispute, Vance and Hutson. Both employees were promoted to that position on the same day, and for the most part both were assigned to the same range of duties. We accept Vance's allegation that their work assignments were not identical, but the record reflects that they were assigned to a substantially similar set of tasks. Thus, even if Vance had established that Ball State subjected her to a materially adverse action, her claim would fail because [**31] she has not satisfied [*475] the final element of the *prima facie* analysis.

Vance also alleges that Ball State retaliated by offering her fewer opportunities to work overtime hours. We said in *Lewis v. City of Chicago, 496 F.3d 645, 654*

(7th Cir. 2007), that the loss of opportunity to work overtime can amount to an adverse employment action. The parties agree that Vance worked fewer overtime hours than Brad Hutson in 2007. Ball State defends by arguing that Hutson is not similarly situated to Vance because he worked significantly more regular hours than her, which, as a consequence, made him available to work more overtime hours. This is in part because Ball State has a "work continuation" policy, which mandates that the employee who began a task that is unfinished at the end of a shift must stay and get the task completed.

The record indicates that Vance often took FMLA leave, called in sick unexpectedly, and left work early for health reasons. Vance does not dispute that she worked fewer regular hours than Hutson. Instead, she argues that, because she was the more senior employee, she should have been offered more opportunities to work overtime. She adds, without citation or support, that [**32] the work continuation policy Ball State relies on is "void." Neither of these arguments is availing. Even if Vance had seniority over Hutson, the undisputed facts establish that they did not work a comparable number of regular hours. Thus, the two are not similarly situated for the purpose of this analysis. Vance's assertion that the work continuation policy is void, without citing evidence in the record, is unhelpful. We have repeatedly said that a "nonmoving party cannot defeat a motion for summary judgment with bare allegations." *de la Rama v. Illinois Dep't of Human Services, 541 F.3d 681, 685 (7th Cir. 2008)*.

Finally, Vance argues that Ball State retaliated against her by issuing her a verbal warning for allegedly splattering gravy on Davis and slamming pots and pans on the counter. Although we give the concept of an adverse employment action a generous construction, it is not this broad. Vance appears to concede as much, altering her argument slightly on appeal to claim that Ball State's warning to Vance amounts to taking the side of those who harassed her, which she sees as retaliation through the creation of a more hostile work environment. No reasonable jury could find that [**33] the delivery of a verbal warning, based on a complaint from a coworker, constitutes an adverse employment action or creates an objectively hostile work environment.

The judgment of the district court is AFFIRMED.

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Discrimination by Comparison

ABSTRACT. Contemporary discrimination law is in crisis, both methodologically and conceptually. The crisis arises in large part from the judiciary's dependence on comparators—those who are like a discrimination claimant but for the protected characteristic—as a favored heuristic for observing discrimination. The profound mismatch of the comparator methodology with current understandings of identity discrimination and the realities of the modern workplace has nearly depleted discrimination jurisprudence and theory. Even in run-of-the-mill cases, comparators often cannot be found, particularly in today's mobile, knowledge-based economy. This difficulty is amplified for complex claims, which rest on thicker understandings of discrimination developed in second-generation intersectionality, identity performance, and structural discrimination theories. By treating comparators as an essential element of discrimination, instead of as a heuristic device to help discern whether discrimination has occurred, courts have largely foreclosed these other theories from consideration. At the same time, courts have further shrunk the very idea of discrimination by disregarding a central lesson from harassment and stereotyping jurisprudence: discrimination can occur without a comparator present. The comparator methodology retains its appeal, despite these deficiencies, because its empirical patina permits courts to evaluate discrimination claims without appearing to engage in a subjective analysis of workplace dynamics. Given the complex nature of both identity and discrimination, however, the comparisons produce a false certainty at best. By contrast, alternate methodologies, including the contextual consideration favored in harassment and stereotyping jurisprudence as well as the hypothetical comparator embraced in European law, offer a meaningful framework for matching discrimination law and norms to workplace facts, while preserving judicial legitimacy. With comparators dislodged from their methodological pedestal, we may yet recover space for the renewed development of discrimination jurisprudence and theory.

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INTRODUCTION

Contemporary discrimination law is in the midst of a crisis of methodological and conceptual dimensions. The underlying problem is that evaluating allegations of discrimination requires courts and others to see something that is not observable directly: whether an accused discriminator has acted because of a protected characteristic. While this challenge has long been with us, as putative discriminators rarely admit discriminatory intent,[1] the crisis arises because the most traditional and widely used heuristic—comparators, who are similar to the complainant in all respects but for the protected characteristic—is barely functional in today's economy and is largely unresponsive to updated understandings of discrimination.

Some decades ago, when identity-based differentiation was relatively open and notorious and when many workplaces were of a Tayloresque scale with easily comparable jobs,[2] individuals claiming discrimination could often point to counterparts who were treated better. Courts could then deduce, with some confidence, that the protected trait was the reason for the adverse treatment at issue.[3] But in a mobile, knowledge-based economy, actual comparators are

1. *See, e.g.*, Chad Derum & Karen Engle, *The Rise of the Personal Animosity Presumption in Title VII and the Return to "No Cause" Employment*, 81 TEX. L. REV. 1177, 1207 (2003) (recognizing that as soon as Title VII became law, "no sensible employer would admit that it based a decision on one of the prohibited classifications").

2. *See* FREDERICK WINSLOW TAYLOR, THE PRINCIPLES OF SCIENTIFIC MANAGEMENT (1911). For further discussion, see *infra* notes 73-76 and accompanying text.

3. In this sense, the comparator is used to show causation—that the challenged acts occurred because of the protected trait and would not have occurred absent impermissible reliance on that trait. The causation determination is necessary because one of the central inquiries in a discrimination case is whether the challenged acts were "because of" a protected characteristic. Title VII of the Civil Rights Act of 1964 provides, for example, that "[i]t shall be an unlawful employment practice 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*." 42 U.S.C. § 2000e-2(a)(1) (2006) (emphasis added); *see also* 29 U.S.C. § 623a-1 (2006) (forbidding, through the Age Discrimination in Employment Act, adverse employment actions "*because of such individual's age*" (emphasis added)).

   To decide a disparate treatment claim under these and similar laws, a court must determine "whether the employer is treating 'some people less favorably than others because of'" any of these characteristics. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) (quoting Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977)). While comparators are not statutorily required to make this determination, courts have come to treat them, in many cases, as essential to showing the requisite discriminatory intent. *See* Charles A. Sullivan, *The Phoenix from the* Ash*: Proving Discrimination by Comparators*, 60

hard to come by, even for run-of-the-mill discrimination claims.[4] For the complex forms of discrimination made legible by second-generation theories, the difficulties in locating a comparator amplify exponentially.[5]

This methodological problem has spilled over, conceptually, to constrict the very idea of discrimination. Consider Justice Thomas's statement that a finding of discrimination *cannot* be made without "a comparison of otherwise similarly situated persons who are in different groups by reason of certain characteristics provided by statute."[6] Justice Kennedy has observed similarly that "one who alleges discrimination must show that she 'received differential treatment vis-à-vis members of a different group on the basis of a statutorily described characteristic.'"[7] On this view, however abusively an employer treats its employees, the bad acts do not present a discrimination problem so long as

ALA. L. REV. 191, 204-06 (2009) (observing that a similarly situated comparator is not required by statute but that "the absence of a comparator is often fatal to a claim"). Further, although the ultimate question whether a defendant employer acted because of a protected characteristic is reserved for trial, courts regularly evaluate the link between the facts presented and the protected characteristic in the course of deciding dispositive pretrial motions. Disparate impact cases do not require a similar showing of discriminatory intent. *See infra* Section III.C. In constitutional discrimination claims, by contrast, a showing of discriminatory intent is always required. *See* Washington v. Davis, 426 U.S. 229 (1976) (finding no legally cognizable claim of discrimination where a policy had a racially disproportionate impact but there was no evidence of discriminatory intent).

The application of these doctrines and the related determinants of discrimination law's scope is also shaped, more generally, by views of discrimination law's social, political, and economic function. As Robert Post has observed, discrimination law is not actually concerned with eradicating all trait-based acts but rather only a subset of acts that has been socially disapproved. Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CALIF. L. REV. 1 (2000).

4. The case of Wendy Norville is illustrative. Norville was a black nurse who alleged that the hospital where she worked had discriminated against her by "refus[ing] to accommodate her disability despite having made job accommodations for two disabled white nurses." Norville v. Staten Island Univ. Hosp., 196 F.3d 89, 95 (2d Cir. 1999) (Sotomayor, J.). Although Norville produced evidence about the better treatment of her white coworkers, she lost her claim because she did not persuade the court that other nurses were "subject to the same standards governing performance evaluation and discipline, and . . . engaged in conduct similar to [hers]." *Id.* at 96 (quoting Mazzella v. RCA Global Commc'ns Inc., 642 F. Supp. 1531, 1547 (S.D.N.Y. 1986), *aff'd*, 814 F.2d 653 (2d Cir. 1987)); *see also* Opsatnik v. Norfolk S. Corp., 335 F. App'x 220, 222 (3d Cir. 2009) (noting the district court's rejection of twenty-four proposed comparators).

5. *See infra* Section II.B.

6. Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 617 (1999) (Thomas, J., dissenting).

7. *Id.* at 611 (Kennedy, J., concurring) (quoting *id.* at 616 (Thomas, J., dissenting)).

they are committed in an evenhanded fashion.[8] Their position, in essence, is that discrimination laws and norms do not impose obligations with meaningful abstract value.

Yet this position foreshortens traditional understandings of discrimination even within the Supreme Court's own jurisprudence. As the case law that addresses harassment and stereotyping makes clear, objectionable trait-based acts and statements occur in the absence of a comparator.[9] Indeed, in a well-known stereotyping case, the Court acknowledged the lower court's finding that no comparators existed, yet still found that the plaintiff, Ann Hopkins, was discriminatorily denied partnership at her accounting firm.[10] Likewise, in a much-discussed harassment case, the Court unanimously recognized that discrimination, in the form of sexual harassment, could occur in a work environment where only men were present.[11] At the same time, the Court has acknowledged that the presence of a better-treated comparator does not transform permissible acts into unlawful ones. "Treating seemingly similarly situated individuals differently in the employment context is par for the course," Chief Justice Roberts recently wrote.[12]

8. This view is echoed by courts that have concluded that "equal opportunity" harassers, those who harass both men and women, do not violate sex discrimination prohibitions. *See, e.g.*, Lack v. Wal-Mart Stores, Inc., 240 F.3d 255, 262 (4th Cir. 2001) (rejecting a sex discrimination claim because "[i]n its totality, the evidence compels the conclusion that [the supervisor] was just . . . indiscriminately vulgar and offensive, . . . obnoxious to men and women alike"); *cf.* Kathryn Abrams, *Complex Claimants and Reductive Moral Judgments: New Patterns in the Search for Equality*, 57 U. PITT. L. REV. 337, 345 n.47 (1996) (describing "the dominant 'equality theory' understandings that animate antidiscrimination law" as comparative).

9. *See infra* Part IV. In conversation, Charles Sullivan has suggested that harassing acts and stereotyping statements amount to an admission of discriminatory intent. As will be elaborated below, I disagree with that contention, in part because employers ordinarily defend these kinds of acts and statements as nondiscriminatory and the courts often disagree with an employee's contention that the specified speech or conduct reflects discriminatory intent.

10. Price Waterhouse v. Hopkins, 490 U.S. 228, 236 (1989).

11. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998). For discussion of other circumstances in which an antidiscrimination norm may be violated absent an actual comparator, including the possible role of a hypothetical comparator, see *infra* Section VI.B.

12. Engquist v. Or. Dep't of Agric., 553 U.S. 591, 604 (2008).

Still, the scope of discrimination law continues to shrink.[13] The judicial demand for comparators continues largely unabated outside the harassment and stereotyping contexts,[14] sharply narrowing both the possibility of success for individual litigants[15] and, more generally, the very meaning of discrimination.

13. I develop this claim primarily through identity-discrimination cases brought under federal employment discrimination laws rather than through cases that rest on constitutional equal protection challenges, state law claims, or discrimination claims outside the employment context. Yet, as will be elaborated, the analysis here is not limited to statutory prohibitions against discrimination or to the employment context. Discrimination based on factors other than identity, however, such as forms of economic discrimination addressed in antitrust law, is beyond this Article's scope. Still, some of the discussion below may be useful for the conceptualization of discrimination in those areas as well.

14. *See infra* Part I.

15. On the dismal fate of most discrimination claimants, see Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 444, 449-52 (2004). *See also* Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175, 176-77 (2010) (concluding that employment discrimination plaintiffs "receive cursory attention in legal process and a limited remedy" and that discrimination law "seldom offers an authoritative resolution of whether discrimination occurred"). Employment discrimination plaintiffs who prevail at trial lose on appeal forty-two percent of the time; judgments for employer-defendants are reversed in fewer than eight percent of cases. Clermont & Schwab, *supra*, at 450; *see also* Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947, 958 (describing employment discrimination plaintiffs as "one of the least successful classes of plaintiffs at the trial court level" as well as on appeal).

Individuals who present claims involving more than one aspect of their identity—such as race and sex—fare even worse. Minna J. Kotkin, *Diversity and Discrimination: A Look at Complex Bias*, 50 WM. & MARY L. REV. 1439 (2009) (discussing disproportionately high loss rates for individuals who bring complex discrimination claims). A new empirical study reinforces that even when individuals do not bring claims based on "overlapping axes of disadvantage," their "demographic diversity" further reduces their likelihood of success in discrimination litigation. Rachel Best et al., *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 LAW & SOC'Y REV. (forthcoming 2011) (manuscript at 5) (on file with author).

Some scholars maintain that courts' hostility toward discrimination claims is ideologically based. *See, e.g.*, Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 22-26 (2006) (asserting that courts resist a structural approach to discrimination claims, in part, because many judges are ideologically opposed to second-guessing decisions by employers); Michael Selmi, *Why Are Employment Discrimination Cases So Hard To Win?*, 61 LA. L. REV. 555, 561-69 (2001) (arguing that "courts approach cases from a particular perspective that reflects a bias against the claims" and that this ideological bias colors how courts adjudicate discrimination claims). On this view, the choice of the comparator heuristic, which narrows the set of discrimination claims

In this Article, I argue that we are seeing the transformation of a heuristic device[16] for observing discrimination into a defining element of discrimination and that this collapse presents two serious problems. First, methodologically, comparators' deficiencies have come to outweigh their strengths as devices for discerning discrimination. Specifically, the demand for similarly situated, better-treated others underinclusively misses important forms of discrimination and forecloses many individuals from having even an opportunity to be heard because sufficiently close comparators so rarely exist.[17]

The second problem is conceptual. Since the early 1990s, much of the theoretical work on discrimination has attempted to make legible the many ways in which discrimination occurs beyond the forms of easily recognizable, deliberate exclusion that are based on relatively thin conceptions of protected traits.[18] Yet when comparators are treated as definitional, these theories cannot gain jurisprudential traction because the problems they identify cannot, in effect, be seen by courts.

likely to succeed, as explained below, could be seen as both deliberate and in service of ideologically motivated, outcome-oriented aims. Whether or not this is actually the reason for courts' embrace of the comparator heuristic, the lack of transparency and accountability associated with the assumptions and judgments embedded in the heuristic's selection triggers the inquiries I pursue here.

16. For an extended discussion of heuristics, see SCOTT E. PAGE, THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES 52-72 (2007). Page explains that heuristics are, in essence, thinking rules that generate solutions to problems. *Id.* at 55. In discrimination cases, the critical factor—discriminatory intent—is hidden from view, and the comparator heuristic works by reducing the set of likely explanations for the adverse treatment that triggered the claim.

The term "heuristics" came to prominence in cognitive psychology during the 1970s through the work of Daniel Kahneman and Amos Tversky, who "posited that because decisionmaking often involves an abundance of information, time pressures, and an array of possible alternatives, people intuitively and unconsciously use cognitive shortcuts or 'heuristics' to make decisions about probabilities." Nancy Levit, *Confronting Conventional Thinking: The Heuristics Problem in Feminist Legal Theory*, 28 CARDOZO L. REV. 391, 395-96 (2006); *see also* Cass R. Sunstein, Lecture, *Moral Heuristics and Moral Framing*, 88 MINN. L. REV. 1556, 1558 (2004) (analyzing the "pervasive role" that heuristics play in legal judgments). *See generally* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982).

17. *See infra* Parts II & III.

18. *See* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001). As will become apparent, first- and second-generation claims are best understood as falling along a spectrum, rather than as sharply distinct. *See infra* Part II.

This Article considers three of the leading theories.[19] The first is intersectionality theory, which recognizes that although the law designates trait-based protections sequentially, employers and others often target individuals because of their identity as a whole, rather than because of individual traits in isolation from one another.[20] In these situations, an employee, such as a black woman or a disabled older man, claims to have experienced discrimination based on a combination of legally protected traits. He or she struggles under a comparator regime in part because it can be difficult to decide who is the proper comparator—is it someone who shares neither of the individual's traits or shares one but not the other? In addition, because intersectional plaintiffs are often few in number relative to all others in a workplace, decisionmakers tend to be skeptical of the comparison's probative value and are typically unwilling to conclude that comparatively worse treatment is attributable to discriminatory intent rather than to the plaintiff's idiosyncratic quirks.

The second theory is identity performance, which conceives of identity traits in a thick way, recognizing that individuals sometimes experience discrimination because of stereotypes about behaviors or personal styles associated with their identity group rather than because of their phenotype. When operationalized, the theory produces cases in which employees and others seek to show that they have suffered trait-based discrimination because they have, for example, a Spanish-inflected accent or a traditionally African

19. Later in the Article I also briefly address additional second-generation theories related to implicit bias and other cognitive psychological research regarding discrimination. *See infra* Section V.C.

20. Intersectionality theory emerged in legal scholarship in the early 1990s. *See, e.g.*, Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1243-44 (1991) ("[T]he experiences of women of color are frequently the product of intersecting patterns of racism and sexism, and . . . tend not to be represented within the discourses of either feminism or antiracism.") (footnote omitted); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990) (characterizing and criticizing "gender essentialism—the notion that a unitary, 'essential' women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience"). More recent theory makes the point that the relationship among multiple identity traits is better characterized as multidimensional or cosynthetic, with traits interacting in both dominant and subordinating ways depending on the surrounding context. As Darren Hutchinson has written, "Multidimensionality theorists have attempted to move beyond intersectionality's antiessentialist roots by examining questions of 'intersecting' privilege and subordination—rather than simply focusing on the lives of individuals, such as women of color, who are excluded from 'single-issue' frameworks." Darren Lenard Hutchinson, *New Complexity Theories: From Theoretical Innovation to Doctrinal Reform*, 71 UMKC L. REV. 431, 435-36 (2002). For further discussion, see *infra* Section II.B.

hairstyle.[21] Yet a comparator-based approach misses identity-performance theory's point in all but the most limited circumstances. For example, we might imagine an employer refusing to promote one Latino but promoting several others and arguing that it was not ethnicity but personal style (that is, too much Spanish-speaking or too thick an accent) that led to the promotion denial. Unless there is a non-Latino comparator who speaks the same amount of Spanish or has the same accent, the claim will not be legible in an analytic regime that recognizes discrimination only in the presence of a better-treated counterpart.[22]

The third is structural discrimination theory, which focuses on the ways in which the structures and dynamics of workplaces and other environments can effectuate—and obscure—discriminatory intent. Central to this theory are the "patterns of interaction among groups within the workplace that, over time, exclude nondominant groups" based on protected traits but are "difficult to trace directly to intentional, discrete actions of particular actors."[23] Comparators, even if they exist, are unlikely to shed light on the identity traits

21. *See* Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1297-98, 1307-08 (2000). For further discussion, see *infra* Section II.B.

22. *See, e.g.*, Garcia v. Spun Steak Co., 998 F.2d 1480 (9th Cir. 1993) (rejecting the claim that termination for speaking Spanish constituted national origin discrimination under Title VII); Fragante v. City & Cnty. of Honolulu, 888 F.2d 591, 596, 599 (9th Cir. 1989) (finding that "[a]ccent and national origin are obviously inextricably intertwined in many cases" but rejecting the plaintiff's employment discrimination claim because of the "*effect* of his Filipino accent on his ability to communicate"); Korpai v. A.W. Zengeler's Grande Cleaners, Inc., No. 85 C 9130, 1987 WL 20428, at *2 (N.D. Ill. Nov. 24, 1987) ("Discrimination based on foreign immigration and speech with an accent is not discrimination based upon Hungarian ancestry or Hungarian characteristics, for purposes of Section 1981."). *But see* Carino v. Univ. of Okla. Bd. of Regents, 750 F.2d 815 (10th Cir. 1984) (upholding a determination that the plaintiff suffered discrimination because of his national origin and related accent). *See generally* Christopher David Ruiz Cameron, *How the García Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 10 LA RAZA L.J. 261 (1998) (discussing the relationship of accent discrimination to race- and ethnicity-based discrimination); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991) (analyzing accent discrimination and the related application of antidiscrimination law). For further discussion of identity performance theory, see *infra* notes 124-139.

23. Sturm, *supra* note 18, at 460; *see also* Tristin K. Green, *Work Culture and Discrimination*, 93 CALIF. L. REV. 623, 665 (2005) [hereinafter Green, *Work Culture*] ("[D]iscriminatory work cultures are too complex and too intertwined with valuable social relations to be easily regulated through judicial pronouncements and direct regulation of relational behavior."). *See generally* Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849 (2007) (describing and defending structural discrimination theory).

that motivated the exclusionary interaction patterns in all but the most blatant situations. The judicial insistence on comparators thus renders imperceptible the link between the protected trait and the reduction in opportunities or increase in adverse treatment.

Stepping back, we see that the comparator methodology has left these theories virtually noncognizable in the adjudication context and, by doing so, has depleted antidiscrimination norms of much of their content. Put another way, the synergistic relationship between the law's production of observational tools and those tools' production of law has put comparators in a position to shape and limit what courts can see as discriminatory.

Several payoffs follow from this clarified picture of the comparator methodology's consequences. For one, by putting into stark relief how little work discrimination law is doing in court, we can flesh out more of the story behind the numerous empirical studies showing that discrimination plaintiffs lose their cases at disproportionately high rates.[24] That is, the mismatch between the comparator heuristic and today's work world helps make sense of why so many discrimination plaintiffs lose their cases.

In addition, a more robust understanding of the comparator methodology's conceptual limitations prompts us to revisit Lon Fuller's observations regarding the forms and limits of adjudication,[25] this time in the context of discrimination law. Here we find a longstanding debate about whether discrimination law already overreaches and, even if it does not, whether the newer theories press it to do so.[26] Some argue that because we are largely past

24. *See supra* note 15.

25. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978). Fuller defined adjudication as involving the "authoritative determination of questions raised by claims of right and accusations of guilt" through the consideration of "proofs and reasoned arguments," *id.* at 368-69, and then focused on addressing adjudication's limitations, particularly in circumstances that required, for proper resolution, a managerial-style analysis of polycentric and dynamic conflicts. To the extent that claims require these types of analyses and judgments, which do not rest on proofs and reasoned argument, Fuller argued that they demand more than reasonably can be asked of an adjudicator. *Id.* at 370-71.

26. *See, e.g.*, RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 59-78 (1992) (objecting to discrimination laws because they interfere with the efficiencies gained in a homogeneous work environment); John J. Donohue III, Essay, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411 (1986) (maintaining that Title VII's ban on discrimination may maximize social welfare); Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 157 (2009) (discussing disagreements regarding whether discrimination law prohibits the types of employer conduct captured by structural discrimination theories); *cf.* Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053,

the primordial phase of identity discrimination, with its overt or obvious trait-based differentiations, a modified or new paradigm may be needed to redress ongoing issues in the workplace.[27] Others take the position that, whatever one's normative preferences, courts are simply not capable of entertaining the complex, multifaceted forms of discrimination that the newer theories elaborate.[28] Still others maintain that discrimination law has much it can do to address those whose identity-based injuries were missed by first-generation analyses.

Rather than join this debate directly, my interest here is in using the clarified picture of comparator-centric analysis to gauge the possibilities and limits for both adjudication and theory in this area, however thinly or thickly identity-based protections are conceived. By shedding light on why the methodology has had such sticking power notwithstanding its striking

1059 (2009) ("The unconscious bias discourse is as likely to subvert as to further the goal of substantive racial justice.").

27. *See infra* Section II.B.

28. *See, e.g.*, Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479, 2481 (1994) (describing the difficulty courts have in giving an account of complex cases "that would help integrate such claims into the mainstream of Title VII doctrine"); Jonah Gelbach, Jonathan Klick & Lesley Wexler, *Passive Discrimination: When Does It Make Sense To Pay Too Little?*, 76 U. CHI. L. REV. 797, 800 (2010) (arguing that discrimination law does not reach employers who design compensation packages to "avoid[] hiring individuals from [a] disfavored group"); Susan Sturm, *Equality and the Forms of Justice*, 58 U. MIAMI L. REV. 51, 54 (2003) ("[A]ny theory of discrimination that is sufficiently clear to provide guidance . . . cannot deal adequately with the varied, complex, and shifting dynamics and normative meaning of group-based discrimination."); *cf.* Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1900 (2009) (maintaining, with respect to unconscious discrimination, that "[a]ggressive legal strategies" may "have a negative effect on people's internalization of nondiscrimination norms" and exacerbate rather than "reduc[e] undesirable behaviors").

In addition, some second-generation theory has challenged the primacy of litigation as a means for redressing discrimination while also recognizing the value of courts working collaboratively with employers to restructure workplaces. *See* Sturm, *supra* note 18, at 522-23 (recognizing the potential for achieving results through litigation where employers and courts engage collaboratively in problem solving); *see also* Susan Sturm, *Law's Role in Addressing Complex Discrimination*, *in* HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH: RIGHTS AND REALITIES 35 (Laura Beth Nielsen & Robert L. Nelson, eds., 2005) (analyzing the role of courts in elaborating norms and working with nonlegal actors to shape responses to complex discrimination). Others, however, have moved in directions more attenuated from law, focusing primarily on redressing social norms around identity and discrimination by restructuring extralegal conversations. *See, e.g.*, KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS (2006).

deficiencies, we can begin to develop a picture of the features necessary to create viable supplements or alternatives.

This Article proposes that the comparator methodology has retained its popularity in large part because it serves entrenched judicial-legitimacy preferences that favor clearly defined and identifiable categories and, relatedly, disfavor sociologically oriented inquiries. With the advantage of an empirical patina, comparators suggest that the slippery interactions between law and lived experience in this area are susceptible to data-driven analysis based on workplace facts and that the resolution of claims does not rest on a judge's subjective perceptions of complex workplace dynamics.[29] This fits with the general inclination of courts to analyze issues involving complex social judgments in ways that appear to turn on "facts" rather than normative judgments.[30]

Along these lines, comparators can also be described as having the virtues of rules because they function to delineate sharply between situations where discrimination might occur and where it might not. As a result, they appear to constrain courts charged with discerning discrimination and, by the same token, offer predictability to employers interested in avoiding discrimination suits.[31]

On the other hand, however, comparators' empirical cast masks the inevitable and contestable judgments about the qualities that make for an acceptable comparison,[32] as well as the underlying normative judgments about the nature of discrimination and the capacity of existing law to remedy

29. *See infra* Part V. Within the employment arena, comparators are likely also appealing because their limited reach enhances the preservation of employer autonomy in workplace decisionmaking, which has proven to be an enduring value in this area. *See infra* notes 215-217 and accompanying text.

30. *See* Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 COLUM. L. REV. 1955 (2006) [hereinafter Goldberg, *Constitutional Tipping Points*]; Suzanne B. Goldberg, *On Making Anti-Essentialist and Social Constructionist Arguments in Court*, 81 OR. L. REV. 629 (2002) [hereinafter Goldberg, *Anti-Essentialist and Social Constructionist Arguments*].

31. On these and other virtues of rules, see generally Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992). Yet, as will be shown below and has been addressed more generally in the context of the rules/standards debate, rule-like measures and frameworks are typically embedded with unarticulated standard-like assumptions, reinforcing the point that a binary distinction between rules and standards often masks the mutually constitutive nature of those categories. *See, e.g.*, Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992) (showing the malleability of rule and standard characterizations).

32. *Cf.* Devon W. Carbado, *The Ties that Bind*, 19 CHICANO-LATINO L. REV. 283, 294 (1998) ("[O]ur identities are, on some level, unmanageable—fluid, contingent, and contestable.").

discriminatory harms.[33] In the terms of the rules/standards debate, we could thus say that the rule-like function of the comparator depends fundamentally on normative, and standard-like, judgments about comparators' probative value.

33. For example, a comparator framework focuses on capturing formal equality violations but misses the antisubordination theorists' concern with workplace conditions that are formally equal but nonetheless exacerbate trait-related differences among employees. It will miss, for example, the particular consequences for women when an employer refuses to allow breaks or private space for breastfeeding because there are no male comparators. Likewise, an employer who regularly makes sexualized or race-related comments to all employees would not face a comparator-based claim because all employees would be subjected to the same epithets. Yet the lack of breastfeeding accommodations as well as the making of sexual or racist remarks can surely have a trait-differentiated effect on the ability of women and members of racial minorities to perform in the workplace. *See* Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1144 (1986) ("[P]arceling out goods such as workplace benefits according to egalitarian distributive principles may not result in people's positions actually coming out equal in the end."); *see also* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 128 (1989) (arguing that "neutral" norms perpetuate bias); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986) (advocating an antisubordination approach); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 63 MINN. L. REV. 1049, 1059-61 (1978) (suggesting that the individualization of discrimination claims has undermined efforts to use discrimination law to promote distributive justice in the face of the historical practice of discriminating against a particular group); Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245 (1983) (arguing for approaches to ending discrimination that emphasize substantive rather than formal or procedural equality). Specifically with respect to women in the workplace, see Mary E. Becker, *Prince Charming: Abstract Equality*, 1987 SUP. CT. REV. 201, 247, which observes that a framework concerned with formal equality will be unable to address job structures that clash with parenting responsibilities typically taken up by women; and Martha Chamallas, *Mothers and Disparate Treatment: The Ghost of* Martin Marietta, 44 VILL. L. REV. 337, 338 (1999), which argues that "the ban on disparate treatment will not solve the work/family conflict for women who experience actual, rather than perceived, conflicts because they find that there are just not enough hours in the day."

Still, as Owen Fiss has observed, although "the ideal of equality . . . is capable of a wide range of meanings," formal equality, which he describes as the "antidiscrimination principle," has become a "mediating principle" that underlies the concept of equality in both Title VII and the Equal Protection Clause. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 108 (1976); *see also* Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 6 (1976) (defining the "antidiscrimination principle" as disfavoring racial classifications and arguing that other inequalities may need to be addressed by different theories and principles, including principles of economic justice). The Americans with Disabilities Act, with its requirement that employers provide reasonable accommodation to employees with qualifying disabilities, is understood as an exception to this general rule.

In this light, we can conclude that for all of the judgment avoidance and other instrumental values that comparators may bring to discrimination analysis, courts put too much faith in them. The judicial default to comparators crowds out not only other heuristics, but also other more textured conceptions of discrimination, all of which is to the detriment of discrimination jurisprudence and theory.[34] By lowering the comparator heuristic's pedestal, I aim to clear a remaining barrier in the path of first-generation cases and to illuminate and begin to redress the challenge that the comparator heuristic's dominance poses to second-generation theories' translation to jurisprudence.

While the constraining effect of judicial-legitimacy concerns must be taken into account, I argue that these concerns need not limit courts' observation of discrimination to instances where comparators can be found. Indeed, an additional payoff from broadening the frame and considering other approaches to seeing discrimination is that the rigidity and blinder-like effects of the insistence on comparators come more clearly into focus. Concomitantly, the virtues of the contextual analysis, currently applied mainly to harassment and stereotyping claims, become clearer, as does that methodology's applicability to other discrimination cases.

Part I of this Article sets the foundation for the discussion here by outlining the ways in which courts rely on comparators as both a default heuristic and an element of discrimination law. Part II then shows that, notwithstanding the occasional value of comparators for revealing discrimination, courts' treatment of comparators as central to discrimination analysis functions primarily to filter out, rather than to facilitate recognition of, numerous types of discrimination. This Part shows, too, the ways in which the insistence on comparators is especially devastating for second-generation claims that rest on intersectionality, identity performance, and structural theories of discrimination. Building on this descriptive presentation, Part III looks critically at the comparisons that we do accept, exposes the assumptions embedded in them, and suggests that comparators do not warrant the degree of reliance we now give them as illuminators of discrimination. Part IV considers contextual analysis as a methodological alternative to comparators

34. This effort to reduce dependence on a flawed method for observing discrimination dovetails, in a sense, with James Greiner's recent effort to challenge the dominance of multiple regression analysis as the chief statistical technique for observing discrimination. *See* D. James Greiner, *Causal Inference in Civil Rights Litigation*, 122 HARV. L. REV. 533 (2008). For another approach to enhancing the value of statistical analysis in enabling comparison, see Edward K. Cheng, *A Practical Solution to the Reference Class Problem*, 109 COLUM. L. REV. 2081 (2009).

and shows how this approach governs discrimination cases involving harassment and stereotyping.

Part V asks why comparators have had such sticking power, given their serious limitations and the existence of alternate means of observing discrimination. My aim here is both to shed light on the judicial-legitimacy considerations that reinforce reliance on comparators and to identify factors that may affect the potential for new methodologies to gain traction. I argue that the sociologically complex nature of identity discrimination, combined with entrenched concerns about unduly invading employer autonomy, lead courts to prefer empirically styled observational approaches. These approaches, in turn, can avoid the appearance of judicial subjectivity in evaluating workplace dynamics. With these factors in mind, Part VI proposes and evaluates several alternate methodologies intended to destabilize the dominance of comparators in discrimination analysis. It considers, as well, whether these alternatives can help recover the space for judicial consideration of antidiscrimination norms that the comparator heuristic's narrow window has largely shut out from consideration.

I. THE EMERGENCE AND INSTANTIATION OF COMPARATORS IN DISCRIMINATION LAW

Observations about the relationship between comparators and discrimination have ancient roots, dating back, at least, to Aristotle's observation that unequal treatment occurs when likes are not treated alike.[35] Incorporating this view, contemporary discrimination law designates a set of protected characteristics (or, in Aristotle's terms, establishes a group of "likes") and imposes penalties on employers who use these characteristics as a basis for treating employees differently and adversely (treating the "likes" as "not alike"). Title VII of the 1964 Civil Rights Act, for example, specifies that it is unlawful for an employer to "discriminate . . . because of" race, sex, and the other characteristics protected in the law.[36]

35. ARISTOTLE, NICHOMACHEAN ETHICS 1131a-b (Martin Ostwald trans., The Bobbs-Merrill Co. 1962) (c. 384 B.C.E.). Aristotle also acknowledged that difficulty inhered in determining whether comparators were sufficiently like each other. There is some irony in linking Aristotle to today's antidiscrimination regime in that he was arguably more concerned with the problem of treating unlikes equally than in insuring broad-based equality. *Id.* ("[T]his is the source of quarrels and recriminations, when equals have and are awarded unequal shares *or unequals equal shares*.") (emphasis added).

36. 42 U.S.C. § 2000e-2 (2006).

While the statute itself, like other antidiscrimination measures, does not define discrimination in a comparative sense,[37] comparators have clear appeal as an aid for gauging whether discrimination has occurred. Initially, they make visible the occurrence of comparatively adverse treatment by showing that not all employees have been fired, disciplined, or otherwise unfavorably treated. Then, comparison of the better- and worse-treated employees helps isolate whether the protected trait is the reason for the adverse action. If an employer has two employees who are similar but for *X* characteristic, and the employer treats Employee *X* worse than Employee Not-*X*, we are generally comfortable inferring that *X* is the basis, or cause, for the different treatment.[38] As the Second Circuit explained, "In the run of the mill discrimination cases . . . a plaintiff can make a showing of disparate treatment simply by pointing to the adverse employment action and the many employees who suffered no such fate."[39]

Of course, an inference is a logical determination from known facts,[40] not a guarantee of what actually occurred. But that is all that the law can reasonably require if courts are to find discrimination where the employer denies having discriminated.[41] Consequently, because of their utility in producing inferences

37. It does elaborate the areas in which unlawful adverse treatment might occur, including hiring and firing but also "compensation, terms, conditions, or privileges of employment." *Id.* § 2000e-2(a).

38. *Cf.* Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 14 (1987) (observing that "what initially may seem to be an objective stance may appear partial from another point of view").

39. Abdu-Brisson v. Delta Air Lines, Inc., 239 F.3d 456, 467 (2d Cir. 2001); *see also* Billingsley v. Jefferson Cnty., 953 F.2d 1351 (11th Cir. 1992) (finding sufficient evidence of race discrimination where black employees were fired for excessive absences while a white employee was only suspended for three days); Bradley v. Americold Servs., No. Civ. A. 97-2161-KHV, 1997 WL 613335 (D. Kan. Sept. 8, 1997) (denying summary judgment where an employer terminated the black plaintiff for allegedly threatening harm to a coworker but only suspended a white supervisor for threatening to kill two employees). *But see, e.g.*, Flores v. Preferred Technical Grp., 182 F.3d 512 (7th Cir. 1999) (rejecting a national origin discrimination claim where the plaintiff was terminated for breaking a work rule violated by twenty-seven other employees, and where she and her sister (who was fired for a different reason) were the only two recognizably Hispanic employees and the only two fired).

40. *See* BLACK'S LAW DICTIONARY 847 (9th ed. 2009) (defining inference as "[a] conclusion reached by considering other facts and deducing a logical consequence from them"); *cf.* Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 323 (2007) ("defining 'inference' as[, inter alia,] 'a conclusion [drawn] from known or assumed facts or statements'") (citing 16 OXFORD ENGLISH DICTIONARY 949 (2d ed. 1989) (second alteration in original)).

41. *Cf.* U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983) (noting that "[t]he law often obliges finders of fact to inquire into a person's state of mind" and that

of discrimination, comparators have emerged as the predominant methodological device for evaluating discrimination claims. Yet courts rely on them far beyond their evaluative function, to the point that comparators are treated not only as a useful heuristic for evaluating claims but also as an essential element of a discrimination claim.

A. Comparators as the Default Methodology for Observing Discrimination

It is not surprising that courts have long looked to comparators as a tool to aid in discerning whether impermissible discrimination has occurred. As the Supreme Court explained early in its employment discrimination jurisprudence, evidence that an employer treated comparable white workers better than a black employee would be "[e]specially relevant" to showing discrimination.[42]

Indeed, in the case just quoted, *McDonnell Douglas Corp. v. Green*, the Court first set out the burden-shifting framework that is now widely used in evaluating employment discrimination claims where a plaintiff lacks direct evidence of discrimination and is thus a focal point for the comparator demand.[43] This framework, when applied in the context of a hiring

"'[i]t is true that it is very difficult to prove what the state of a man's mind at a particular time is'" (quoting Edgington v. Fitzmaurice, [1885] Ch.D. 459 at 483 (Eng.))).

42. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973). The Court recognized that other forms of evidence "*may* be relevant to any showing of pretext," including "facts as to the petitioner's treatment of respondent during his prior term of employment; petitioner's reaction, if any, to respondent's legitimate civil rights activities; and petitioner's general policy and practice with respect to minority employment." *Id.* at 804-05 (emphasis added). The Court added that "statistics as to petitioner's employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks." *Id.* at 805. But the Court also "caution[ed] that such general determinations [about discrimination patterns from statistical analysis], while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to rehire." *Id.* at 805 n.19. In effect, the Court suggested, absent an admission of racial motivation from the employer, a comparator would likely be the most effective means for showing whether impermissible discrimination had occurred because it could most reliably establish that race discrimination was a proximate cause for the employer's actions. For discussion of discrimination cases in which courts have observed that actual comparators are not necessary to a discrimination claim, see *infra* Part IV.

43. Because employers typically refrain from directly linking their adverse actions to an employee's protected trait, relatively few discrimination plaintiffs can present direct evidence of discriminatory intent, meaning evidence that "'if believed, proves [the] existence of [a] fact in issue without inference or presumption.'" Schoenfeld v. Babbitt, 168 F.3d 1257, 1266 (11th Cir. 1999) (alterations in original) (quoting Burrell v. Bd. of Trs. of Ga. Military

discrimination claim (the basis for Green's claim against McDonnell Douglas), requires an applicant to show that he or she (1) belongs to a protected class; (2) applied to and was qualified for a position for which the employer was seeking applicants; (3) was rejected for the position; and (4) that the position remained open after that rejection and/or the position was offered to someone else.[44] Once the prima facie case is established, the burden shifts to the employer, who must offer a nondiscriminatory reason for its decision not to hire.[45] After that, the burden returns to the plaintiff to prove that the employer's proffered reason was pretextual and that discrimination actually motivated the adverse action.[46]

Within this framework, courts have split over precisely when the comparator becomes relevant.[47] For some, an employee must produce a comparator at the outset, as part of the prima facie case; only after that will the

Coll., 125 F.3d 1390, 1393 (11th Cir. 1997)); *see also id.* (describing direct evidence as "'the most blatant remarks, whose intent could be nothing other than to discriminate' on the basis of some impermissible factor" (quoting Carter v. City of Miami, 870 F.2d 578, 582 (11th Cir. 1989))).

44. *McDonnell Douglas*, 411 U.S. at 802. The precise elements of the prima facie case will vary depending on the factual context of the discrimination claim. Clark v. Coats & Clark, Inc., 990 F.2d 1217, 1223 n.1 (11th Cir. 1993). For a discrimination claim in the context of ongoing employment, for example, courts typically require that the plaintiff establish a prima facie case by showing that "'(1) she is a member of a protected class; (2) she was subjected to adverse employment action; (3) her employer treated similarly situated male employees more favorably; and (4) she was qualified to do the job.'" EEOC v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1286 (11th Cir. 2000) (quoting Maniccia v. Brown, 171 F.3d 1364, 1368 (11th Cir. 1999)). The Supreme Court has observed, in the context of an employment discrimination case involving *McDonnell Douglas* burden-shifting, that the prima facie showing was "'never intended to be rigid, mechanized, or ritualistic.'" Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002) (quoting Furnco. Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978)).

45. *McDonnell Douglas*, 411 U.S. at 802.

46. *Id.* at 807; *see also* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 134 (2000) (explaining that discrimination can be deemed the "most likely" explanation for the employer's conduct if the employer's proffered justification is rejected). *But see* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993) (holding that a plaintiff does not necessarily establish pretext by disproving the employer's proffered justification for its action).

47. *See* Sullivan, *supra* note 3, at 194, 208 ("[S]ometimes the presence or absence of a comparator is assessed by the court in determining whether plaintiff has made out her prima facie case," but "more commonly, . . . the court tends to find comparators critical for pretext proof."); *cf.* Michael J. Zimmer, *A Chain of Inferences Proving Discrimination*, 79 U. COLO. L. REV. 1243, 1290-91 (2008) (observing that plaintiffs can introduce evidence of discrimination at both the prima facie and pretext stages). Of course, not each step of the sequence (prima facie case, nondiscriminatory reason, showing of pretext) is reached in every case.

court shift the burden and require an employer to proffer a nondiscriminatory reason for its adverse action.[48] Other courts require, or strongly encourage, the production of comparators only at the third, pretext phase of the sequence, at which point the employee must show that the employer's *real* reason for acting adversely was the protected characteristic, notwithstanding any nondiscriminatory reasons that the employer advanced in response to the prima facie case.[49] Although the difference between these approaches can have great significance for an individual case,[50] I leave the debate about their relative virtues for another day, as my concerns with overreliance on the comparator heuristic exist at all stages of the adjudication process.[51]

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48. *See, e.g.*, Adebisi v. Univ. of Tenn., 341 F. App'x 111, 112 (6th Cir. 2009) (ruling that a plaintiff "failed to make a *prima facie* showing of . . . discrimination, because he failed to show that a similarly-situated, non-protected person was treated more favorably"); Drake-Sims v. Burlington Coat Factory Warehouse, 330 F. App'x 795, 801 (11th Cir. 2009) (same); Nagle v. Vill. of Calumet Park, 554 F.3d 1106, 1119 (7th Cir. 2009) (same); *see also* Lee v. Kansas City S. Ry., 574 F.3d 253, 259 (5th Cir. 2009) (describing as a prong of the prima facie case that the plaintiff must show that "he was treated less favorably because of his membership in that protected class than were other similarly situated employees who were not members of the protected class, under nearly identical circumstances"); Fields v. Shelter Mut. Ins. Co., 520 F.3d 859, 864 (8th Cir. 2008) (same); Flores v. Preferred Technical Grp., 182 F.3d 512 (7th Cir. 1999) ("The linchpin of the plaintiff's *prima facie* case is evidence of disparate treatment between members of the plaintiff's protected class and nonmembers.").

49. *See, e.g.*, King v. Hardesty, 517 F.3d 1049, 1063 (8th Cir. 2008) (describing and applying the comparator requirement in the context of the pretext evaluation); Wright v. Murray Guard, Inc., 455 F.3d 702 (6th Cir. 2006) (finding that the plaintiff had established a prima face case of race discrimination but lacked an adequate comparator to demonstrate pretext); Harvey v. Anheuser-Busch, Inc., 38 F.3d 968, 972 (8th Cir. 1994) (same as *King*).

In rejecting the position that a discrimination plaintiff must produce an actual comparator as part of the prima facie case, the Second Circuit criticized "the grotesque scenario where an employer can effectively immunize itself from suit if it is so thorough in its discrimination that all similarly situated employees are victimized." Abdu-Brisson v. Delta Airlines Inc., 239 F.3d 456, 467 (2d Cir. 2001). *See also supra* note 8.

50. In a race discrimination case, the Eighth Circuit identified differing demands for comparators within its own circuit, which ranged from a strict comparator demand at the prima facie stage of the burden-shifting analysis to a "low threshold" demand at that stage, accompanied by more rigorous review at the pretext stage. Rodgers v. U.S. Bank, N.A., 417 F.3d 845, 851 (8th Cir. 2005). Opting for the low threshold requirement, the court explained that "[u]sing a more rigorous standard at the prima facie stage would 'conflate the prima facie case with the ultimate issue of discrimination,' thereby effectively eliminating the burden-shifting framework the Supreme Court has directed us to use." *Id.* at 852 (quoting Williams v. Ford Motor Co., 14 F.3d 1305, 1308 (8th Cir. 1994)).

51. For further discussion of the insistence on comparators at the prima facie stage, see, for example, Ernest F. Lidge III, *The Courts' Misuse of the Similarly Situated Concept in Employment Discrimination Law*, 67 MO. L. REV. 831, 839 (2002), which argues that requiring

Notably, while the *McDonnell Douglas* burden-shifting framework facilitates examination of the challenged employment decision, it provides no guidance as to the techniques that a court should use to sift through the competing accounts of an employer's action.[52] The same is true of the "mixed-motive" burden-shifting framework, in which the employee shows at the outset that the protected trait was among the reasons for the employer's actions and the employer, in response, attempts to show that it would have taken the same adverse act even without considering the protected trait.[53]

Comparators become relevant to the analysis, then, because they help expose—whether in the single- or mixed-motive analysis—that "likes" have been treated in an "unlike" fashion and give rise to the inference that discrimination is the reason for that differentiation. The Supreme Court has regularly affirmed comparators' value for this purpose,[54] as have lower courts,

comparative evidence at the prima facie stage "violates the statutory language and also has a number of other problems"; and Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229, 2292 (1995), which maintains that "[s]erious problems inhere in requiring the plaintiff to produce comparative data at the prima facie stage of the case."

52. *See* Malamud, *supra* note 51, at 2291 (pointing out that the *McDonnell Douglass* framework does not "by its terms" require comparative evidence).

53. In contrast to the *McDonnell Douglas* analysis, where the individual plaintiff bears the burden of persuasion throughout the adjudication process, in a mixed-motive case, once the individual has established the employer's reliance on a protected trait, liability attaches and the employee will recover damages *unless* the employer can show persuasively that it would have "taken the same action in the absence of the impermissible motivating factor." 42 U.S.C. § 2000e-5(g)(2)(B) (2006). In that case, the employee can still obtain certain kinds of declaratory or injunctive relief as well as attorney's fees and costs. *Id.* § 2000e-5(g)(2)(B)(i).

54. *See, e.g.*, Ash v. Tyson Foods, Inc., 546 U.S. 454, 457 (2006) ("[Comparative evidence] may suffice, at least in some circumstances, to show pretext."); O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 312 (1996) (assuming that a comparator would be useful to show that the employer had acted "*because of*" the plaintiff's age); Patterson v. McLean Credit Union, 491 U.S. 164, 187-88 (1989) ("[A litigant] might seek to demonstrate that [the employer's] claim to have promoted a better qualified applicant was pretextual by showing that she was in fact better qualified than the person chosen for the position.").

The comparator heuristic is used to observe discrimination in other contexts as well. With respect to the use of peremptory strikes of jurors during voir dire, for example, the Court has struggled to determine how best to see whether discriminatory intent, rather than permissible instinct, motivated the strike. In its most recent decision in this area, the Court reinforced the value of comparison in illuminating whether race discrimination had occurred in the use of a state's peremptory strikes in a capital murder case. The Court first considered statistics showing the disproportionately high use of peremptory strikes against black potential jurors and then observed that

which also typically treat them as their preferred lens for evaluating discrimination claims.[55] Commentators have observed as well that "the first step in most discrimination cases is for the plaintiff to identify an individual of another race (or the opposite sex, etc.) who was treated more favorably than she—a comparator."[56]

> [m]ore powerful than these bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve. If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination.

Miller-El v. Dretke, 545 U.S. 231, 241 (2005).

55. Gossett v. Okla. *ex rel* Bd. of Regents for Langston Univ., 245 F.3d 1172, 1177 (10th Cir. 2001) (explaining, in a sex discrimination suit brought by a man who had been involuntarily withdrawn from a state university nursing program, that "evidence that the defendant treated the plaintiff differently from others who were similarly situated . . . is especially relevant to a showing of pretext"); Kendrick v. Penske Transp. Servs., 220 F.3d 1220, 1230 (10th Cir. 2000) (noting that a plaintiff seeking to show discriminatory conduct by the defendant "often does so by providing evidence that he was treated differently from other similarly-situated employees who violated work rules of comparable seriousness"). As the Massachusetts Supreme Judicial Court put the point, similarly situated comparators are "'usually the most probative means of proving that an adverse action was taken for discriminatory reasons,'" even if they are "'not absolutely necessary.'" Trs. of Health & Hosps. v. Mass. Comm'n Against Discrimination, 871 N.E.2d 444, 451 (Mass. 2007) (quoting Trs. of Health & Hosps. v. Mass. Comm'n Against Discrimination, 839 N.E.2d 861, 866 (Mass. App. Ct. 2005)).

56. Sullivan, *supra* note 3, at 202. Sullivan adds:

> The reality on the ground is 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 (although the courts continue to invoke the *McDonnell Douglas* mantra), but rather on whether the plaintiff has identified a suitable "comparator" who was treated more favorably than she.

Id. at 193; *see also* Martin J. Katz, *Reclaiming* McDonnell Douglas, 83 NOTRE DAME L. REV. 109, 181 n.270 (2007) ("The most common form of evidence offered in [cases based on unconscious discrimination or bias] is comparative evidence . . . ."); Lidge, *supra* note 51, at 831-32 (describing the use of a comparator as "[a] common way of proving" discrimination on account of a protected characteristic). Treatises take this position as well. *See, e.g.*, 1 LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 8D.04 n.3 (2d ed. 2009) ("The most common way of demonstrating that an employer's explanation for an adverse employment action is pretextual is to show that similarly situated persons of a different race or sex received more favorable treatment."); *id.* § 8.02[6] (explaining that where the plaintiff alleges failure to hire based on discrimination, the most common method of making a prima facie case "is to show that the employer subsequently hired someone for the position, and that the hired person had equal or lesser qualifications compared to those of the plaintiff").

B. Comparators as a Defining Element of Discrimination Law

In much of discrimination law, however, comparators have taken on an importance beyond their service as a potentially useful heuristic for seeing discrimination. They constitute, to many courts, a threshold requirement of a discrimination claim and, in that sense, part of discrimination's very definition.[57] On this view, discrimination occurs only when an actor has differentiated between two groups of people because of a protected trait, which means that the absence of a comparator signals the absence of discrimination.

Lower courts and commentators regularly take this position, insisting that litigants identify comparators before their cases can proceed and treating the absence of a comparator as fatal to a claim.[58] An observation by the Eleventh Circuit in a discrimination case brought by a black doctor who had been removed from his position at a federal correctional institution is illustrative: "[T]he plaintiff *must* show that his employer treated similarly situated employees outside his classification more favorably than [himself]."[59]

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57. Justices Thomas and Kennedy have expressed such a view. *See supra* notes 6-7 and accompanying text.

58. *See, e.g.*, Knight v. Baptist Hosp. of Miami, Inc., 330 F.3d 1313, 1316 (11th Cir. 2003) (finding that the plaintiff could not sustain her discrimination claims because she "[could not] show that similarly situated employees of other races were treated better"); Paluck v. Gooding Rubber Co., 221 F.3d 1003, 1012 (7th Cir. 2000) (holding that to establish a prima facie case for discriminatory discharge, the plaintiff must show that "she was discharged while other, similarly-situated employees who were not members of the protected class were treated more favorably"); Norville v. Staten Island Univ. Hosp., 196 F.3d 89, 95 (2d Cir. 1999) (ruling that the plaintiff "did not produce evidence sufficient to support a reasonable inference that her termination was the result of race discrimination" because she failed to identify satisfactory comparators); 3 LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 47.05 (2d ed. 2009) (stating that, in the context of pregnancy discrimination, "if the employee cannot show that she was in fact treated differently from similarly situated non-pregnant employees, her claim will fail"); 3 LEX K. LARSON, LABOR AND EMPLOYMENT LAW § 54.02[6] (2010) (observing that where a plaintiff alleges discrimination in hiring, "failure of the plaintiff to present evidence of comparative qualifications of persons subsequently hired was sometimes viewed as fatal to a plaintiff's prima facie case"). *But see* 3 LEX K. LARSON, EMPLOYMENT DISCRIMINATION, § 47D.05 (2d ed. 2009) (analyzing EEOC v. Nw. Mem'l Hosp., 858 F. Supp. 759 (N.D. Ill. 1994), where a "plaintiff's failure to provide comparative evidence was not fatal to her case").

59. Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997) (emphasis added). *But see, e.g.*, Bryant v. Aiken Reg'l Med. Ctrs. Inc., 333 F.3d 536, 545-46 (4th Cir. 2003) (maintaining that although comparative evidence may be "helpful," a plaintiff "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").

One analytic point is crucial here. If comparators are fundamental either to discrimination statutes or to our theoretical conceptualization of discrimination, then we can hardly object to their pervasive use. On the other hand, if comparators are merely one choice among several for how courts might go about the task of perceiving discrimination, as I contend here, then we have reason to be more concerned. These questions are addressed in Parts III and IV. For now, it is simply important to have a clear sense of comparators' dominance in shaping discrimination jurisprudence.

II. THE COMPARATOR DEMAND AS A BARRIER TO DISCRIMINATION CLAIMS

The judicial demand for comparators functions largely as a barrier to discrimination claims, accounting in part for the low success rates of these claims in ways that have gone underappreciated by courts and commentators. This Part catalogues the sets of circumstances in which courts' insistence on the production of comparators inhibits or precludes discrimination claims.[60] As the discussion shows, the comparator demand poses a serious obstacle both practically and conceptually. As a practical matter, comparators are hard to find even in workplaces with a diverse group of employees. And conceptually, the existence of a comparator is simply not relevant, under some discrimination theories, to the question whether discrimination has occurred.

To assess the consequences of the comparator demand, I look separately at first- and second-generation discrimination claims. Although the two types of claims exist along a spectrum rather than as mutually exclusive groupings, the distinction is useful for illuminating the separate ways in which the demand operates for more traditional and more cutting-edge discrimination claims. As noted at the outset, the first-generation cases rest on generally accepted theories about both the kinds of discriminatory acts that are or should be prohibited by governing statutes and the scope of the traits protected under those statutes.[61] These are, in other words, claims of sex, race, or other types of discrimination that would be easily recognizable to the person on the street even if they are not easily proven in court. The second-generation cases, by contrast, offer a thicker conceptualization of discrimination that has not achieved the same popular traction even though these cases are thought, in much of the scholarly literature, to be one of the most important next steps for

60. I leave to the following Parts consideration of the impact of the comparator approach on the meaning of discrimination.

61. *See supra* notes 18, 26 and accompanying text.

bringing discrimination law closer to lived experience. As will become apparent, a comparator-obsessed legal regime erects a serious barrier to many first-generation claims and renders second-generation claims even less likely to succeed.

Before turning to the comparator demand's distinct effects on first- and second-generation claims, one aspect of the comparator jurisprudence warrants initial attention for its effect on the evaluation of evidence in nearly all discrimination cases. When courts apply a comparator-based analysis, they frequently disregard or discount evidence that is not associated directly with the comparator. This means that adverse incidents directed at the plaintiff, such as hostile remarks or treatment by noncomparator coworkers or supervisors, are often marginalized as "stray" remarks and acts not worthy of serious consideration.[62] As the Eleventh Circuit observed in a housing disability discrimination case that challenged a city's use of zoning ordinances to close down a drug-rehabilitation halfway house, for example, "Evidence that neighbors and city officials are biased against recovering substance abusers is irrelevant absent some indication that the recoverers were treated differently than non-recoverers."[63] This deliberately acontextual approach, with its "willingness to continue to compartmentalize various aspects of plaintiff's proof to find that none is sufficient,"[64] is, I contend, a side effect of the comparator analysis's dominance and the skepticism toward discrimination claims that emerges from that dominance.[65]

62. In *Price Waterhouse v. Hopkins*, Justice O'Connor wrote that "stray remarks in the workplace, . . . statements by nondecisiomakers, and statements by decisionmakers unrelated to the decisional process itself" should not be treated as proving the connection between an employer's acts and the protected trait. 490 U.S. 228, 277 (1989) (O'Connor, J., concurring); *see also id.* at 251 (majority opinion) ("Remarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision.").

63. Schwarz v. City of Treasure Island, 544 F.3d 1201, 1216 (11th Cir. 2008). In the case, which was brought under the Fair Housing Act, neighbors and city commissioners had made statements about not wanting recovering drug users in their town, but the court deemed the statements irrelevant because of the absence of a comparator. *Id.*

64. Sullivan, *supra* note 3, at 216 n.93.

65. This compartmentalization effect is even more notable because it runs contrary to the Court's suggestion that all evidence must be taken together in evaluating a discrimination claim. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 148-49 (2000) (identifying as relevant, inter alia, the "strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case").

For a critique of the stray-remarks doctrine, see, for example, Catherine Albiston et al., *Ten Lessons for Practitioners About Family Responsibilities Discrimination and Stereotyping*

A. The Comparator Default and First-Generation Cases

The comparator demand's inhibiting effect on first-generation discrimination claims can be seen in five primary ways. In many cases, potentially comparable coworkers are not seen as sufficiently comparable because of job responsibilities or workplace performance issues. In others, potential comparators are seen as insufficiently probative because of concerns about small sample size. In still others, the comparators are not seen as probative because the individual bringing the claim has a unique position in the workplace, works in an environment that is homogeneous with respect to the relevant trait, or has a trait-related aspect of identity, such as pregnancy, that is treated as inherently not comparable to others outside the trait-bearing group.

1. No Sufficiently Comparable Coworkers

Most commonly, the comparator default blocks discrimination claims because courts find that there is no individual sufficiently comparable to the employee-plaintiff to show that the protected characteristic, rather than some other factor, was the reason for the challenged adverse treatment.[66] Often, this

Evidence, 59 HASTINGS L.J. 1285, 1293-96 (2008). These authors argue that "[s]ocial science research has shown the value of 'stray remarks' as providing a window into the hidden biases in the workplace," *id.* at 1293, and that "[a]s social science research mounts and more courts acknowledge that '[c]ontext matters'—indeed it matters a lot—in these cases, the 'stray remarks' doctrine may be cast aside," *id.* at 1296 (citing Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 69 (2006)).

66. For example, in *Holifield v. Reno*, the court stated:

> Holifield has failed to produce sufficient affirmative evidence to establish that the non-minority employees with whom he compares his treatment were similarly situated in all aspects, or that their conduct was of comparable seriousness to the conduct for which he was discharged. Having failed to meet his burden of proving he was similarly situated to a more favorably treated employee, Holifield has not established a prima facie case.

115 F.3d 1555, 1563 (11th Cir. 1997); *see also* LaFary v. Rogers Grp., Inc., 591 F.3d 903, 909 (7th Cir. 2010) (finding that a coworker who took leave that was comparable to the leave taken by the pregnancy discrimination plaintiff was not similarly situated based on the employer's needs at the time when the coworker was rehired but the plaintiff was not); Senske v. Sybase, Inc., 588 F.3d 501, 510 (7th Cir. 2009) (rejecting an age discrimination claim for lack of an adequate comparator while observing that "[a]lthough the 'similarly situated' concept is a flexible one, the comparators must be similar enough that differences in their treatment cannot be explained by other variables, such as distinctions in their roles or performance histories" (citing Henry v. Jones, 507 F.3d 558, 564 (7th Cir. 2007))); White v. Fla. Dep't of Highway Safety & Motor Vehicles, 343 F. App'x 532, 535 (11th Cir. 2009)

is because the plaintiff's best evidence comes from a comparison to an employee with a different supervisor[67] or with insufficiently similar job responsibilities[68] or, in the case of a challenge to disparate enforcement of a disciplinary rule, to an employee not subject to the same disciplinary standards.[69] Although the circuits vary somewhat in how they characterize the match between comparators and the plaintiff, with some requiring that comparators be "similarly situated in [all] material respects"[70] and others

("[W]hile [the plaintiff] may have shown that some non-minority individuals had isolated issues in their backgrounds, he failed to identify any such individual that had the same number of problems in [as] many areas as he had." (third alteration in original) (internal citation omitted)); Lewis v. Metro. Atlanta Rapid Transit Auth., 343 F. App'x 450, 454 (11th Cir. 2009) (rejecting a comparator in a race discrimination case and stating that "[w]e 'require that the quantity and quality of the comparator's misconduct be nearly identical to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges'") (quoting Burke-Fowler v. Orange Cnty., 447 F.3d 1319, 1323 (11th Cir. 2006)).

67. *See, e.g.*, Aramburu v. Boeing Co., 112 F.3d 1398 (10th Cir. 1997). *Aramburu* held that "'[s]imilarly situated employees,'" for the purpose of showing disparate treatment in employee discipline, "'are those who deal with the same supervisor and are subject to the same standards governing performance evaluation and discipline.'" *Id.* at 1404 (quoting Wilson v. Utica Park Clinic, Inc., 76 F.3d 394, No. 95-5060, 1996 WL 50462, at *1 (10th Cir. Feb. 7, 1996)). The Sixth Circuit has stated:

> [T]o be deemed "similarly-situated", the individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and have 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.

Hollins v. Atl. Co., 188 F.3d 652, 659 (6th Cir. 1999) (quoting Mitchell v. Toledo Hosp., 964 F.2d 577, 583 (6th Cir. 1992)). However, in its recent decision in *Sprint/United Management Co. v. Mendelsohn*, 552 U.S. 379 (2008), the Court declined to embrace a categorical rule regarding whether evidence of discrimination had to come from comparators with the same supervisor.

68. For example, in addressing a sex discrimination claim by a female secretary, the Second Circuit wrote, "Given their quite different positions, no rational inference of disparate treatment on the basis of gender could be drawn from evidence that [two male employees] were not given the secretarial-type tasks assigned to" the female plaintiff. Galdieri-Ambrosini v. Nat'l Realty & Dev. Corp., 136 F.3d 276, 291 (2d Cir. 1998).

69. *See, e.g.*, Wright v. Murray Guard, Inc., 455 F.3d 702, 710 (6th Cir. 2006) (holding that, in the disciplinary context, comparators must "'have been subject to the same standards and [must] have engaged in the same conduct without . . . differentiating or mitigating circumstances'" (quoting Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344, 352 (6th Cir. 1998))).

70. *See* Perkins v. Brigham & Women's Hosp., 78 F.3d 747, 751 (1st Cir. 1996). *See generally* Tricia M. Beckles, Comment, *Class of One: Are Employment Discrimination Plaintiffs at an*

insisting on "nearly identical" comparators,[71] all agree that the fit must be tight.[72]

As this set of cases reveals, the comparator heuristic might work well for observing discrimination in large, Tayloresque workplaces, where multiple workers engage in tasks that are susceptible to relatively straightforward comparison.[73] Indeed, the very point of Taylor's *Shop Management* was to remove "[a]ll possible brain work . . . from the shop and center[]" the work with managers.[74] By reducing jobs to specific tasks and standardizing supervision, Taylor prompted a shift in the workplace so that workers who had once been skilled in a variety of aspects of production and supervision were

Insurmountable Disadvantage if They Have No "Similarly Situated" Comparators?, 10 U. PA. J. BUS. & EMP. L. 459, 470-72 (2008) (reviewing the standards set out in several circuits).

71. As the Sixth Circuit wrote in the context of a disparate discipline complaint:

> [T]he "comparables" [must be] similarly-situated *in all respects*. . . . [They] must have dealt with the same supervisor, have been subject to the same standards and have 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.

Mitchell v. Toledo Hosp., 964 F.2d 577, 583 (6th Cir. 1992); *see also* Nix v. WLCY Radio/Rahall Commc'ns, 738 F.2d 1181, 1185 (11th Cir. 1984) ("[A] plaintiff fired for misconduct makes out a prima facie case of discriminatory discharge if he shows that he is a member of a protected class, that he was qualified for the job from which he was fired, and 'that the misconduct for which [he] was discharged was *nearly identical* to that engaged in by [an employee outside the protected class] whom [the employer] retained.'" (alteration in original) (emphasis added) (quoting Davin v. Delta Air Lines, Inc., 678 F.2d 567, 570 (5th Cir. Unit B 1982))).

72. In the separate but related context of whether comparative proof is sufficiently probative to show that discrimination accounted for the selection of someone other than the plaintiff, the Supreme Court rejected a lower court demand that the difference between comparators must be "'so apparent as virtually to jump off the page and slap you in the face.'" Ash v. Tyson Foods, Inc., 546 U.S. 454, 456-57 (2006) (quoting Ash v. Tyson Foods, Inc., 129 F. App'x 529, 533 (11th Cir. 2005)). At the same time, the Court endorsed other demanding characterizations of the comparator requirement. *See id.* at 457-58 (citing Cooper v. Southern Co., 390 F.3d 695, 732 (11th Cir. 2004) (holding that "disparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question"); Raad v. Fairbanks N. Star Borough Sch. Dist., 323 F.3d 1185, 1194 (9th Cir. 2003) (holding that qualifications evidence alone could establish pretext where the plaintiff's qualifications are "clearly superior" to those of the candidate selected); Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1294 (D.C. Cir. 1998) (en banc) (concluding that pretext can be inferred if "a reasonable employer would have found the plaintiff to be significantly better qualified for the job"). For characterizations of the comparator requirement after *Ash*, see also *supra* note 66.

73. *See* FREDERICK WINSLOW TAYLOR, SHOP MANAGEMENT 50 (1911).

74. *Id.* at 34.

now performing a narrower set of routine—and easily comparable—tasks. Within this system, whose very design aimed to create comparable jobs and workers, the turn to comparators as a means of demonstrating discrimination might have been imperfect but was surely viable in many instances.

Today, however, the workplace barely resembles its Taylor-inspired predecessor. As Katherine Stone has observed, jobs are now "defined in terms of competencies" and employees are valued, not for their fungible skill sets, but for "their varied skills and flexibility."[75] In addition, "[t]he decentralization of authority and the flattening of hierarchy" obscures what were previously clear lines of authority, making it increasingly difficult to "locat[e] the responsible party in the face of decentralized and dispersed decision-making."[76] Given the flexible and dynamic nature of many contemporary jobs, the insistence on comparators seems starkly mismatched with the work world as it currently operates.

2. Small Sample Size

In other instances, the difficulty is that courts, while insisting on comparators, are skeptical of the selected comparators' probative value because of concerns about sample size.[77] As a federal district court observed in a race and sex discrimination case brought by a black woman who worked as a civilian for the Army, "The generally small sample size and lack of historical data further undermined the evidentiary value of the statistics" showing that black women were underrepresented in senior-grade Army positions.[78] In

75. *See* KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 165 (2004); *see also* Jim Pope, *Next Wave Organizing and the Shift to a New Paradigm of Labor Law*, 50 N.Y.L. SCH. L. REV. 515, 516 (2005-2006) (describing "[f]lexibility and mobility" as "hav[ing] replaced predictability and stability as core values in business organization").

76. STONE, *supra* note 75, at 165-66.

77. For discussion of the particular challenges that sample size concerns present for individuals who bring discrimination claims based on more than one protected characteristic, see *infra* notes 118-123 and accompanying text. Even in less complex, first-generation cases, sample-size issues can be impediments for individuals bringing discrimination claims.

78. Judge v. Marsh, 649 F. Supp. 770, 780 (D.D.C. 1986). In a Seventh Circuit case, Judge Posner elaborated on an aspect of this sample size issue in a case brought by black female students who argued that they were punished more harshly for hazing sorority pledges than were comparable white students, where he rejected the proffered comparators as inadequate. He observed:

> In a large number of dissimilar cases, if there were reason to think the dissimilarities were randomly distributed and therefore canceled out, an inference

systemic disparate treatment challenges, the Court has similarly observed that small sample sizes produce statistical analyses with little probative value.[79] In other words, when an employee relies on comparative evidence but is either alone or one of few with his or her protected trait, courts have been skeptical that the protected identity trait, rather than a quirk of the employee, is the reason for the adverse action.

Current iterations of intersectionality theory suggest that this sort of skepticism about the revelatory effects of comparison would be well founded for all comparisons rather than just in cases where individuals present intersectional discrimination claims. Because all individuals have multidimensional aspects of their identities, very close comparisons are almost always hard to come by.[80] In this sense, the comparator analysis can be seen as mismatched not only with today's workplaces, as suggested above, but also with contemporary understandings of identity.

3. Uniquely Situated Employees

In addition to the difficulties that arise where potential comparators may actually exist in a workplace, there are several types of first-generation cases in which there are simply no comparators from which to choose. In some cases, an employee's position is unique, particularly with regard to high-level employees who cannot credibly claim that their responsibilities are closely

> of discrimination might be drawn. And likewise in a small sample if the cases were identical except for a racial difference. But in a very small sample of dissimilar cases, the presence of a racial difference does not permit an inference of discrimination; there are too many other differences, and in so small a sample no basis for thinking they cancel out.

Williams v. Wendler, 530 F.3d 584, 588-89 (7th Cir. 2008). Courts are often skeptical of data drawn from small samples. *See* Sengupta v. Morrison-Knudsen Co., 804 F.2d 1072, 1076 (9th Cir. 1986) ("The problem with [a small sample size] is that slight changes in the data can drastically alter appearances."); Contreras v. City of L.A., 656 F.2d 1267, 1273 n.4 (9th Cir. 1981) ("Statistics are not trustworthy when minor numerical variations produce significant percentage fluctuations."); Morita v. S. Cal. Permanente Med. Grp., 541 F.2d 217, 220 (9th Cir. 1976) ("'[S]tatistical evidence derived from an extremely small universe . . . has little predictive value and must be disregarded.'" (quoting Harper v. Trans World Airlines, Inc., 525 F.2d 409, 412 (8th Cir. 1975))).

79. *See* N.Y. City Transit Auth. v. Beazer, 440 U.S. 568, 584-87 (1979); *see also* Mayor of Phila. v. Educ. Equal. League, 415 U.S. 605, 620-21 (1974) (criticizing "the simplistic percentage comparisons" used by the court of appeals as "lack[ing] real meaning in the context of [the] case" and affirming "the District Court's concern for the smallness of the sample").

80. For additional discussion of intersectionality theory, see *infra* notes 112-123 and accompanying text.

comparable to those of anyone else in the firm.[81] One comment cites the "class of one" of Carleton Fiorina, who lost her position as president and chief executive officer of Hewlett-Packard and, had she wanted to bring a sex discrimination claim, would have been precluded if required to show a comparator.[82] This difficulty also arises in other settings, such as academia, where an employee is often the only specialist in his or her field and is thus uniquely situated in terms of both work product and related responsibilities.[83]

More generally, in a knowledge-based economy, the blurring of lines between higher- and lower-level jobs increasingly precludes employees from finding comparators. As a result, even employees who are less senior will often hold a unique position and will similarly find themselves without a comparator.[84] In addition, for contractual or other reasons, "cases occasionally arise where a plaintiff cannot show disparate treatment only because there are no employees similarly situated to the plaintiff."[85] In one of those cases, Pan Am pilots who had joined Delta Air Lines were not positioned similarly to any

81. *See, e.g.*, Holifield v. Reno, 115 F.3d 1555, 1563 (11th Cir. 1997) ("[There] are only a limited number of potential 'similarly situated employees' when higher level supervisory positions for medical doctors are involved.").

82. Beckles, *supra* note 70, at 472.

83. *See, e.g.*, Martha S. West, *Gender Bias in Academic Robes: The Law's Failure To Protect Women Faculty*, 67 TEMP. L. REV. 67 (1994) (analyzing the ways in which federal discrimination laws have failed to protect women faculty members from discrimination in higher education institutions).

84. *See, e.g.*, Sylva-Kalonji v. Bd. of Sch. Comm'rs, No. 08-0207-KD, 2009 WL 1418808, at *6 (S.D. Ala. May 20, 2009) (finding a proposed comparator inadequate where the plaintiff, a data clerk, and the proposed comparator each performed "unique duties"). *But see* Jackson v. FedEx Corporate Servs., Inc., 518 F.3d 388, 396-97 (6th Cir. 2008) (finding the failure to identify an identically situated comparator not fatal to Title VII claim where the plaintiff worked in a "unique position").

85. Abdu-Brisson v. Delta Air Lines, 239 F.3d 456, 467 (2d Cir. 2001). In that case, the court found that former Pan Am pilots who joined Delta Airlines had made out a prima facie case of age discrimination, even though they had no comparator pilots, but ultimately found that the Pan Am pilots failed to rebut the nondiscriminatory reasons offered by the airline for their action. On the comparator point, the court wrote:

> While Delta is a long way from the days when it had only a single employee, the 488 Plaintiffs in this case find themselves in a similar conundrum: they are in a class all by themselves. Because all the Pan Am pilots hired by Delta were subjected to the same three employment terms challenged in this action, and because the Pan Am pilots differed materially from the pre-APA Delta pilots in terms of their airline of origin and career expectations, there are no Delta employees similarly situated to Plaintiffs who did not suffer the adverse employment actions.

Id. at 467-68.

others for purposes of their age discrimination claim because of the nature of the agreements accompanying their hire. Thus, again, we see the lack of fit between the comparator demand and the structure of many, if not most, contemporary jobs.

In addition, the plaintiff's particular situation with respect to workplace conduct or performance might be distinctive enough to make it hard to come by another comparable employee, even if the workplace has potential comparators in it. In one pregnancy discrimination case, for example, an employee was fired for excessive tardiness the day before her maternity leave was set to begin and lost her case because she presented no evidence that comparable employees were treated differently.[86] The Seventh Circuit, per Judge Posner, indicated that Ms. Troupe might have prevailed had she presented a comparator such as a "Mr. Troupe, who [was] as tardy as Ms. Troupe was, also because of health problems, and who [was] about to take a protracted sick leave growing out of those problems" at the employer's expense.[87] The court went on to express "doubt that finding a comparison group would be that difficult."[88] Perhaps that particular employer had fired many regularly tardy workers on the verge of taking extended sick leaves, but in most, if not all, workplaces, the comparator would be far more difficult to identify than Judge Posner suggests. Indeed, the Third Circuit acknowledged this difficulty when denying the pregnancy discrimination claim of a woman who was fired while absent on maternity leave. Finding that the plaintiff had not identified an adequate comparator, the court added that "[o]f course, it was difficult for her to make such a showing because Carnegie never has had an employee on disability leave for a protracted period for a reason other than pregnancy."[89]

4. Homogeneous Workplaces

In other cases, the lack of comparators arises because the relevant part of the workplace is homogeneous, in the sense that all potentially comparable workers share the same trait that is the basis for the discrimination claim. In those settings, a comparator regime will not recognize most forms of

86. Troupe v. May Dep't Stores Co., 20 F.3d 734, 738 (7th Cir. 1994) (noting that the plaintiff had not presented a comparator to substantiate her discrimination claim).

87. *Id.*

88. *Id.* at 739.

89. *In re* Carnegie Ctr. Assocs., 129 F.3d 290, 297 (3d Cir. 1997).

discrimination.[90] Yet this type of segregation in the workplace remains widespread, which means that the comparator demand leaves large swaths of employment outside the reach of discrimination protections. Sex-segregated jobs, for example, are particularly common.[91] In one illustrative case, all of the relevant secretaries were female, which led the Second Circuit to reject a secretary's sex discrimination case because no comparator existed. "[A]lthough she complains that she was treated less favorably than two employees who held positions comparable to her secretarial position," the court wrote, "both of those employees were women."[92] From this, the court concluded that "[t]here was no evidence that [the plaintiff] was treated differently because of her gender."[93] Likewise, in a sex discrimination case brought by a mother with young children whose request to be scheduled in a different time slot was denied after she submitted a transfer request, the court held that "to establish a prima facie case based on a 'sex plus' theory of employment discrimination, the plaintiff must show that similarly situated men were treated differently than women."[94] Her claim failed because she could not provide a comparator in the form of a man with young children; there were no such men in her workplace.

90. As noted earlier and discussed in depth below, *see infra* Section IV.A, comparators are typically not required for sexual harassment claims, so it is possible that a claim of that sort would be recognized even in a homogeneous environment.

91. For a global analysis of sex-based occupational segregation, see MARIA CHARLES & DAVID B. GRUSKY, OCCUPATIONAL GHETTOS: THE WORLDWIDE SEGREGATION OF WOMEN AND MEN (2004).

92. Galdieri-Ambrosini v. Nat'l Realty & Dev. Corp., 136 F.3d 276, 291 (2d Cir. 1998). As Vicki Schultz has explained in exploring the way that "lack of interest" arguments have been used to justify sex-based differences in employment, a homogeneous workplace does not necessarily indicate the absence of troubling gender bias. *See* Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990).

93. *Galdieri-Ambrosini*, 136 F.3d at 291.

94. Hess-Watson v. Potter, No. Civ.A. 703CV00389, 2004 WL 34833, at *2 (W.D. Va. Jan. 4, 2004); *see also* Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061, 1086 (3d Cir. 1996) (stating that there would be insufficient evidence of gender discrimination against a male employee who was denied a promotion that was subsequently awarded to a female employee where "there is evidence that the decisionmaker was a man and that the great majority of the employees in the job category at issue were men"). *But see* Lewis v. Heartland Inns of Am., L.L.C., 591 F.3d 1033, 1040 (8th Cir. 2010) (denying summary judgment in a sex discrimination case where sex-stereotyping remarks had been made but the plaintiff-employee lacked a male comparator).

The comparator demand has similarly been a barrier to discrimination claims in racially homogeneous workplaces. Typical is this observation in a discrimination case brought by an employee of Nigerian origin that was affirmed by the Second Circuit: "[T]he other unit . . . caseworkers were all African, so while Adeniji was the only person . . . assigned homemaking work while the others were assigned protective diagnostic work and homemaking work . . . he cannot claim that employees outside the Title VII protected class were treated differently than those within the protected class."[95]

5. *Pregnancy, Breastfeeding, and the Nonexistent Comparator*

Finally there are the pregnancy- and breastfeeding-related cases in which there can be no precise comparator by reason of the different reproductive capacities of men and women, and in which other comparators are generally not entertained by courts.[96] Most notorious, perhaps, is the Supreme Court's distinction between pregnant and nonpregnant people that led the Court to conclude that pregnancy discrimination did not amount to sex discrimination in *Geduldig v. Aiello*.[97] When this distinction first appeared, the question was whether California's exclusion of pregnancy from the state disability program's coverage violated the Equal Protection Clause. The Court saw the problem in this way:

> The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.[98]

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95. Adeniji v. Admin. for Children Servs., 43 F. Supp. 2d 407, 426 n.7 (S.D.N.Y. 1999) (citation omitted); *see also* Nieto v. L&H Packing Co., 108 F.3d 621, 623-24 (5th Cir. 1997) (treating the fact that eighty-eight percent of the defendant's workforce were minorities as evidence against the plaintiff's race discrimination claim). *But see* Legrand v. Trs. of Univ. of Ark., 821 F.2d 478, 480 (8th Cir. 1987) (reversing as legal error a district court ruling that plaintiffs had failed to establish a prima facie case because "the overwhelming majority of employees in the Physical Plant is black").

96. These cases, which present some of the most interesting questions related to the role of the comparator heuristic, are also discussed below. *See infra* notes 223-225 and accompanying text.

97. 417 U.S. 484 (1974).

98. *Id.* at 496 n.20. And again: "There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." *Id.* at 496-97.

The Court took the same approach to a claim that pregnancy discrimination amounted to sex discrimination under Title VII, reinforcing that the relevant comparison was between "pregnant women and nonpregnant persons."[99] Consequently, "[a]s a matter of law, at that time, 'an exclusion of pregnancy from a disability-benefits plan providing general coverage [was] not a gender-based discrimination at all.'"[100] While Congress overrode the Court's conclusion in *Gilbert* with the Pregnancy Discrimination Act,[101] which amended Title VII's definition of sex to include pregnancy-based distinctions, the point for our purposes is that the comparator heuristic missed the possibility, recognized by both the dissent[102] and Congress, that the lack of a comparator did not necessarily mean the absence of discrimination.

Sex discrimination challenges that have been brought related to breastfeeding rules have fared about as well as those in *Geduldig* and *Gilbert*, with courts finding that the absence of a comparator for breastfeeding women rendered it unreasonable to see the rules as discriminatory based on sex. In a decision derided by commentators,[103] but representative of other decisions in this area, the Sixth Circuit sustained Wal-Mart's ban on breastfeeding in

99. *See* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 135 (1976) (quoting *Geduldig*, 417 U.S. at 496 n.20).

100. AT&T Corp. v. Hulteen, 129 S. Ct. 1962, 1970 (2009) (quoting *Gen. Elec. Co.*, 429 U.S. at 136).

101. Congress passed the Pregnancy Discrimination Act in 1978, expanding the definition of "sex" in Title VII of the Civil Rights Act of 1964 to include unequal treatment "because of or on the basis of pregnancy, childbirth, or related medical conditions." Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k) (2006)).

102. *Gen. Elec. Co.*, 429 U.S. at 149 (Brennan, J., dissenting) ("[I]n reaching its conclusion that a showing of purposeful discrimination has not been made . . . the Court simply disregards a history of General Electric practices that have served to undercut the employment opportunities of women who become pregnant while employed.").

103. *See, e.g.*, Katherine A. Macfarlane, Derungs v. Wal-Mart Stores*: Another Door Shut—A Federal Interpretation Excluding Breastfeeding from the Scope of a State's Sex Discrimination Protection*, 38 LOY. L.A. L. REV. 2319, 2322 (2005) ("[T]he Sixth Circuit's analysis . . . stymies the natural expansion of sex discrimination protection."); Elizabeth Hildebrand Matherne, *The Lactating Angel or Activist? Public Breastfeeding as Symbolic Speech*, 15 MICH. J. GENDER & L. 121, 133-34 (2008) (arguing that the Sixth Circuit's decision "leaves breastfeeding mothers vulnerable in their everyday lives and pushes them back into the home by making the world so uncomfortable and full of potential confrontations"); Brianne Whelan, *For Crying Out Loud: Ohio's Legal Battle with Public Breastfeeding and Hope for the Future*, 13 AM. U. J. GENDER SOC. POL'Y & L. 669, 673-74, 678 n.44 (2005) (analyzing an Ohio bill, H.B. 554, 125th Gen. Assem., Reg. Sess. (Ohio 2004), proposed in response to *Derungs*, that would allow a "mother . . . to breast-feed her baby in any location of a place of public accommodation wherein the mother otherwise is permitted").

public areas of the store against a state law sex discrimination claim.[104] The court insisted that a comparator analysis be followed, holding that "for there to be impermissible sex discrimination, there must be one gender that is treated differently than another."[105] Continuing, the court explained that no sex discrimination had occurred because the only prohibition Wal-Mart imposed was on a type of feeding that only women could do, and there was, therefore, no class for comparison.[106] The court also pointed out that the same insistence on a comparator had doomed several other challenges to breastfeeding-related restrictions, including one where a federal district court had found that "the lack of a similarly-situated class of men was fatal to the plaintiff's [Title VII] claim: 'if there is no comparable subclass of members of the opposite gender, the *requisite* comparison to the opposite gender is impossible.'"[107] Of the numerous district and appellate court cases it reviewed related to breastfeeding restrictions, none "found that breast-feeding fell within the scope of gender discrimination *because of the absence of a comparable class*."[108]

Thus, a conceptualization that recognizes discrimination only in the presence of a comparator will simply not observe discrimination even in cases, like many of those just discussed, that fall well within widely accepted, first-generation theories of discrimination. Indeed, in some of these settings, the comparator requirement's very design forecloses recognition of the possibility that discrimination might have occurred, including in homogeneous work environments and situations where women and men are seen as being categorically different from one another.[109] That is, by demanding that plaintiffs produce a comparator to have a viable case, courts have transformed the comparator methodology into the substantive law of discrimination. Because that method, as applied, allows for only a narrow set of circumstances

104. Derungs v. Wal-Mart Stores, Inc., 374 F.3d 428 (6th Cir. 2004).

105. *Id.* at 437.

106. *Id.*

107. *Id.* at 439 (emphasis added) (quoting Martinez v. N.B.C., Inc., 49 F. Supp. 2d 305, 310 (S.D.N.Y. 1999)).

108. *Id.* (emphasis added).

109. While these cases involving discrimination claims because of a particular aspect of the lives of many women, such as reproduction or childcare, could fit within the discussion of second-generation claims as well, I include them here because they were framed as relatively straightforward discrimination cases yet were barred, nonetheless, by the comparator demand. *Cf.* Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1 (1995) (questioning whether the recognition of differences between men and women related to reproductive capacity as categorical overstates the difference between socially constructed and biologically rooted gendered distinctions).

to be considered discriminatory, the law of discrimination has, in effect, been narrowed as well.

B. The Comparator Heuristic's Flaws as Amplified in Second-Generation Cases

Not surprisingly, if finding an adequate comparator is difficult in a "simple" discrimination case, where an individual alleges that he or she was treated differently because of his or her protected trait, then the task becomes even more daunting when a claim rests on a more complex understanding of identity or the surrounding workplace structures. Many of the problems posed by the comparator demand in these cases echo those just discussed. Still, the ways in which they manifest render nearly all second-generation cases nonviable, reinforcing the starkness of the disconnect between these newer theories of discrimination and the existing comparator-focused jurisprudence.[110] Hence their separate treatment here.[111]

1. Intersectionality

Among the various cases that track intersectionality theory's insights, the simplest are known as trait-plus cases, in which an employer imposes a rule on members of one group in a workplace based on a combination of their protected trait and some other unprotected attribute, such as having young children or being married to a fellow employee. An early case in this area, *Phillips v. Martin Marietta Corp.*, signaled the possibility of success for an individual who could show, via an explicit policy such as a bar on employment applications from women with small children, that an employer had treated a subset of employees adversely because of a protected trait.[112] Absent an explicitly discriminatory policy, however, an individual is typically required to produce a comparator to show that the adverse treatment is trait-based. This means that the individual must identify a coworker who not only has comparable job responsibilities and lacks the same protected trait but also has the same unprotected attribute, such as parental or marital status.

110. The last Part of this Article returns to this disconnect to discuss alternate methodologies that have the potential to be inclusive of the thicker, second-generation conceptualizations of discrimination.

111. Even for those who would not characterize the circumstances described below as involving discrimination, it is useful to see the similarities in the ways in which the comparator demand affects consideration of both these and first-generation types of claims.

112. 400 U.S. 542 (1971). In *Martin Marietta*, there was a clear comparator group of men with small children whose applications were not barred by the challenged rule. *Id.* at 544.

Given the difficulties associated with finding an adequate comparator in the simplest of circumstances, as described earlier, there are likely to be even fewer, if any, close comparators in these kinds of cases.[113] Consider, for example, the Tenth Circuit's rejection of a sex discrimination claim by an airport custodian shift supervisor who alleged that she was treated worse than the male shift supervisors when she was fired because her husband, whom she supervised, was reported to have left his workplace during his shift.[114] The court cited a litany of cases for the proposition that "gender-plus plaintiffs can never be successful if there is no corresponding subclass of members of the opposite gender."[115] Adding that "[s]uch plaintiffs cannot make the requisite showing that they were treated differently from similarly situated members of the opposite gender,"[116] the court found that Ms. Coleman's claim failed because she could not show that the employer treated her "differently from men who also were married to subordinate employees."[117]

More complicated still are the situations in which an individual claims discrimination based on more than one protected category. These intersectional or multidimensional claims arise when an individual seeks to show that the employer discriminated because of the individual's particular combination of traits, rather than simply trying to show that the employer discriminated on two distinct grounds.[118] As one court explained in connection

113. The challenge here is thus somewhat similar to the challenge for the "unique" Mrs. Troupe in the pregnancy-leave discrimination case described above. *See supra* text accompanying notes 87-89.

114. Coleman v. B-G Maint. Mgmt., Inc., 108 F.3d 1199 (10th Cir. 1997).

115. *Id.* at 1204. As the court also explained, in a "plus"-type case, "although the protected class need not include *all* women, the plaintiff must still prove that the subclass of women was unfavorably treated as compared to the corresponding subclass of men." *Id.* at 1203.

116. *Id.* at 1204.

117. *Id.* at 1205.

118. *See, e.g.*, Vasquez v. Cnty. of L.A., 349 F.3d 634, 653-55 (9th Cir. 2003) (Ferguson, J., dissenting) (stating that a comment about the plaintiff having a "typical Hispanic macho attitude" and others like it showed "particularly offensive stereotypes about Hispanics as lazy, and about Hispanic males as aggressive and domineering" and finding that the remarks and other conduct stated a claim "as to whether [the plaintiff] was subjected to an abusive workplace because of his race and his sex"); Anthony v. Cnty. of Sacramento, 898 F. Supp. 1435, 1445 (E.D. Cal. 1995) (denying defendants' summary judgment motion and stating that "the epithet 'black bitch' cannot be designated exclusively as either racist or sexist"); *see also* Rogers v. Am. Airlines, Inc., 527 F. Supp. 229 (S.D.N.Y. 1981) (finding that African-American women did not constitute a discrete class for the purposes of a Title VII suit); DeGraffenreid v. Gen. Motors Assembly Div., 413 F. Supp. 142, 143 (E.D. Mo. 1976) ("[T]his lawsuit must be examined to see if it states a cause of action for race discrimination,

with a suit brought by an Asian woman, for example, "Asian women are subject to a set of stereotypes and assumptions shared neither by Asian men nor by white women" so the absence of evidence of discrimination against Asian men or white women would not disprove the plaintiff's claim.[119]

Most courts exclude as possible comparators anyone who shares any of the protected characteristics that form the basis of the plaintiff's claim,[120] so that finding a comparator for an intersectional claimant is even more difficult than it is for individuals who base their claim on one protected characteristic. As one court explained, "[T]he more specific the composite class in which the plaintiff claims membership, the more onerous th[e] ultimate burden" of proving discrimination becomes.[121] Thus, even if anecdotal and social science evidence reveals the real experience of intersectional discrimination,[122] it will usually be impossible, as a practical matter, for an individual to find his or her negative mirror image to show that discrimination has occurred. As a result, as one commentator has observed, "courts have basically given up on the complex subject."[123]

2. *Identity Performance*

A second type of complex case for which the comparator demand inhibits the observation of discrimination is the identity performance case. In developing the idea that "[w]orkplace discrimination is driven by more than

sex discrimination, or alternatively either, but not a combination of both."), *aff'd in part, rev'd in part*, 558 F.2d 480 (8th Cir. 1977).

119. Lam v. Univ. of Haw., 40 F.3d 1551, 1562 (9th Cir. 1994); *see also id.* ("[T]he attempt to bisect a person's identity at the intersection of race and gender often distorts or ignores the particular nature of their experiences."); Jefferies v. Harris Cnty. Cmty. Action Ass'n, 615 F.2d 1025, 1032 (5th Cir. 1980) ("The essence of Jefferies' argument is that an employer should not escape from liability for discrimination against black females by a showing that it does not discriminate against blacks and that it does not discriminate against females."); Kotkin, *supra* note 15, at 1475 (describing *Lam* as "one of very few 'plus' claims to have met success").

120. *See* Kotkin, *supra* note 15, at 1491-92; *cf.* Philipsen v. Univ. of Mich. Bd. of Regents, No. 06-CV-11977-DT, 2007 WL 907822, at *6 (E.D. Mich. Mar. 22, 2007) ("Courts are split . . . over whether the proper comparator may only include a person outside of the protected class who has the same 'plus characteristic' as the plaintiff (in this case, a male with young children) or whether the comparator may include any *person* (male or female) who lacks the 'plus' characteristic (in this case, a female without young children).").

121. Jeffers v. Thompson, 264 F. Supp. 2d 314, 327 (D. Md. 2003).

122. *See* Kotkin, *supra* note 15, at 1446 & n.22 (discussing sources).

123. *Id.* at 1462.

the physiological markers of outsider difference,"[124] Devon Carbado and Mitu Gulati observed that outsiders who want to succeed in a workplace "often find themselves having to do extra work to make themselves palatable and their insider employers comfortable."[125] Addressing clothing and hairstyle choices, language use, and styles of socializing, Carbado and Gulati identify "strategic passing," "comforting," "using prejudice," and other strategies as existing along this continuum of identity work.[126] Those who do not engage in these "comfort strategies" may find themselves out of work or outside the partnership track.

In considering what a discrimination claim on these grounds might look like, Carbado and Gulati offer the example of the "fifth black woman" who presents herself, through her choices about clothing and socializing, in ways more associated with African-Americans than do four other black female colleagues.[127] Ultimately, the four others get promoted but the fifth black woman does not, although all have produced comparable work. The question for purposes here becomes whether a court could recognize race discrimination in that set of facts, which indicate that the fifth employee's nonpromotion was because of the way she performed her race. Even if the fifth black woman could produce a comparator from outside of her demographic group, such as a white

124. Carbado & Gulati, *supra* note 21, at 1307; *see also* Green, *Work Culture*, *supra* note 23, at 628 ("[S]etting behavioral expectations along a white, male norm imposes extra performance costs on outsiders and forces reconstruction of identity."); Gowri Ramachandran, *Intersectionality as "Catch 22": Why Identity Performance Demands Are Neither Harmless Nor Reasonable*, 69 ALB. L. REV. 299, 300 (2005) ("[N]egotiating multiple identity performance demands simultaneously often places intersectionals in a uniquely restricted situation, one that has been referred to in other contexts as a 'catch 22' or 'double bind.'"); Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1199-1230, 1269 (2004) (arguing that interpretations of Title VII that "fail to account for the role that volitional behavior or race/ethnicity performance plays in defining individual identity" leave courts unable to reach "equitable resolution" of discrimination claims); Laura Morgan Roberts & Darryl D. Roberts, *Testing the Limits of Antidiscrimination Law: The Business, Legal, and Ethical Ramifications of Cultural Profiling at Work*, 14 DUKE J. GENDER L. & POL'Y 369, 378-86 (2007) (discussing "[i]dentity [p]erformance as a [s]trategic [r]esponse to [w]orkplace [c]ultural [p]rofiling"); Kimberly A. Yuracko, *Trait Discrimination as Race Discrimination: An Argument About Assimilation*, 74 GEO. WASH. L. REV. 365, 369 (2006) ("This paper seeks to begin the process of defining the ways in which employers use trait discrimination so as to begin a more useful normative discussion about when, if ever, antidiscrimination law should prohibit such discrimination.").

125. Carbado & Gulati, *supra* note 21, at 1307.

126. *Id.* at 1299-1307.

127. *See* Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 714-19 (2001).

man, the promotion of four "comparable" peers who are similar with respect to their race and sex (that is, the protected traits on which a claim might be filed) would likely be treated as undermining any inference of discrimination a factfinder might otherwise draw from the comparison.[128] There may well be other strategies for illuminating the possibility that the employer acted with discriminatory intent, as will be discussed shortly, but comparison will be unavailing.

Perhaps the most classic illustration of identity-performance discrimination from case law is *Rogers v. American Airlines*, in which a federal district court rejected a claim that the airline's prohibition of cornrows amounted to race discrimination.[129] "[E]ven if socioculturally associated with a particular race or nationality," the court wrote, the hairstyle "is not an impermissible basis for distinctions in the application of employment practices by an employer."[130] The *Rogers* analysis has since been repeated by numerous courts, which have rejected employees' claims that employer restrictions on or comments about personal appearance choices amount to trait-based discrimination.[131] In a case

128. *See, e.g.*, Smith v. Planas, 975 F. Supp. 303, 308 (S.D.N.Y. 1997) ("Five of the seven individuals identified by Plaintiff as having received higher-paying assignments were black—members of Plaintiff's protected class. As such, Plaintiff has failed to make out a prima facie case of race discrimination because he cannot show that the adverse employment action taken against him occurred in circumstances giving rise to an inference of race discrimination."); Samuels v. N.Y. State Dep't of Corr. Servs., No. 94-CV-8645, 1997 WL 253209, at *5 (S.D.N.Y. May 14, 1997) (finding that an African-American woman failed to articulate a prima facie case for race discrimination because, as two of her alleged comparators were African-American men, she "[could not] show that the adverse employment action taken against her . . . occurred in circumstances giving rise to an inference of race discrimination"). *But see, e.g.*, Graham v. Long Island R.R., 230 F.3d 34, 43 (2d Cir. 2000) ("[Because] Title VII's principal focus is on protecting individuals, rather than a protected class as a whole, an employer may not escape liability . . . simply because it can prove it treated other members of the employee's group favorably.").

129. 527 F. Supp. 229 (S.D.N.Y. 1981). Rogers argued that the grooming policy "discriminate[d] against her as a woman, and more specifically as a black woman." *Id.* at 231; *see also id.* at 231-32 (quoting Rogers's contention that the cornrow style "'has been, historically, a fashion and style adopted by Black American women'"). Scores of articles have analyzed the *Rogers* decision and the racial nature of the airline's selective hairstyle restriction. *See, e.g.*, Paulette Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365; Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEO. L.J. 1079 (2010).

130. *Rogers*, 527 F. Supp. at 232.

131. *See, e.g.*, Tavora v. N.Y. Mercantile Exch., 101 F.3d 907, 908-09 (2d Cir. 1996) (citing numerous cases to support the conclusion that sex-based hair length rules do not violate sex discrimination prohibitions); Pitts v. Wild Adventures, No. 7:06-CV-62-HL, 2008 WL 1899306, at *6 (M.D. Ga. Apr. 25, 2008) (finding that a theme park employer's ban on dreadlocks and cornrows did not amount to race discrimination in part because "the policy

against the United Parcel Service, for example, a driver alleged racial discrimination and harassment in connection with comments about his dreadlocks, which he associated with his African identity as well as his religious beliefs.[132] Among other comments, UPS managers told him he looked like Stevie Wonder, equated his hair with drug use, and more.[133] Yet the court concluded that race was not implicated. "These comments and abuse," the court wrote, "while hurtful, sophomoric and insulting, are not racist in nature and do not support a reasonable inference of racial discrimination."[134] Likewise, another district court found that an employer's conduct was harassing but not racially motivated when he criticized an African American employee's hairstyles, "commented 'it's a black thing' one day when Miller was discussing her hair and fingernails with a white female co-worker," and asked her, among other similar questions, whether she was going to the zoo or to the jungles of Nigeria when she wore an animal-print top.[135]

In these cases, the comparator demand plays what might be described as a supporting role in limiting the discrimination theory's reach. Although courts are generally dismissive of grooming code discrimination claims as restrictions on "personal preference" rather than identity,[136] they also take the absence of comparators to reinforce the absence of discriminatory intent. For example, in *Eatman*, the court observed that the driver "ha[d] not identified any specific similarly situated non-black employee who was not disciplined for violating the hair appearance guideline."[137] It added, in response to the driver's showing that seventeen of the eighteen affected employees were black, that this

applies to all races and there is no evidence that the policy was enforced only against African-Americans"); Austin v. Wal-Mart Stores, Inc., 20 F. Supp. 2d 1254, 1257 n.4 (N.D. Ind. 1998) (citing *Rogers* to sustain store's sex-based hair length rules); *see also* Jespersen v. Harrah's Operating Co., 444 F.3d 1104 (9th Cir. 2006) (en banc) (sustaining sex-based grooming code restrictions against a sex discrimination claim); *Austin*, 20 F. Supp. 2d at 1256 (holding, with respect to a grooming code, that "discrimination based on factors of personal preference" does "not necessarily restrict employment opportunities and thus" is "not forbidden").

132. Eatman v. United Parcel Serv., 194 F. Supp. 2d 256, 259 (S.D.N.Y. 2002). Thanks to Kimberly Yuracko for discussion of *Eatman* and some of the other contemporary identity performance cases noted here.

133. *Id.* at 261, 264.

134. *Id.* at 265.

135. Miller v. CCC Info. Sys., Inc., No. 95 C 6612, 1996 WL 480370, at *1 (N.D. Ill. Aug. 22, 1996). Miller had argued that the hairstyle and clothing comments "were 'racial' because white people do not wear their hair in the same style." *Id.* at *3.

136. *See, e.g.*, *Austin,* 20 F. Supp. 2d at 1256.

137. *Eatman*, 194 F. Supp. 2d at 264.

circumstantial evidence "would not, on its own, reasonably support a finding of discriminatory intent against African Americans."[138] Likewise, in *Rogers*, even while the court stressed that "[a]n all-braided hair style is an 'easily changed characteristic,'" it bolstered its argument by observing that the cornrows ban "applies equally to members of all races."[139]

3. *Structural Discrimination*

In a third situation—where workplace norms, structures, and interactions tend to obscure discriminatory intent (the "structural" cases)—the treatment of comparators as prerequisite to a claim may also exacerbate the difficulties that individuals already face in illuminating discrimination. The claim of structural analysis, as noted earlier, suggests that standard enforcement of discrimination laws misses many of the ways in which members of nondominant groups are excluded or marginalized not only by their supervisors but also by coworkers and others, with a detrimental effect on the terms and conditions of their employment.[140] This analysis, which reflects both the changed workplace and our increasingly refined understanding of the dynamics producing inequality, requires adjudicators to recognize complexly constituted, nonexplicit bias in interactions that often take place over time.[141]

The difficulty is that this view of the dynamics that produce inequality does not match the behavioral assumptions behind the comparator approach, which rely most heavily on striking differences in an employer's treatment of comparable coworkers as the signal of discriminatory intent.[142] A woman may be given less weighty assignments or excluded from certain meetings or outings that ultimately limit her opportunities to advance within a firm, yet unless a precisely comparable male colleague has not been excluded, the different treatment will not be legible for a court focused on actual comparators. Consider the law firm environment, for example. Because associates work on an array of cases, often with a variety of supervisors, a

138. *Id.*; *see also id.* at 265 ("Locked hair . . . is not so closely associated with black people that a racially neutral comment denigrating it can reasonably be understood as a reflection of discriminatory animus . . . . ").

139. Rogers v. Am. Airlines, 527 F. Supp. 229, 232 (S.D.N.Y. 1981).

140. *See supra* note 23 and accompanying text.

141. *See* Sturm, *supra* note 18, at 469 (explaining that the complexity of these claims "lies in the multiple conceptions and causes of the harm, the interactive and contextual character of the injury, the blurriness of the boundaries between legitimate and wrongful conduct, and the structural and interactive requirements of an effective remedy").

142. *See supra* note 72.

female associate is unlikely to be able to identify a sufficient number of closely comparable colleagues with sufficiently similar credentials and assignments to make a persuasive case of sex-based disparate treatment based on differences in assignment quality.[143]

Notably, some recent class actions have succeeded in persuading courts, at least for class certification purposes, that a particular type of hiring or promotion process (usually one in which supervisors have relatively unfettered discretion) is likely to facilitate discrimination based on a protected characteristic.[144] Ordinarily, though, the constricted view of comparators that operates in most cases means that few plaintiffs are able to provide an adequate comparator class that has not been disadvantaged by the employer's practices.

In short, although comparison is the dominant method used for observing discrimination, an actual and sufficient comparator turns out to be unattainable for most individuals who claim discrimination. Further, because of the numerous situations in which a comparator does not exist by virtue of the theory underlying the claim, the insistence on comparators renders whole

143. *Cf.* Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509 (3d Cir. 1992) (rejecting a claim that a law firm's assignment system had disadvantaged the plaintiff because of sex rather than because of her academic credentials); David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CALIF. L. REV. 493, 585 (1996) (arguing that "[n]either disparate treatment nor disparate impact analysis is well suited to rooting out the kind of adverse employment practices" related to assignments, training, and mentoring that are critical to advancement within law firms); S. Elizabeth Foster, Comment, *The Glass Ceiling in the Legal Profession: Why Do Law Firms Have So Few Female Partners?*, 42 UCLA L. REV. 1631, 1642-43 (1995) (discussing the "exclusionary and discriminatory behavior" in law firms that results in women's diminished opportunities for advancement).

144. *See, e.g.*, Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571 (9th Cir. 2010) (en banc) (certifying a sex discrimination class action based in part on a determination that the employer's promotion practices could have facilitated sex-based decisionmaking) *cert. granted*, 79 U.S.L.W. 3128 (U.S. Dec. 6, 2010) (No. 10-277); Butler v. Home Depot, Inc., Nos. C-94-4335 SI & C-95-2182 SI, 1997 WL 605754, at *7 (N.D. Cal. Aug. 29, 1997) (sustaining certification of a sex discrimination class action challenging hiring and promotion practices and quoting expert testimony explaining that "[i]n the context of a male-dominated culture, relying on highly arbitrary assessments of subjective hiring criteria allows stereotypes to influence hiring decisions"). *But see, e.g.*, EEOC v. Chi. Miniature Lamp Works, 947 F.2d 292, 305 (7th Cir. 1991) (rejecting a race discrimination in hiring claim and holding that "[w]ithout probative evidence of discriminatory intent, however, Miniature is not liable when it passively relies on the natural flow of applicants for its entry-level positions"); EEOC v. Wal-Mart Stores, Inc., No. 6:01-CV-339, 2010 WL 583681, at *3 (E.D. Ky. Feb. 16, 2010) (excluding expert witness testimony regarding the link between an employer's practices and sex discrimination on the grounds that the expert had not shown discriminatory intent when concluding that the "overwhelmingly male-dominated workforce" was likely to influence hiring decisions).

categories of potentially discriminatory conduct beyond the reach of discrimination law.

III. ON THE CONCEPTUAL LIMITATIONS OF COMPARATORS

As we have seen, courts place comparators on something of a doctrinal pedestal by treating them as the default heuristic and as a threshold requirement for illuminating whether discrimination could have occurred. Yet the vast number of cases in which comparisons simply cannot be made begs the question whether comparators deserve this status and whether we ought to accept, as many courts and individual judges have, that if no comparison can be drawn, discrimination could not have occurred.

This Part argues that courts' unequivocal embrace of comparators overstates comparators' revelatory powers related to discrimination in two ways. First, the heuristic is overinclusive; it does not prove as much as it is often treated as proving, at least not without important additional assumptions from the factfinder. And second, the heuristic is underinclusive; a comparator's absence does not necessarily show that discrimination has not occurred. To be clear, I am not suggesting that, as a result of these vulnerabilities, we abandon comparators entirely as a means of recognizing discrimination. Indeed, given the challenges associated with any means of observing discrimination, coupled with the entrenched judicial preferences for comparators and the heuristic's occasional utility, that position would be both unwise and unrealistic.

My point, instead, is that comparators, like other methodological devices, work by virtue of unstated assumptions about the nature of discrimination and about how best to identify it. When we take account of these assumptions, we will be better positioned to see that the comparatively different treatment revealed by the heuristic is a byproduct of discrimination rather than discrimination itself. With that awareness, we will also be better positioned to avoid erroneously insisting upon the presence of a differently treated comparator as a necessary (and, in some cases, sufficient) element of discrimination.

A. Comparators as Overinclusive

At the most basic level, comparators are surely useful in reducing the set of variables that might explain an employer's adverse treatment of one employee

relative to another.[145] Yet the move from the reduced set of explanations to the conclusion that an employer more likely than not acted because of the employee's protected trait is not as defensible as courts sometimes suggest.

Indeed, the confidence that many courts express in the power of comparison to reveal discrimination contrasts sharply with other significant strands of American discrimination jurisprudence that recognize the complex and idiosyncratic nature of most employment decisions. As the Court has observed, "[T]reating seemingly similarly situated individuals differently in the employment context is par for the course."[146] Again: "To treat employees differently is . . . . simply to exercise the broad discretion that typically characterizes the employer-employee relationship."[147] Although the Court was writing in the context of a public employee's equal protection argument that her layoff was impermissibly arbitrary, its understanding that employers "'often must take into account the individual personalities and interpersonal relationships of employees in the workplace'"[148] could hardly be limited to those circumstances.

Yet if the baseline expectation is that employers will regularly treat similarly situated employees differently,[149] different treatment of comparable coworkers is likely to reflect merely benign variation in the workplace.[150] On this view, the comparator heuristic would be flawed if the fact of different treatment triggered our suspicion that discrimination had occurred.

145. If two employees have the same educational and experiential qualifications and similar job responsibilities, the set of possible explanations for the employer's negative treatment of one of them is significantly reduced. As compared to a situation in which the employees have different qualifications and responsibilities, then, discrimination is proportionately more likely to be the reason for the employer's adverse action.

146. Engquist v. Or. Dep't of Agric., 553 U.S. 591, 604 (2008).

147. *Id.* at 605; *see also Ezold*, 983 F.2d at 542 (observing that Title VII "does not require employers to treat all employees fairly").

148. *Engquist*, 553 U.S. at 604 (quoting Brief for Petitioner at 48, *Engquist*, 553 U.S. 591 (No. 91-1780)).

149. This view that employers regularly act arbitrarily but without discriminatory intent reinforces, and is reinforced by, the strong commitment to at-will employment and the related reluctance of courts to "second-guess difficult and expertise-laden personnel judgments." David Charny & G. Mitu Gulati, *Efficiency-Wages, Tournaments, and Discrimination: A Theory of Employment Discrimination Law for "High-Level" Jobs*, 33 HARV. C.R-C.L. L. REV. 57, 100 (1998). For further discussion of the comparator heuristic's synergies with judicial deference to employers, see *infra* notes 215-217 and accompanying text.

150. *But see* Selmi, *supra* note 15, at 561-62 (arguing that courts underestimate the probability that discriminatory intent infects this sort of seemingly idiosyncratic treatment).

Even if employers ordinarily treat similarly situated employees in the same way, different treatment can signal discrimination only if we make several additional, arguably fragile assumptions. For one, reliance on comparators as expositors of discrimination assumes that employers act rationally, so that when they deviate from their typical equal treatment model, they do so deliberately in a way that reliably signals discrimination.[151] If we assume, instead, that employers are not fully rational, we can find discrimination only by making the additional assumption that discriminatory intent, rather than arbitrariness or idiosyncrasy, is more likely to explain deviations from equal treatment.[152]

Of course, any exercise in comparison also requires the analyst to treat the inevitable differences between individuals as nonsalient. Because all individuals have multidimensional aspects of their identities, as current iterations of intersectionality theory show, very close comparators are hard to come by even for a relatively simple discrimination claim. In almost any setting, there are innumerable differences between individual employees, both by virtue of personal background and job assignments, that conceivably could explain an employer's adverse action against one but not another. In "high-skill or knowledge intensive jobs,"[153] this is true almost by definition, as no positions are exactly alike or often even very similar—at least in a workplace striving for an efficient, nonduplicative management structure. This not only makes monitoring difficult[154] but also renders the comparator heuristic virtually unusable, as the essence of hiring and promotion in these positions depends on the unique set of skills and contacts that an experienced professional brings to a position. In this light, different treatment can nearly always be attributed to nondiscriminatory motivations. Yet the typical judicial reliance on the comparator heuristic does not ordinarily engage in depth, or at all, with those consequential determinations.

Even in the context of lower-level positions, a comparison between two individuals who perform the same function but differ by the nature of their protected trait shows us intentional discrimination occurred only if we make assumptions that allow the comparison to do so. In this context, I think back to my days working at an ice cream shop. My manager, Chip, never liked me

151. Relatedly, if we were to treat job descriptions as reliable indicators of which jobs might be comparable across positions in a firm, we would assume a stability that runs contrary to the dynamic realities of actual jobs in any given workplace.

152. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 527 (1993).

153. Charny & Gulati, *supra* note 149, at 60.

154. *Id.* at 60-61.

much and made clear from time to time that he wanted to fire me. Had he done so while leaving in place my male coworkers and replacing me with a young man, I could have demonstrated a prima facie case of sex discrimination. Or, if he fired only me after learning that every scooper, including me, gave away ice cream to friends, the comparison could also suggest sex discrimination—disparate punishment of similarly situated employees for the same offense—if we let it. Given what we know about Chip's sentiments toward me, however, comparison is not necessarily revealing of Chip's reasons for the adverse action. Still, at the prima facie stage, this might not trouble us—the work that comparison does here, at most, is to make an opening suggestion that Chip fired me for an impermissible reason; it need not be treated as conclusive proof.

But, as we move through the burden-shifting process, we ought to consider what additional work, if any, we allow the comparison to do. Or, put another way, the question is whether (and why) we treat the comparison as probative at all. Taking the case to the next stage, imagine that Chip offered a nondiscriminatory reason for firing me—he disliked my sense of humor or my commitment to my schoolwork. And suppose I offered evidence in response that he laughed heartily at my jokes and repeated them to others and had given me the same congratulatory ice cream cake for doing well at school that he had given to my male ice cream scooping peers. Then what? I have arguably shown not only that his reasons for the firing were not credible, but also that they were pretexts for discrimination.

At this point, we might say that the set of possible reasons for Chip's actions has been narrowed even further, to the point that we will treat sex discrimination as the likely reason for his firing me.[155] But, again, comparison is the "closer" on my discrimination claim only if we are willing to impute discriminatory intent to Chip's comparatively worse treatment of me relative to my male coworkers. The governing law says that we can; although the doctrine would not mandate a determination that Chip discriminated,[156] my evidence would allow a factfinder to hold that Chip had discriminated against me.

155. *Cf.* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000) ("[O]nce the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision.").

156. *St. Mary's Honor Ctr.*, 509 U.S. at 511 (holding that a court's "rejection of the [employer]'s proffered reasons" for its actions does not entitle a plaintiff to judgment as a matter of law).

Yet if we could peer into Chip's mind, we might have learned that his dislike was rooted in my particular ambitions for college (which were different from those of my also-college-bound scooping peers) rather than in my being female.[157] Comparison, seen in this light, was helpful for showing that Chip saw me differently from how he saw my peers[158] but was misleading to the extent that we read more into it than that. In other words, while the comparison can reliably narrow the set of reasons for Chip's actions, we *choose* to infer that Chip acted "because of sex." The comparator analysis itself does not require that interpretation of the facts.

Two interrelated observations follow. The first is simply that, as suggested above, comparators are a valuable filtering device, in that we can be reasonably confident in their ability to shrink the set of possible explanations for an employer's action. The second is that comparators are imperfect filtering devices; they are not a clear, or necessarily reliable, window into discriminatory intent.

Although some might say that this imperfection of fit should lead us to abandon comparators altogether, that is not my suggestion. It is always the case that circumstantial evidence requires a factfinder to draw inferences about intent rather than guaranteeing certainty.[159] And it is always the case that, unless we limit discrimination claims to situations where employers admit that they acted because of an employee's protected characteristic, we must draw from circumstances. Consequently, to the extent that we recognize discrimination even when an employer denies having discriminated and require plaintiffs to prove an employer's discriminatory intent, comparators are among our best resources.[160]

The point, instead, is that comparators themselves neither provide definitive insight into employers' motives nor inevitably compel conclusions regarding whether an employer acted because of an employee's protected trait, as courts often suggest they do. Instead, the comparator's revelation of

157. As the Court explained in *Price Waterhouse v. Hopkins*, "In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman." 490 U.S. 228, 250 (1989).

158. As a potential additional virtue, the comparator framework may encourage employers to be more explicit and comprehensive about the grounds for their actions and their agents' actions to protect against adverse inferences.

159. *See supra* note 40 and accompanying text.

160. Still, the imperfections of such an approach raise interesting questions about why the courts treat comparison as confidently as they do. I consider these questions below.

discriminatory intent rests on a set of assumptions about both the similarity of the complainant and the comparator and the baseline rationality of employers. For the comparator's probative work to be assessed properly, relative to other methodologies, those assumptions must be part of the conversation. The comparator's imperfections as a filtering device ought also to give us pause with respect to the transformation of comparators from heuristic to substantive law.

B. Comparators as Underinclusive

The comparator heuristic's underinclusiveness should give us additional cause to be dubious when courts treat comparators as the only or preeminent method for illuminating discriminatory intent. Recall that the triggering problem for discrimination law is the employer's decision to take action because of the trait. This means, again, that while the presence of a comparator may help illuminate an employer's reliance on a protected trait, the existence of a better-off comparator is a byproduct of the discrimination rather than the discrimination itself.

The Supreme Court made this point when considering the sex discrimination claims of female security guards who alleged that the county government running the jail where they worked intentionally paid them less because they were female.[161] In its defense, the county argued that discrimination could have occurred only if the women had engaged in "equal work" relative to the male guards.[162] The Court was clear that the county's comparative conceptualization of discrimination was unduly constrained. "In practical terms," the Court wrote, restricting recognition to instances where comparisons could be made would "mean[] that a woman who is discriminatorily underpaid could obtain no relief—no matter how egregious the discrimination might be—unless her employer also employed a man in an equal job in the same establishment, at a higher rate of pay."[163] The Court labeled this type of practice as "blatantly discriminatory," recognizing that the discrimination was rooted not in the comparison between men and women but in the employer's decision to underpay an employee because she is a woman.[164]

161. Cnty. of Wash. v. Gunther, 452 U.S. 161 (1981).

162. *Id.* at 177.

163. *Id.* at 178.

164. *Id.* at 179.

Likewise, the Second Circuit observed:

> If [an] employee were fired for a discriminatory reason, and no one was hired to replace him, he could never demonstrate disparate treatment because there is no point of comparison. . . . [I]t stands to reason that, in such a case, the plaintiff should be able to create an inference of discrimination . . . .[165]

Or imagine, returning to my ice cream scooping experience, that Chip fired me because of my sex but did not replace me with another scooper. The absence of a comparator would not change the fact that Chip treated me adversely "because of sex."

In other words, if we understand discrimination to mean adverse treatment because of a protected trait, we ought to be able to find discrimination even when comparison is not a meaningful possibility. It is no doubt true that, without a comparator, the fact that an employer acted because of the employee's trait rather than for some other reason becomes more difficult to see. But, to the extent we agree that the discrimination could have occurred, our limitations in seeing discriminatory intent should prompt us to explore other methodologies and perhaps rethink the way in which courts rely on comparators as our best, or even exclusive, methodology.

C. Comparison and Disparate Impact

Interestingly, disparate impact theory and jurisprudence reinforce how questionable the conceptual link is between comparators and proof of discriminatory intent. Comparison is critical to disparate impact cases in that the trait-based impact is ordinarily shown by comparing the effect of a rule or policy on individuals with and without the protected trait at issue. So, for example, in the Court's recent ruling in *Ricci v. DeStefano*, the disparate impact claim rested in part on a showing that the city's decision not to rely on test results had a comparatively adverse effect on white firefighters who would have been promoted had the test results been counted.[166]

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165. Abdu-Brisson v. Delta Air Lines, Inc., 239 F.3d 456, 467 (2d Cir. 2001).

166. 129 S. Ct. 2658 (2009). For other cases in which comparators are critical to demonstrating disparate impact, see, for example, *Lewis v. City of Chicago*, 130 S. Ct. 2191 (2010), which found that the plaintiff had made out a cognizable prima facie disparate impact claim by showing that an employment practice affected African-Americans more negatively than others; and *Meacham v. Knolls Atomic Power Laboratory*, 554 U.S. 84 (2008), which held that a disparate impact claim requires plaintiffs to show that employment practices cause statistical disparities between groups.

Yet the point of comparative proof in *Ricci* and other disparate impact cases is not to show the employer's discriminatory intent but rather to highlight the effect of the challenged decision. Indeed, courts do not draw an inference of discriminatory intent from the comparatively adverse treatment. Instead, intent in disparate impact cases is irrelevant to the analysis and, more deeply, to the law's concern in this area, which is to eradicate employer actions that have the effect, if not the aim, of discriminating based on a protected trait.[167] Thus, while the primary focus here is on the overreliance on comparators in disparate treatment cases, the additional evidence of a disconnect between comparators and intent in the disparate impact context should cast further doubt on the faith that courts place in comparators' revelatory powers.

IV. CONTEXT: A METHODOLOGICAL ALTERNATIVE

Notwithstanding the dominance of comparators in much of the employment discrimination jurisprudence, harassment and stereotyping case law shows that the task of observing discrimination can be managed successfully with other techniques and that discrimination is not centrally defined by comparison. Indeed, although these cases are not often treated as different in kind analytically from other discrimination cases, when seen through a comparator lens it becomes clear that they are. While individual employees might offer a comparator as part of their proof, the discrimination claim is typically founded not on a comparison to coworkers but instead on the harassing and/or stereotype-based interactions between the employee and others in the workplace.

More specifically, in the harassment context, the employee will point to one or more statements or acts by coworkers or supervisors that negatively affected the employee's work environment and had either an explicit or implicit connection to the employee's protected characteristic(s). A sexual harassment plaintiff might indicate, for example, that a supervisor or coworker touched her inappropriately or targeted her with sexually demeaning comments.

In the stereotyping cases, an individual will seek to show that an employer treated him or her adversely because of stereotypes associated with the individual's protected characteristic(s). Here, the crux of the claim is typically that the employer acted adversely based on doubts about the individual's

167. *See* Raytheon Co. v. Hernandez, 540 U.S. 44, 52-53 (2003) (noting that while disparate treatment cases depend on an employer's motivation for the challenged acts, disparate impact cases do not).

ability to perform the job at issue not because of merit but because of stereotypes associated with the individual's identity characteristic.

For both types of cases,[168] courts discern discriminatory intent in the acts and statements at issue by looking to all of the surrounding circumstances for the ways in which the protected traits may have operated to affect employer decisionmaking. Comparators may be present, but they are not decisive. For this reason, these cases, and their application of a totality-of-the-circumstances analysis, reinforce the claim here that comparators are best understood as one among several observational tools rather than as a defining element without which discrimination cannot occur. This Part first will trace the development of the contextual methodology in discrimination cases involving stereotyping and harassment, and then will consider the relationship of this method to the work of comparators as a means for seeing discrimination.

A. The Emergence of the Contextual Model in Stereotyping and Harassment Jurisprudence

The recognition that discriminatory intent could be discerned from context, including an employer's acts and statements, rather than from comparison to other employees, initially took hold in the Supreme Court's sexual harassment jurisprudence. Indeed, in the Court's first case to find that harassing acts could themselves amount to discrimination, *Meritor Savings*

168. It bears noting that harassment and stereotyping claims are not mutually exclusive. Indeed, there are a number of cases in which employees have prevailed because the harassment they experienced took the form of stereotyping linked to a protected characteristic. In *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864 (9th Cir. 2001), for example, a male waiter was repeatedly harassed because his coworkers thought he was too effeminate. As the court observed,

> At its essence, the systematic abuse directed at Sanchez reflected a belief that Sanchez did not act as a man should act. Sanchez was attacked for walking and carrying his tray "like a woman"—i.e., for having feminine mannerisms. Sanchez was derided for not having sexual intercourse with a waitress who was his friend. Sanchez's male coworkers and one of his supervisors repeatedly reminded Sanchez that he did not conform to their gender-based stereotypes, referring to him as "she" and "her." And, the most vulgar name-calling directed at Sanchez was cast in female terms. We conclude that this verbal abuse was closely linked to gender.

Id. at 874; *see also* Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1067 (9th Cir. 2002) (en banc) (finding it "clear" that sexualized attacks on a gay man, "who was singled out from his male coworkers" for hostile treatment, stated a sex discrimination claim).

Bank v. Vinson, comparators were but one option on a long list of techniques for discerning discriminatory intent.[169]

In *Meritor*, the Court addressed whether a bank supervisor, who had acted in sexually aggressive ways toward the plaintiff, had acted "because of sex" rather than for some other reason by looking to the Equal Employment Opportunity Commission's guidelines. Those guidelines identified "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" as sexual harassment and, separately, defined sexual harassment as a form of sex discrimination.[170] Yet the Court also made clear that not all such advances and conduct would amount to discrimination; instead, only "sufficiently severe and pervasive" acts would warrant remediation under the statute.[171]

But neither of these points, by itself, shows that the sexualized conduct was "because of sex" rather than for some other reason. Indeed, the Court has since reiterated that sexualized harassment is not necessarily harassment "because of sex" within the meaning of Title VII.[172] As Justice Scalia observed for a

169. The central question was whether a sexually harassed litigant needed to show additional adverse action by the employer, such as demotion or termination, to state a discrimination claim. The Court held she did not. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986) ("Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex."). Both in *Meritor* and subsequently, the Court recognized that racially harassing acts can likewise create a hostile and discriminatory environment. *See id*. at 66-67; *see also* Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 116 n.10 (2002) ("Hostile work environment claims based on racial harassment are reviewed under the same standard as those based on sexual harassment.").

170. *Meritor*, 477 U.S. at 65.

171. *See id.* at 67 ("[The] 'mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee' would not affect the conditions of employment to [a] sufficiently significant degree to violate Title VII." (quoting Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1972))). "For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Id.* (alteration in original) (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)); *see also* Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 68 (2006) ("[I]t is important to separate significant from trivial harms. Title VII, we have said, does not set forth 'a general civility code for the American workplace.'" (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998))); Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) (stating that judicial standards for sexual harassment must "filter out complaints attacking 'the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing'" (quoting BARBARA LINDEMANN & DAVID KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 175 (1992))).

172. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998); *see also* David S. Schwartz, *When Is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1748-58 (2002) (observing that modern academics and courts have questioned the assumption that sexual harassment occurs "because of sex").

unanimous court in *Oncale v. Sundowner Offshore Services*, "We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations."[173] Still, even while characterizing "the critical issue" in a comparative manner—that "members of one sex [be] exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed"—comparators were last on the Court's list of methods of seeing the link between the adverse act and the protected characteristic.[174] The more prominent and "easy" methods, according to the Court, involved consideration of the harassing statements and actions themselves,[175] as well as the defendant's sexual orientation.[176]

The larger point, as the Court explained, is that observing discrimination in a workplace requires consideration of not only "the words used or the physical acts performed" but also "a constellation of surrounding circumstances, expectations, and relationships."[177] In short, what matters for seeing

173. *Oncale*, 523 U.S. at 80.

174. *Id.* (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)); *see also id.* at 80-81 ("A same-sex harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.").

175. *Id.* at 80 ("A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace.").

176. On the relevance of a defendant's sexual orientation, the Court stated:

> Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex. The same chain of inference would be available to a plaintiff alleging same-sex harassment, if there were credible evidence that the harasser was homosexual. But harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.

Id.

177. *Id.* at 82. *See also, e.g.*, Petrosino v. Bell Atl., 385 F.3d 210, 221 (2d Cir. 2004) ("The mere fact that men and women are both exposed to the same offensive circumstances on the job site . . . does not mean that, as a matter of law, their work conditions are necessarily equally harsh. The objective hostility of a work environment depends on the totality of the circumstances."); Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058, 1063 (7th Cir. 2003) (rejecting a discrimination claim after "consider[ing], as in any sex harassment case, the 'social context in which the particular behavior occurs'" (quoting *Oncale*, 523 U.S. at 81)).

discrimination is context, with comparison being but one technique among several for making that contextual evaluation.[178]

The use of this type of contextual but noncomparative evaluation to observe identity-based discrimination can also be seen outside the employment context. In finding that Georgia's segregated confinement of mentally disabled patients amounted to discrimination "by reason of" disability,[179] for example, the Court in *Olmstead v. Zimring* rejected outright the need for a comparator. It declared instead that it could observe discrimination by analyzing the segregating act in context, similar to its approach in the harassment cases. Specifically, the Court rested its "[r]ecognition that unjustified institutional isolation of persons with disabilities is a form of discrimination" on two observations—one related to the expressive meaning of isolation and the other related to the harm caused to those isolated:

> First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life. Second, confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.[180]

In short, the Court saw that the segregation of mentally disabled individuals was discrimination because of disability not by comparing the act to the treatment of others, but instead by looking more broadly at the segregating act's social meaning and its injurious effect.[181]

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178. This could be characterized as a Bayesian approach to evidence. One might also argue that the Court in *Meritor* deployed a hypothetical comparator by imagining, in effect, a man who would not have been subject to the same conduct as the female plaintiff. If that is the case, there is no mention of that analytic move by the Court. Further, the "opposite-sex" hypothetical comparator provides little help in understanding the Court's analysis in the same-sex harassment context, where the Court, as in *Oncale*, did not give any indication that it was imagining that a female worker on the offshore oil platform where Joseph Oncale was harassed would not also have been subject to harassment.

179. Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 598 (1999).

180. *Id.* at 600-01 (internal citations omitted); *see also* City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978) ("In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." (quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971))).

181. Notably, although Congress had specified this type of segregation as discriminatory, the Court did not simply rest on the statute's findings, which "identified unjustified

The importance of contextual evidence of discrimination, rather than comparator evidence, can be seen in stereotyping cases as well. In *Price Waterhouse v. Hopkins*, for example, the Court found that the accounting firm had discriminated impermissibly by relying on sex stereotypes to deny partnership to Ann Hopkins.[182] Although Hopkins had offered evidence of how male partnership candidates had been treated, the Court noted specifically the district court's finding that she did not have an adequate comparator. There were male candidates who lacked the interpersonal skills that Hopkins had also been accused of lacking, but they were not sufficiently comparable because they "possessed other, positive traits that Hopkins lacked."[183] Instead, the Court looked to the sex-stereotyped remarks made about Hopkins to find that the firm had acted "because of" sex. These included the observation by some partners at the firm that she was "macho," that she "overcompensated for being a woman," that she should "take a course at charm school," and that, "to improve her chances for partnership . . . [she] should 'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.'"[184]

In an approach endorsed by others on the Court,[185] the plurality treated its observation of stereotyping remarks as equivalent to observing discriminatory intent directly, writing simply that "stereotyped remarks can certainly be *evidence* that gender played a part" in an employer's decision.[186] Although

'segregation' of persons with disabilities as a 'for[m] of discrimination,'" but, as illustrated, explained and justified that determination. *Olmstead*, 527 U.S. at 600 (citing 42 U.S.C. §§ 12101(a)(2), (5) (2006)).

182. 490 U.S. 228 (1989).

183. *Id.* at 236.

184. *Id.* at 235.

185. *Id.* at 259 (White, J., concurring) ("I agree that the finding [of sex discrimination] was supported by the record."); *id.* at 261 (O'Connor, J., concurring) (agreeing with the plurality that "on the facts presented in this case," Hopkins had showed that the firm relied adversely on her sex in its partnership decision); *id.* at 265 ("Congress was certainly not blind to the stigmatic harm which comes from being evaluated by a process which treats one as an inferior by reason of one's race or sex."). Even the dissenters agreed that "Hopkins plainly presented a strong case . . . of the presence of discrimination in Price Waterhouse's partnership process" and that "[e]vidence of use by decisionmakers of sex stereotypes is, of course, quite relevant to the question of discriminatory intent." *Id.* at 294, 295 (Kennedy, J., dissenting).

186. *Id.* at 251; *see also id.* ("As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."). Further, the Court explained why stereotypes violate Title VII's sex discrimination prohibition: "An employer who objects to aggressiveness in women but whose positions require this trait places women in an

Hopkins had introduced expert testimony to show, through social psychological theory, that these and other comments should properly be seen as sex stereotyping, the plurality characterized that testimony as "merely icing on Hopkins' cake."[187] Making its observation of discrimination sound straightforward, the plurality observed that "[i]t takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring 'a course at charm school.'"[188]

The Court was clear that stereotyped remarks themselves do not necessarily show that impermissible discrimination has occurred. Instead, the employee who has alleged discrimination "must show that the employer actually relied on her gender in making its decision."[189] But, most significant for our purposes, the remarks can help make that showing because they are treated as exposing the employer's intent to act because of the employee's protected characteristic.[190]

B. Acts, Statements, and Automaticity

In essence, the Court, through its "no special training" comments, suggested that drawing the link between acts, statements, and discriminatory intent is undemanding, if not automatic. Yet much like the overstated faith in the comparator heuristic, this characterization also implies that acts and statements themselves do more work than they actually do to establish that an employer has acted because of a protected trait.

Justice O'Connor's commentary in *Price Waterhouse* is illustrative of the way in which courts frequently gloss over the difficulties associated with discerning discriminatory intent from stereotyping statements. As she explained, not every statement regarding an employee's sex necessarily

intolerable and impermissible catch-22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind." *Id.*

187. *Id.* at 256.

188. *Id.*

189. *Id.* at 251.

190. *See also* Prowel v. Wise Bus. Forms, 579 F.3d 285, 291-92 (3d Cir. 2009) (putting comments made to the plaintiff-employee in context and finding those comments sufficient to state a sex stereotyping claim); Schroer v. Billington, 577 F. Supp. 3d 293, 303-05 (D.D.C. 2008) (finding, in context, that an employer's comments about the plaintiff themselves amounted to sex stereotyping).

Some would argue that courts are comfortable turning to context where stereotyping or harassing incidents have occurred because those incidents are more easily understood than other occurrences, as described in the cases in Part II, *supra*, to signal the presence of discriminatory intent. I address this point *infra* at text accompanying notes 264-265.

demonstrates sex stereotyping and, therefore, discriminatory intent. "[A] mere reference to 'a lady candidate' might show that gender 'played a role' in the decision," she wrote, "but by no means could support a rational factfinder's inference that the decision was made 'because of' sex."[191] For Justice O'Connor, this understanding followed from the point that "[r]ace and gender always 'play a role' in an employment decision in the benign sense that these are human characteristics of which decisionmakers are aware and about which they may comment in a perfectly neutral and nondiscriminatory fashion."[192]

Yet distinguishing the comments that reveal discriminatory intent from those that do not is neither as easy nor as obvious as the comments of Justice O'Connor and other members of the Court seem to suggest.[193] While Justice O'Connor did not find the "lady candidate" reference troublesome, others, including Hopkins's expert witness, could make a strong case that the reference showed that the firm's treatment of Hopkins was centrally shaped by her being a woman to the point that the very way in which they identified Hopkins focused on her being female. Likewise, although the majority in *Olmstead* deemed it "evident" that the act of segregating mentally disabled individuals amounted to discrimination,[194] the dissent found it equally evident that no discrimination had occurred.[195]

Indeed, a central claim of second-generation theories is that discriminatory intent is often missed in precisely the sort of "lady candidate" statement that Justice O'Connor dismissed as nonprobative. As discussed earlier, for example, many courts would not see race discrimination in the refusal to promote the "fifth black woman" even if the nonpromoted woman could identify negative comments about her African-style clothing or her black church choir

191. *Price Waterhouse*, 490 U.S. at 277.

192. *Id.*

193. Indeed, as suggested earlier, it is this difficulty that, outside of the stereotyping and harassment cases, drives courts to embrace comparator evidence so strongly.

194. Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 600 (1999).

195. *Id.* at 623 (Thomas, J., dissenting) (describing the majority's analysis as "fly[ing] in the face" of the Court's precedent). We can see similar disagreement over the link between sex-based rules and stereotyping in *Nguyen v. INS*, where Justice O'Connor, in dissent, had no difficulty concluding that a rule favoring mothers over fathers for purposes of conferring U.S. citizenship on foreign-born children was rooted in impermissible sex stereotypes, while a majority of the Court found the sex-based distinction to be perfectly legitimate. *Compare* 533 U.S. 53, 74-97 (2001) (O'Connor, J., dissenting), *with* 533 U.S. at 56-73 (majority opinion). For further discussion of the ways in which the majority and dissenting opinions in *Nguyen* interpreted the same facts differently and, consequently, reached different conclusions about the constitutionality of the challenged rule, see Goldberg, *Constitutional Tipping Points*, *supra* note 30, at 1970-74.

membership, so long as her four African-American peers were promoted.[196] Yet as Carbado and Gulati suggest, when examined closely, those sorts of comments reflect the same sort of racial stereotyping that is seen more easily in other settings.[197]

In other words, a case like *Price Waterhouse* may be easy because the Court "gets" the link between sexism and statements about a partnership candidate being too macho. Likewise, the Court may have little difficulty finding that an employer's use of the word "boy" when talking to African-American employees suggests the presence of discriminatory intent.[198] But there is nothing inherent in harassing acts and stereotyping statements in general that makes their underlying discriminatory intent fundamentally easier to unmask than the discriminatory intent that might underlie other types of adverse treatment. Instead, it is agreement (or presumed agreement) on the social meaning of those acts and statements, when considered through a contextual lens, that renders the cases easy for courts to decide. Consequently the "easy" characterization should be understood as describing the Court's comfort level with finding discriminatory intent in particular acts or statements, and not as suggesting that observing discriminatory intent is any more automatic in the stereotyping and harassment contexts than it is through comparisons.

C. Reconsidering Comparators in Light of the Contextually Focused Stereotyping and Harassment Jurisprudence

Recall Justice Thomas's assertion that a conceptualization of discrimination that does not require a comparison is "nonsensical"[199] and "drains the term of

196. *Cf.* Jesperson v. Harrah's Operating Co., 444 F.3d 1104 (9th Cir. 2006) (en banc) (presenting differing views in majority and dissenting opinions as to whether a policy requiring female employees to wear makeup constituted sex stereotyping); Zalewska v. Cnty. of Sullivan, 316 F.3d 314, 323 (2d Cir. 2003) (declining to give credence to the "stereotype[]" that a woman wearing pants is dressed "more masculinely"); Weinstock v. Columbia Univ., 224 F.3d 33, 44-45 (2d Cir. 2000) (finding that labels such as "nice" and "nurturing" used to describe a female professor were insufficient as a matter of law to demonstrate sexually discriminatory intent).

197. *See* Carbado & Gulati, *supra* note 21, at 1279-93. Again, even readers who reject either the premise of identity performance theory or the view that discrimination law embodies the theory's premise may benefit from seeing that the easy identification of discrimination in some acts and statements but not others is not because those acts and statements are different in kind but rather because there is more general consensus about discriminatory intent underlying some acts and statements than there is about others.

198. *See* Ash v. Tyson Foods, Inc., 546 U.S. 454, 456 (2006).

199. Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 618 (1999) (Thomas, J., dissenting).

any meaning other than as a proxy for decisions disapproved of by this Court."[200] Specifically, Justice Thomas suggested that "no principle" could "limit[] this new species of 'discrimination' claim . . . because it looks merely to an individual in isolation, without comparing him to otherwise similarly situated persons, and determines that discrimination occurs merely because that individual does not receive the treatment he wishes to receive."[201]

If it is correct that discrimination exists only where an individual can show a comparator in a better-off position, then we ought to be able to locate this type of comparison within the harassment and stereotyping jurisprudence. If not, we ought to ask whether Justice Thomas's concerns about the potential lack of a limiting principle for a noncomparative discrimination analysis undermine the validity of the contextual method for observing discrimination.

As a preliminary matter, it is worth reiterating that Justice Thomas's constrained conceptualization of discrimination did not capture majority support when he advanced it in *Olmstead* and that his approach conflicts with the Court's harassment and stereotyping decisions discussed above. Moreover, comparison is arguably counterproductive as a means for illuminating, let alone defining, discrimination where an employer singles out an employee for harassment or stereotyping because of a protected trait. In these kinds of cases, an employee can often show that others outside his or her protected group were not treated adversely, but the employer can likewise show that some within the protected group were not treated adversely either. At that point, the comparison no more allows for an inference of discriminatory intent based on a protected characteristic than for an inference that something else particular to the employee had provoked the employer's actions.

Yet, as discussed above, it is long settled that when an employer targets one employee for adverse treatment from among others who share the same protected trait, discrimination can be found. Despite Justice Scalia's having joined Justice Thomas's opinion in *Olmstead*, it was Scalia's own opinion in *Oncale* that made this point by allowing a man to bring a sexual harassment claim based on the activities of other men in a workplace where no women were present.[202] Even Justice Kennedy, who agreed with Justice Thomas's

200. *Id.* at 624.

201. *Id.*

202. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 77, 79-80 (1998). On the question whether ideas of comparison are embedded in conceptualizations of sexual harassment, Katherine Franke has observed that "sexual harassment is a kind of sex discrimination not because the conduct would not have been undertaken if the victim had been a different sex . . . but precisely because . . . . it perpetuates, enforces, and polices a set of gender norms

insistence on comparators, did not fully embrace the limited scope for discrimination law that Justice Thomas advanced. Instead, he specifically "put[] aside issues of animus or unfair stereotype" when expressing his support for a comparison-based methodology, suggesting, in effect, that the presence of either could render the comparison-driven analysis unnecessary.[203]

All of this reinforces that while comparators are one acceptable mode of exposing discrimination, they are certainly not, conceptually or doctrinally, a categorical requirement. Yet the question remains whether courts, by finding discrimination absent a comparative showing, are misusing discrimination law to mandate their own preferred code of conduct per Justice Thomas's view.

The very suggestion that comparator-based discrimination findings are objective while noncomparative analyses are subjective significantly overstates the differences between these methods for discerning discrimination, creating a false and unhelpfully dichotomous analysis. As discussed earlier, observing discrimination through comparators is no more automatic than through these other means. The determination that a comparator is adequate (or inadequate) for purposes of illuminating discriminatory intent arguably effectuates the subjective preferences of courts at least as much as the finding of discrimination through an examination of acts or statements. So while it is true that making a contextual determination about which acts or statements reveal impermissible discrimination requires judgment calls or assumptions by the court, so too does the application of the comparator analysis.

Indeed, the suggestion that discrimination can truly be seen only via comparators and that all other non-comparison-based discrimination findings amount to policy judgments is reminiscent of a decades-old debate about the underpinnings of equality guarantees. Prompting that debate was the argument, advanced by Peter Westen, that equality was both "empty" and "entirely '[c]ircular'" because similar treatment could be required only for those deemed to be sufficiently similar.[204] Others quickly responded with a

that seek to feminize women and masculinize men." Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 696 (1997).

203. *Olmstead*, 527 U.S. at 611 (Kennedy, J., concurring). Justice Kennedy observed that "[a]t the outset it should be noted there is no allegation that Georgia officials acted on the basis of animus or unfair stereotypes regarding the disabled," *id.*, and argued that "absent a showing of policies motivated by improper animus or stereotypes, it would be necessary to show that a comparable or similarly situated group received different treatment," *id.* at 613.

204. Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 547-51 (1982). Westen argues that:

> Equality is an empty vessel with no substantive moral content of its own. Without moral standards, equality remains meaningless, a formula that can have

range of theories to suggest that the equality guarantee did indeed have valuable content.[205] Yet, however forcefully advocated, each of these positions necessarily rested on the premise that substantive judgments and assumptions were required to give equality its content.[206]

Likewise, the process of observing discrimination necessarily requires judgments about whatever circumstantial forms of evidence we are considering—whether comparisons, harassing acts, or stereotyping statements—as well as decisions about which discrimination theories to embrace. As shown earlier, choices about which comparisons will be treated as exposing discrimination and which will not, just like the choices about which acts and statements are because of a protected trait and which are not, are just that—choices. None is more mechanical or automatic than the other.

Because these choices are thus essential to evaluating any circumstantial evidence, comparators provide false certainty to the extent that they are treated as elemental to, or objectively confirmatory of, discrimination. In turn, this false certainty enables courts to elide accountability (1) for their decisions to require comparators in the first place; and (2) for their dispositive judgments regarding the scope of acceptable comparators and the diminished value of other non-comparator-based evidence. The contextual evaluation, by contrast, gives greater exposure to the choices that courts make regarding their theory of discrimination and the relationship of workplace evidence to that theory. This is because the doctrine insists that a connection be established between the

> nothing to say about how we should act. With such standards, equality becomes superfluous, a formula that can do nothing but repeat what we already know.
>
> *Id.* at 547 (footnote omitted).

205. *See, e.g.*, C. Edwin Baker, *Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection*, 131 U. PA. L. REV. 933 (1983) (urging that an "equality-of-respect" model reflects the best substantive understanding of the equal protection guarantee); Kent Greenawalt, *How Empty Is the Idea of Equality?*, 83 COLUM. L. REV. 1167, 1184-85 (1983) (arguing that the principle of equality has been central to advancement of greater political rights and social opportunities); Karst, *supra* note 33, at 279-80 (maintaining that equality rhetoric has substantive effect on legal rights and political culture); Kenneth W. Simons, *Equality as a Comparative Right*, 65 B.U. L. REV. 387, 389 (1985) ("A right to equal treatment is a *comparative* claim to receive a particular treatment just because another person or class receives it.").

206. *See* Finley, *supra* note 33, at 1144. Discussing Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1711 (1976), Finley writes, "Kennedy's insight is that there is no determinate, coherent way to choose between . . . formal equality or substantive equality. Inevitably, the choice depends on our sets of values and visions of society." *Finley*, *supra* note 33, at 1144 n.113. Finley adds that "[t]here is no way, within the doctrinal framework itself, to tell us when we should adopt the approach of formal equality, and when a substantive equality approach is called for. Instead, we must appeal to deeply political conceptions of what values and type of society we wish to foster." *Id.*

protected characteristic and the acts or statements at issue.[207] Of course, as illustrated by *Price Waterhouse*, where courts find that connection to be easy or obvious, they may move quickly or automatically from the acts or statements to a finding of discrimination.[208] But even in those circumstances, the move is there for all to see, whereas the comparator framework provides cover for courts' similar judgments and the resulting jurisprudential inhibition of all but the most formalistic antidiscrimination norms and theories.

V. JUDICIAL LEGITIMACY AND THE STICKING POWER OF COMPARATORS

At this point we have seen that comparators are not the only means for seeing discrimination and that, by design (or at least in a typical application), there are serious limitations to the discrimination that comparators can reach. Yet comparators remain dominant to the point that discrimination lawsuits typically cannot be won without them.

This Part explores the reasons for comparators' sticking power, and aims both to explain why such an imperfect means for observing and defining discrimination has achieved dominance and to understand the possibilities for new methodologies going forward. My central claim is that comparators have gained their status because their empirical appearance enables courts to accommodate a primary legitimacy concern that plagues judicial intervention on issues related to identity and a subsidiary concern related to employer autonomy. That is, comparators offer a seemingly bright-line framework for identifying elusive facts and resolving complex social judgments even though a flexible framework would be more appropriate.

A. The Legitimacy Concerns at Play

The prospect of a free-form, or even relatively unstructured, inquiry into workplace behaviors related to individual identity taps directly into the legitimacy- and capacity-protecting inclination exhibited by many courts to avoid tasks that have the cast of a sociological inquiry.[209] This antisociological

207. In addition to its value in terms of judicial accountability, the contextual evaluation also adds substantive value by exposing, and possibly avoiding, the diminishment of antidiscrimination norms effected by the comparator heuristic. *See supra* note 33.

208. *See supra* text accompanying notes 182-188.

209. For extended development of this point, see Goldberg, *Constitutional Tipping Points*, *supra* note 30; and Goldberg, *Anti-Essentialist and Social Constructionist Arguments*, *supra* note 30.

bent can be seen, for example, in the Court's turn to visible markers such as ancestral lineage and surnames[210] when defining identity categories, rather than to the more complex and contested social norms that are widely understood, even by the Court, to contribute importantly to the content of these categories.[211] It can be seen as well in the way that the Court cites changed factual understandings about a social group rather than acknowledging changed social norms when invalidating restrictions on group-member rights previously accepted as legitimate.[212]

The basic idea is that while courts may be well equipped to sift among empirical facts, they are less institutionally suited, both in terms of training and resources, for deep investigation and analysis of social norms. Consequently, however attentive they may be to trends in social stances regarding an issue or

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We might point to similar reasons to explain courts' turn to discrimination as the legal framework for evaluating sexual harassment, rather than dignity, which is the more common approach within European law. As Gabrielle Friedman and James Whitman have observed, "For Americans . . . the concept of 'dignity' often remains unconquerably vague, unfillable with meaningful content. . . . It is 'discrimination' that seems the *hard* concept in America, the concept with real content." Gabrielle S. Friedman & James Q. Whitman, *The European Transformation of Harassment Law: Discrimination Versus Dignity*, 9 COLUM. J. EUR. L. 241, 268 (2003).

210. *See, e.g.*, Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 610 (1987) (relying on an early nineteenth-century definition of race "continued series of descendants from a parent who is called the *stock*") (internal citation omitted); Hernandez v. Texas, 347 U.S. 475, 480 n.12 (1954) ("[J]ust as persons of a different race are distinguished by color, these Spanish [sur]names provide ready identification of the members of this class."). These same themes can be traced through lower court decisions. *See, e.g.*, Sail'er Inn, Inc. v. Kirby, 485 P.2d 529, 540 (Cal. 1971) (identifying race and lineage as "immutable trait[s], a status into which the class members are locked by the accident of birth"); Hernandez v. Hous. Indep. Sch. Dist., 558 S.W.2d 121, 124 (Tex. Civ. App. 1977) (characterizing lineage and race as "classifications based upon unalterable traits"). *But see* Commonwealth v. Rico, 711 A.2d 990, 994 (Pa. 1998) ("The mere spelling of a person's surname is insufficient to show that he or she belongs to a particular ethnic group.").

Kenji Yoshino has written in the equal protection context about the way in which a trait's "visibility" enhances the likelihood for heightened judicial review of trait-based classifications. *See* Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 485, 496-98 (1998). He described this visibility as "the perceptibility of traits such as skin color that manifest themselves on the physical body in a relatively permanent and recognizable way." *Id.* at 497.

211. *See, e.g.*, *Saint Francis Coll.*, 481 U.S. at 610-11 (cataloguing dictionaries and encyclopedias that discuss the socially constructed nature of race); Williams v. Wendler, 530 F.3d 584, 587 (7th Cir. 2008) (describing "'race'" as "a fuzzy term").

212. *See* Goldberg, *Constitutional Tipping Points*, *supra* note 30, at 1998-99 (citing Roper v. Simmons, 543 U.S. 551, 610 (2005) (Scalia, J., dissenting)).

a particular social group,[213] courts are more likely to register that awareness through commentary about observable facts than through a sociologically framed analysis. While the latter might be more accurate and candid, it also would leave courts more vulnerable to charges that they are acting beyond their capacity and using their powers to institutionalize their own social views into legal mandates.[214]

In addition, courts tend to be especially wary of appearing to be hyper-regulators of the workplace given the background commitments, both ideological and doctrinal, that typically favor employer autonomy. Because discrimination law carves out an exception to the general tolerance for bad workplace behavior,[215] including "low-grade" discrimination,[216] courts have a strong interest in avoiding the appearance that they are deploying the law in ways that infringe on employers' well-established prerogatives to govern their workplaces as they like.[217]

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213. *Cf.* Steven G. Calabresi, *Thayer's Clear Mistake*, 88 NW. U. L. REV. 269, 272 (1993) ("Mr. Dooley's dictum about the Supreme Court's tendency to follow the election returns seems no less apt today than when it was first printed almost a century ago."); Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2606 (2003) ("[J]udicial decisions rest within a range of acceptability to a majority of the people.").

214. Goldberg, *Constitutional Tipping Points*, *supra* note 30, at 1999; *cf.* Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After* Lawrence v. Texas, 88 MINN. L. REV. 1233, 1241 (2004) (identifying a similar concern as a reason for the Court's avoidance of explicit morals-based rationales for government action).

215. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) (addressing the "risk" that Title VII might function as "a general civility code for the American workplace"); Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989) (explaining that Title VII "eliminates certain bases for distinguishing among employees while otherwise preserving employers' freedom of choice" and describing the Court's task as drawing a "balance between employee rights and employer prerogatives").

216. By "low-grade" discrimination, I mean the discriminatory acts that the law has been construed not to prohibit. In the sexual harassment context, for example, the Court has reinforced that Title VII "forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment." *Oncale*, 523 U.S. at 81. *See also id.* ("'Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview.'" (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993))).

217. For a discussion of the historical development of the at-will employment doctrine in America, which arguably has influenced contemporary views about judicial deference to employer autonomy, see Clyde W. Summers, *Employment At Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 66 (2000) (identifying at-will employment as a "fundamental assumption [that] has shaped our labor law"). *Cf.* Deborah A. Ballam, *Employment-At-Will: The Impending Death of a Doctrine*, 37 AM. BUS. L.J. 653 (2000) (arguing that the expansion of modern tort law is gradually eviscerating at-will employment in America); Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will*

B. The Comparator Heuristic's Legitimizing Work

The comparator heuristic, as it is used by most courts, accommodates both of these concerns because it gives the appearance that the facts of differential treatment, rather than the courts' own assumptions and judgments, are doing the work to show that trait-based discrimination has occurred and that, as required by the applicable discrimination law, the court must intervene. That is, if the comparison reveals that an employee with *X* characteristic was treated differently from the similarly situated employee without *X* characteristic, the resulting inference of discriminatory intent is treated as the comparison's logical, natural product.[218]

The comparison thus has an empirical cast to it—it documents, from facts, the different treatment and, by implication, the discriminatory intent. Given the pressures created by courts' general orientation to avoid the sociological role and the undue disruption of employer prerogatives, the comparator heuristic provides comfort by appearing to produce "hard" evidence of discrimination. Put another way, the inference of discriminatory intent becomes less superficially vulnerable, at least from the vantage point of the judicial-legitimacy concerns just described, to the extent that it is presented as resting on facts rather than on the court's subjective judgments about a workplace. Yet, as discussed above, comparators produce results regarding the presence of discriminatory intent that are surely false. Further, by failing to specify the results' underlying subjectivity, they obscure the absence of judicial accountability for the analytic choices and assumptions made.

The contextual methodology for gleaning discriminatory intent from stereotyping and harassing acts might seem to be in tension with these legitimacy concerns because it lacks the comparators' ability to produce "facts." As applied, however, courts find other ways to suggest that it is the workplace context, rather than their own judgment, that is shedding light on the presence or absence of discrimination. Recall that in the stereotyping and harassment contexts, courts have stressed that linking workplace conduct to a protected

World, 74 TEX. L. REV. 1655, 1655 (1996) ("The employer's presumptive right to fire employees at will—for good reason, for bad reason, or for no reason at all—has been drastically cut back in the last sixty years. . . . The at-will rule now coexists with numerous important exceptions—statutory and common law, state and federal—that prohibit . . . . discrimination based on race, sex, age, or other characteristics.").

218. Of course, as shown earlier, a court's choices as to how tight a fit to demand between the plaintiff and the comparator are contestable. But once those choices have been made, there can be no denying the difference in treatment, should one exist.

characteristic neither requires "special training" nor presents great difficulties. Put in legitimacy terms, then, the facts appear to be doing the work.

Of course, as discussed above, not all harassing acts or stereotyping statements can be linked to a protected trait and treated as discriminatory.[219] But, from a legitimacy standpoint, if the context reveals acts or statements that are widely assumed to reflect discriminatory intent, the Court need not expend reputational capital to find the presence of discrimination. We see this, for example, in cases where courts have little difficulty finding statements that mothers should not work outside the home while raising young children to be sex-related[220] or that calling an African-American man a "boy" can be racially derogatory.[221]

219. The debates among experts about whether Wal-Mart stereotyped and then discriminated against its female employees underscore this point. *Cf.* John Monahan, Laurens Walker & Gregory Mitchell, *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks,"* 94 VA. L. REV. 1715, 1742-43 (2008) (identifying the sex discrimination case of *Dukes v. Wal-Mart* as a landmark case for "the use of social science research on stereotyping to support claims for relief in employment discrimination [lawsuits]"). This is apart from the question whether the acts and statements are sufficiently harmful to exceed the tolerance for low-grade discrimination.

220. In applying *Price Waterhouse* to a family responsibilities discrimination suit, for example, the Second Circuit recently rejected an employer's argument that disparaging comments about a woman's commitment to work after having children could not be treated as sex-based "without comparative evidence of what was said about fathers." Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 121 (2d Cir. 2004). The statements included inquiries as to how the plaintiff was "planning on spacing [her] offspring," requests that the plaintiff "not get pregnant until [her supervisor] retire[d]," suggestions that the plaintiff "wait until [her son] was in kindergarten to have another child," and statements that it was "'not possible for [the plaintiff] to be a good mother and have this job.'" *Id.* at 115 (first and fourth alterations in original) (internal quotation marks omitted). The court found specifically that no such comparison was required to see discriminatory intent. Instead, "the notions that mothers are insufficiently devoted to work, and that work and motherhood are incompatible, are properly considered to be, themselves, gender-based." *Id.* at 121. Invoking *Price Waterhouse*, the court added that "stereotypical remarks about the incompatibility of motherhood and employment 'can certainly be *evidence* that gender played a part' in an employment decision," and that, therefore, "stereotyping of women as caregivers can by itself and without more be evidence of an impermissible, sex-based motive." *Id.* at 122 (quoting Price Waterhouse v. Hopkins, 480 U.S. 228, 251 (1989)). The court identified other circuit courts in agreement that these types of comments support a finding of discriminatory intent. *See, e.g.*, Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 57 (1st Cir. 2000) (holding that a direct supervisor's "specifically question[ing] whether [the plaintiff] would be able to manage her work and family responsibilities" supported a finding of discriminatory animus, where the plaintiff's employment was terminated shortly thereafter); Sheehan v. Donlen Corp., 173 F.3d 1039, 1044-45 (7th Cir. 1999) (holding, in a Pregnancy Discrimination Act case, that a reasonable jury could have concluded that "a supervisor's statement to a woman known to be pregnant that she was being fired so that she could 'spend more time at home with her children' reflected unlawful motivations

Comparators become important, then, in situations where the challenged conduct is not easily or obviously recognized, per these social understandings, as embodying discriminatory intent or, more colloquially, as speaking for itself. In these cases, comparators' empirical overtones suggest that the inquiry involves more than just the subjective preferences of a particular court, which Justice Thomas derided in response to the noncomparative analysis in *Olmstead*.[222] Consider the Court's early pregnancy cases in this light. The comparison of pregnant and nonpregnant people did not produce facts showing that the challenged rules restricting pregnancy benefits were "based on sex."[223] Indeed, the Court in *Gilbert* wrote that it needed only the most "cursory" analysis to reach that conclusion.[224] Had the Court wanted to "see" discriminatory intent in that distinction, it would have needed a source other than the comparator to do so. At the time, however, the Court may have sensed there was not widespread agreement on the connection between pregnancy-related restrictions and sex discrimination. Consequently, without a comparator or easy connection between the employer's acts and discriminatory intent, the majority seemed to suggest that a finding of sex discrimination would have reflected its subjective sensibilities rather than its objective judgment, thereby undermining its legitimacy.[225]

because it invoked widely understood stereotypes the meaning of which is hard to mistake").

221. *See* Ash v. Tyson Foods, Inc., 546 U.S. 454, 456 (2006). On remand, the Eleventh Circuit affirmed its earlier determination that "the ['boy'] comments were ambiguous stray remarks . . . and are not sufficient circumstantial evidence of bias" to sustain the plaintiff's race discrimination claim. Ash v. Tyson Foods, Inc., No. 08-16135, 2010 WL 3244920, at *13 (11th Cir. Aug. 17, 2010) (alternation in original).

222. *See* Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 624 (1999) (Thomas, J., dissenting). The Court showed its sensitivity to this type of critique while allowing a non-comparison-based sex discrimination challenge to the compensation of the female prison guards in *County of Washington v. Gunther*, emphasizing that the discrimination inquiry did not "require a court to make its own subjective assessment of the value of the male and female guard jobs." 452 U.S. 161, 181 (1981).

223. Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 135 (1976).

224. *Id.*

225. The dissenters, by contrast, would have located sexually discriminatory intent in the pregnancy classification following the same model that the Court has used since for linking stereotyping and harassment to discriminatory intent. They stated that nothing more than "common sense" was necessary to see the link between the two. *Id.* at 149 (Brennan, J., dissenting) ("[I]t offends common sense to suggest that a classification revolving around pregnancy is not, at the minimum, strongly 'sex related.'").

C. The Call for Experts as a Response to Legitimacy Concerns

This legitimacy-protective dynamic that leads courts to prefer quasi-empirical demonstrations of discriminatory intent via the comparator heuristic also helps explain why scholars have stepped up the call for expert testimony in employment discrimination claims. Experts, like comparative data, enable courts to avoid the appearance of engaging in the arguably sociological task of discerning identity discrimination.[226]

In part, experts may be useful within the comparator framework to expand courts' sense of which comparisons could be probative. Charles Sullivan, for example, argues that courts need help with the "real question" of "when the putative comparator is similar enough to justify the inference" of discrimination.[227] He suggests that experts can establish the "standard of care" against which an employer's conduct can be measured.[228] For Minna Kotkin, who documents courts' difficulty observing discrimination when a discrimination claim rests on multiple grounds, experts are likewise the key to expanding courts' understanding of how stereotypes operate and their conception of appropriate comparators.[229]

The centrality of experts to theories that advocate noncomparative methods for observing discrimination similarly can be understood as responding to, or at least reflecting sensitivity to, the judicial-legitimacy concerns just described. The implicit bias literature, for example, highlights the ways in which experts can document the presence of implicit identity-related biases and the effects of those biases on workplace decisions.[230] If carried out by experts, this approach

226. Still, courts must engage in a potentially sociological assessment when evaluating the admissibility of testimony by sociologists, cognitive psychologists, and other experts on discrimination under the standard set out in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). *Daubert* requires federal courts to screen expert testimony for "scientific validity" to ensure reliability and relevance. *Id.* at 594-95. Some have suggested that *Daubert* has presented a particular hurdle for expert testimony in discrimination cases. *See* Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 551-55 (2010) (discussing scholarship addressing the effect of *Daubert* on the admission of expert testimony in discrimination cases and observing that *Daubert*, together with summary judgment practices, may be part of a "lethal combination" that disadvantages plaintiffs in civil rights and employment discrimination cases).

227. Sullivan, *supra* note 3, at 223.

228. *Id.* at 237.

229. Kotkin, *supra* note 15, at 1449, 1495-97.

230. For recent discussion and review of implicit bias research in the social sciences, see, for example, Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); Jerry Kang &

to identifying discriminatory intent that is otherwise not readily observable can have the appearance of objectivity and, relatedly, of being driven by factors other than the influence of the court's subjective preferences.

The legitimacy concerns also help explain why, even if a plurality of the Supreme Court dismissed the expert testimony regarding sex stereotyping at Price Waterhouse as "icing on the cake," those litigating the case had thought the testimony might be helpful. If the Court had not found the link between the statements made and the partnership denial to Ann Hopkins to be so noncontroversial, then there would have been little, other than the Court's own judgments, to confirm the link between the statements and the protected characteristic of sex. In this light, the expert testimony in the case can be seen as a quasi-empirical source to verify or even compel that judgment.

This move to locate determinations about discriminatory intent in experts can be characterized as simply shifting the legitimacy debate from the observation of discrimination to the treatment of expert testimony, where the debate is similarly fraught.[231] Moreover, the increased focus on experts (with their attendant high costs)[232] risks exacerbating existing resource imbalances between plaintiffs and defendants, making the move difficult in all but class actions and unusually high-value discrimination cases. Still, conceptually at least, the shift may be just enough to overcome the legitimacy concerns to which courts are so vulnerable. Justice Scalia has written, in the sexual harassment context, that "common sense" and "an appropriate sensitivity to social context" is all that is necessary to discern discriminatory intent.[233] But where there is no easy agreement about how best to understand the social context, courts again become vulnerable to charges of imposing their own preferences on a workplace if there is no extrajudicial source that can be said to have compelled their observation of discrimination.[234]

Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CALIF. L. REV. 1063, 1071 (2006); and Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997 (2006). The Court has long recognized that these biases can result in cognizable discrimination. *See* Watson v. Fort Worth Bank, 487 U.S. 977, 990 (1988) (acknowledging "the problem of subconscious stereotypes and prejudices" in employment). My focus here is on how courts can come to see the operation of these stereotypes and prejudices.

231. *See supra* note 226.

232. *Cf.* Christopher Tarver Robertson, *Blind Expertise*, 85 N.Y.U. L. REV. 174, 177 (2010) (noting the significant cost of expert testimony).

233. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998).

234. This is not to suggest that expert evidence will always be accepted by courts as sufficient or decisive to establish the presence of discriminatory intent, but instead only that the expert testimony enables courts to invoke an external source when drawing the link between the

D. Legitimacy Concerns and the Viability of Second-Generation Discrimination Theories

These legitimacy concerns appear to present a particular hurdle for second-generation discrimination theories because, ordinarily, there are no comparators for intersectional, identity performance, or structural claims. If these theories are to translate into practice, their success will depend on eliding the comparator heuristic and finding a different means of exposing the discrimination at issue, such as the contextual approach of the stereotyping and harassment cases.

Although relatively few second-generation theories have succeeded in making this move to contextual analysis or in finding an alternate methodology, "family responsibilities discrimination" theory has had notable success in gaining doctrinal traction and may offer valuable lessons.[235] The theory, known as FRD, is concerned with the ways in which employees, particularly women, face barriers in the workplace associated with their parenting or other caregiving responsibilities.[236] Often employees who suffer adverse action related to their family responsibilities cannot show discrimination through a comparator either because there are no similarly situated coworkers or because the potential comparators in a workplace are all women or otherwise share the same protected trait.

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challenged conduct and the protected characteristic. *Cf.* Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring) (stating that expert testimony about sex stereotyping at Price Waterhouse would not have been enough to give rise to inference of discriminatory intent).

235. *See* Joan C. Williams & Stephanie Bornstein, *The Evolution of "FReD": Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311, 1357 (2008) (stating that FRD lawsuits have "cemented that plaintiffs in Title VII disparate treatment cases may show [family responsibilities] discrimination even when they lack a comparator"); *see also* Catherine Albiston et al., *Ten Lessons for Practitioners About Family Responsibilities Discrimination and Stereotyping Evidence*, 59 HASTINGS L.J. 1285 (2008).

236. Joan Williams and Stephanie Bornstein have defined family responsibilities discrimination as "discrimination against employees based on their responsibilities to care for family members," which includes "pregnancy discrimination, discrimination against mothers and fathers, and discrimination against workers with other family caregiving responsibilities." Williams & Bornstein, *supra* note 235, at 1313. They have observed that "[w]hile FRD most commonly occurs against pregnant women and mothers of young children, it can also affect fathers who wish to take on more than a nominal role in family caregiving and employees who care for aging parents or ill or disabled partners." *Id.* For additional discussion of FRD, see JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 101-10 (2000); and JOAN C. WILLIAMS & CYNTHIA THOMAS CALVERT, *Introduction* to WORKLIFE LAW'S GUIDE TO FAMILY RESPONSIBILITIES DISCRIMINATION (2006).

Rather than try to work from within the comparator heuristic, advocates for recognition of FRD worked around it and, centrally, engaged experts (as well as popular culture) to ease courts' way into seeing the link between employers' skepticism of workers with family responsibilities and the protected characteristic of sex. Social scientists have been particularly important to this effort, as they have documented "an underlying schema that assumes a lack of competence and commitment when women are viewed through the lens of motherhood and housework."[237] These data, supplemented by additional research, do the work of linking maternal stereotypes to discriminatory intent. Perhaps responding to *Geduldig* and *Gilbert*, where the Court was unable to bring itself to see the pregnancy-sex connection, FRD advocates effectively relocated the task of observing discriminatory intent from the courts to expert social scientists.

FRD recognition advocates have sought to establish the link between employers' adverse treatment of parents and sexism in the popular culture as well, so that the link between an employer's skepticism toward a new mother's work ethic and sex discrimination can be seen easily and without any special training.[238] Thus, when these advocates celebrate that courts have accepted non-comparator-based FRD claims, we can understand this success as deriving in part from judicial confidence in public acceptance of the caregiver-sex discrimination link because public acceptance minimizes the risk that courts will appear to be meddling unduly in employer freedom or imposing their subjective views of discrimination.[239]

237. Williams & Bornstein, *supra* note 235, at 1327.

238. *Id.* at 1314 (describing the issue of caregiver discrimination as one that "has 'arrived' in the public consciousness").

239. In a more limited way, discrimination claims related to gender identity and performance also have begun to gain traction. *Compare* Schroer v. Billington, 525 F. Supp. 2d 58 (D.D.C. 2007) (refusing to dismiss a sex discrimination claim against the Library of Congress, which withdrew a job offer it had made to a military specialist upon learning she was transgender), *with* Ulane v. E. Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984) (rejecting a sex discrimination claim brought by an airline pilot who was fired after the airline learned she was transgender). Some of the reasons for the more recent claims' success relate to judicial perceptions about the fixed nature of sex in transgender individuals, consistent with the legitimacy concerns regarding identity described earlier. But others, more relevant to the inquiry here, derive from the sex stereotyping in these cases, which is as blatant and relatively easy to recognize as the stereotyping in *Price Waterhouse*.

By contrast, consider the poor track record of challenges to sex-based dress and grooming codes as discriminatory.[240] In these situations, the underlying theoretical claim is that an employer's insistence on having men and women groom and dress themselves differently is not materially different from first-generation-style sex-based classified advertisements or blanket refusals to hire women; in both, the employer impermissibly polices gender norms.[241] Yet courts regularly do not see the sex-based distinction as discriminatory, in part because of the way in which they apply a comparator analysis to these cases.[242]

The legitimacy concerns can help illuminate why comparators are so difficult to escape in this context. In the view of most courts to have addressed these challenges, the link between the sex-based rules and discriminatory intent is not nearly as "obvious" or easy as in the case of sexual harassment or sex stereotyping. Even relative to FRD, courts do not see evidence that the public imagination considers grooming codes to be obviously discriminatory. Nor is there a wealth of social science on which courts can rely, as there is for FRD, to do the work of establishing that these grooming codes embody sex-based stereotypes or otherwise to illuminate and verify that sex-based discriminatory intent is embedded in the codes.

240. *See, e.g.*, Jespersen v. Harrah's Operating Co., 444 F.3d 1104 (9th Cir. 2006) (rejecting a sex discrimination challenge to a casino grooming code that imposed different requirements on men and women); *cf.* Cloutier v. Costco Wholesale Corp., 390 F.3d 126 (1st Cir. 2004) (affirming summary judgment for an employer where an employee alleged that a "no facial jewelry" policy constituted religious discrimination); Pitts v. Wild Adventures, Inc., No. 7:06-CV-62-HL, 2008 WL 1899306, at *5-6 (M.D. Ga. Apr. 25, 2008) (finding no merit to the plaintiff's allegation that a grooming policy that prohibited dreadlocks and cornrows constituted race discrimination against African-American employees). *But see* Tamimi v. Howard Johnson Co., 807 F.2d 1550 (11th Cir. 1987) (affirming a judgment in favor of an employee who alleged sex discrimination over a dress code that required female employees to wear makeup and lipstick).

241. For a discussion of grooming standards and gender norms, see Devon Carbado et al., *Foreword: Making Makeup Matter*, 14 DUKE J. GENDER L. & POL'Y 1 (2007). Carbado et al. state that "grooming standards *can* (but needn't always) function to regulate and give content to our identities." *Id.* at 2; *see also* United States v. Virginia, 518 U.S. 515 (1996) (sustaining a first-generation-type challenge to the exclusion of women from the Virginia Military Academy).

242. Apart from the comparator issue, some courts have treated dress and grooming codes, as opposed to other employer conduct, as falling more broadly within an employer's discretion and, therefore, as less susceptible to restriction via Title VII and other antidiscrimination measures. *See* Jennifer L. Levi, *Misapplying Equality Theories: Dress Codes at Work*, 19 YALE J.L. & FEMINISM 353, 353-55 (2008) ("[T]he typical dress code that simply distinguishes the appearance of men and women in the workplace has been found to be unobjectionable by courts."); *id.* at 355 n.4 (citing cases).

Because the link between sex-based grooming codes and impermissible stereotyping does not fall within *Price Waterhouse*'s "no special training" standard, some other methodology is needed to review the discrimination allegation, and courts most often funnel these cases through what amounts to a comparator analysis. As the Ninth Circuit found, for example, when sustaining a casino's extensive dress code that included different makeup, hair, and nail care requirements for men and women, "[t]he only evidence in the record to support the stereotyping claim is [the plaintiff's] own subjective reaction to the makeup requirement."[243] The court contrasted the employee's claim in that case with cases in which, it suggested, the link between a dress code and discrimination would be easier to find, such as where a dress code "tend[ed] to stereotype women as sex objects" or invite sexual harassment.[244] Given courts' interest in avoiding sociological judgments about identity discrimination that infringe on employer freedom, it is not surprising that where the court did not find "clear" stereotyping and where a comparison did not produce a striking difference in the treatment of men and women,[245] the court did not find discrimination because of sex.[246]

In short, courts' concerns about navigating between the Scylla of sociological tasks and the Charybdis of employer autonomy surely account for some, if not all, of the comparators' appeal. With their empirical, legalistic cast, comparators strongly suggest that courts' findings of impermissible discrimination are the product of neither an amateur judicial evaluation of social norms and workplace dynamics nor a court's arrogant disregard of employer autonomy. Instead, they are—or, more precisely, have the appearance of being—compelled simply and cleanly by both the facts and the governing law.

243. *Jespersen*, 444 F.3d at 1112.

244. *Id.*

245. The dissenters disagreed with this characterization of the policy, finding that the grooming code's makeup requirements for women imposed a distinct burden not imposed on men and that this difference in treatment was "'because of' sex" and was "clearly and unambiguously impermissible under Title VII." *Id.* at 1114 (Pregerson, J., dissenting) (describing Jespersen's evidence as "show[ing] that Harrah's fired her because she did not comply with a grooming policy that imposed a facial uniform (full makeup) on only female bartenders").

246. Again, the substantive consequence of this application of the comparator heuristic was to limit the reach of discrimination law and its underlying norms.

VI. PROSPECTS FOR CHANGE

Assuming that no social scientific advance will render obsolete the need for judicial inquiries into discriminatory motive and that courts will retain their sensitivity to the legitimacy concerns just described, this Part suggests several possibilities for expanding courts' methodological repertoire for observing discrimination in light of comparators' costly deficiencies. Although full development and evaluation of alternate approaches is beyond this Article's scope, the suggestions below aim to counter the comparator demand's flattening effect on discrimination law and norms in both first- and second-generation theories and cases while also taking account of both judicial-legitimacy and accountability concerns.[247]

Setting aside strategies for enlarging the set of acts and statements that are widely understood to expose discriminatory intent,[248] potential means for expanding the set of approaches used to observe discrimination range from tweaks to the current comparator regime to more expansive frameworks. The latter have the benefit of allowing more nuanced review, but they also bear the weakness, in some cases, of providing less guidance and less protection to courts concerned about their legitimacy. Ultimately, I argue that a move toward applying the contextual analysis that is already familiar from the stereotyping and harassment jurisprudence will best address both the legitimacy concerns to which comparators respond and the accountability flaws embedded in that methodological choice—with the additional benefit of restoring a less formalistic, more substantive treatment of discrimination law and norms.

247. Although the focus here is on developing options that might enable greater judicial recognition of diverse forms of discrimination, it is also possible that, again recalling Fuller, litigation and adjudication are simply not well-suited to resolving certain kinds of complex suits, including those that are the focus of second-generation theorizing. *See supra* notes 25-28 and accompanying text. Legislative and policy advocacy as well as collaborative efforts with employers, public accommodation operators, and others may ultimately be more effective in eliminating barriers related to protected (and other) traits. However, because the primary focus of this Article is on what courts can do, and because many of the extra-litigation efforts just described operate in the shadow of doctrine, the alternate analytic approaches here warrant consideration, even if all they do is enhance the possibilities for success of the nonlitigation strategies.

248. The movement to have FRD recognized provides a strategic model worthy of consideration for these kinds of efforts because of its combined focus on developing social science and establishing understanding of the link between family responsibilities and sex discrimination in the public's mind.

A. Involving Experts in Setting Comparators' Contours

A first option would be to accept the comparator methodology's dominance but expand the conception of an appropriate comparator. As noted earlier, the Court itself rejected a formulation demanding that a comparison produce a result that "virtually . . . jump[s] off the page and slap[s] you in the face" before a finding of discrimination can be made.[249] Beyond that, the suggestions of Kotkin and Sullivan that experts be used to establish reasonable comparators despite differences in jobs, supervisors, or even employers could prove helpful in enabling more employees to identify adequate comparators.[250] By recasting the selection of comparators as a determination involving facts subject to expert analysis and verification, rather than as a matter turning exclusively on the judgment of the court, it might be possible to broaden the conceptualization of comparators while attending to the legitimacy constraints in this area.

For first-generation theories, this expansion would almost certainly be helpful in mitigating the comparator heuristic's barrier-like effects. The broader the pool, the more likely an employee will be able to identify a colleague who is similarly situated but for the protected characteristic.

The benefit flowing from the sheer increase in numbers of potential comparators would be much more limited for second-generation intersectionality claims, however. Recall that the difficulty in these cases does not lie, primarily, in finding a comparator. Instead, when an individual appears anomalous amidst the comparator pool because of his or her particular combination of traits, courts tend to be skeptical—even with comparators—that discrimination, as opposed to a quirk particular to that individual, motivated the employer's adverse action.[251]

For identity-performance-based suits, broadening the pool of comparators would likewise be unavailing. For example, returning to Carbado and Gulati's example of the fifth black woman, a broader comparator pool would not, in itself, help that employee show that her race (rather than other factors related to her personal presentation) was the basis for the adverse treatment. Even with a broad pool, the employer could still produce the four other black women whom it promoted to strengthen its argument that it had legitimate,

249. Ash v. Tyson Foods, Inc., 546 U.S. 454, 456-57 (2006) (quoting Ash v. Tyson Foods, Inc., 129 F. App'x 529, 533 (11th Cir. 2005)).

250. *See supra*, notes 227-229 and accompanying text.

251. *See supra* notes 77-79 and accompanying text. A broader comparator pool might possibly enable a plaintiff to invoke systemic evidence of discrimination by identifying a greater number of similar coworkers who have suffered adverse action from the employer.

nondiscriminatory reasons for denying promotion to the fifth black woman. With the benefit of a broader comparator pool, the fifth black woman could potentially identify a non-black woman who had a similar style but received a promotion, but as a practical matter it is difficult to imagine this sort of comparison-based claim succeeding. Even if the employee could find a comparator, employers could be counted on to undermine the broader comparator pool as insufficiently attuned to salient differences in workplace cultures that are relevant to consideration of employees' personal style.

For second-generation claims based on structural discrimination, where workplace patterns make discrimination difficult to observe and trace, expanding the size of the comparator pool would seem to be of marginal assistance, at best. Having more employees in the mix could conceivably help illuminate the effects of the discrimination that is masked within employee interactions. But as much of the structurally focused literature makes clear, the structures and relationships within workplaces that facilitate and exacerbate diffuse and subtle discrimination will still escape observation within a comparator framework.

B. Considering Hypothetical Comparators

A related possibility would be to expand the current comparator-based approaches by allowing for hypothetical comparators as well as actual comparators.[252] This approach has been embraced in England, for example, where the Sex Discrimination Act of 1975 "permits a comparison to be drawn between the way in which a woman is treated and the way in which a 'hypothetical male' would have been treated."[253] The European Union has likewise embraced the value of the hypothetical comparator through its discrimination-related directives, which provide that discrimination can be found "where one person is treated less favourably than another is, has been or *would be* treated in a comparable situation on grounds of racial or ethnic

252. Even this proposal would move beyond the discrimination theory advanced by Justice Thomas in *Olmstead*, which restricts the recognition of discrimination to situations in which actual differences of treatment between actual employees can be documented.

253. *See* Sandra Fredman, *Reforming Equal Pay Laws*, 37 INDUS. L.J. 193, 200 (2008); *see also* Iain Steele, Note, *Beyond Equal Pay?*, 37 INDUS. L.J. 119 (2008) (recognizing the value of a hypothetical male comparator for a woman bringing a claim under the Sex Discrimination Act of 1975).

origin."[254] As one commentator has observed, "Clearly, the comparator need not 'exist'; establishment of the probability of 'his' or 'her' better treatment will be enough."[255]

This shift would enhance even further the benefits that flow from broadening the actual comparator pool, at least for first-generation cases, by providing more opportunities to produce a discrimination-exposing comparison. Second-generation cases, by contrast, would experience less gain from this change for the same reasons that gains from enlarging the set of actual comparators would be limited.

The potential problem is that the move to a hypothetical comparator may tread more closely on judicial-legitimacy concerns than an approach that expands the scope of "real" comparators because it overtly acknowledges the court's work in seeing discrimination rather than simply in "finding" discrimination in the facts presented. Yet there may be ways around this difficulty. As Sandra Fredman observed with respect to the United Kingdom's equal pay laws, "[T]here is a well-developed methodology for determining what a hypothetical male would have been paid, using either a proportionate value method or a proxy method."[256] Thus, this type of expert-driven, data-based portrait of the hypothetical comparator could conceivably fit neatly with the judicial-legitimacy concerns in this area.

However, while either legislative commitments or statistical analysis might work in the equal pay context, where job criteria and pay ranges are arguably susceptible to quantification and comparison,[257] hypothesizing a comparison to

254. Council Directive 2000/43/EC, art. 2, 2000 O.J. (L 180) 22, 24 (emphasis added); *see also* Council Directive 2006/54/EC, 2006 O.J. (L 204) 23; Council Directive 2000/78/EC, 2000 O.J. (L 303) 16.

255. Elisabeth Holzleithner, *Mainstreaming Equality: Dis/Entangling Grounds of Discrimination*, 14 TRANSNAT'L L. & CONTEMP. PROBS. 927, 934 (2005). For additional discussion of the use and limitations of comparators in Australia, Canada, and Europe, see generally Aileen McColgan, *Cracking the Comparator Problem: Discrimination, "Equal" Treatment and the Role of Comparisons*, 6 EUR. HUM. RTS. L. REV. 650 (2006), which collects and analyzes cases from European supranational and domestic courts that address the use of comparators; Sophia Reibetanz Moreau, *Equality Rights and the Relevance of Comparator Groups*, 5 J.L. & EQUAL. 81 (2006), which analyzes the Canadian Supreme Court's use of comparators; and Belinda Smith, *From* Wardley *to* Purvis *– How Far Has Australian Anti-Discrimination Law Come in 30 Years?*, 21 AUSTL. J. LAB. L. 3 (2008), which critiques the High Court of Australia's constrained use of hypothetical comparators.

256. Fredman, *supra* note 253, at 201.

257. The failure of most comparable worth litigation in the United States suggests, however, that even this effort might be doomed by charges of unconstrainable subjectivity. *See, e.g.*, Birch v. Cuyahoga Cnty. Probate Court, 392 F.3d 151, 170 (6th Cir. 2004) (noting that courts have refused to apply *Gunther* analysis where a comparable worth case "involves a subjective

prove the discriminatory treatment of a corporate executive or a group of plant workers where there are no actual comparators will not have that factual, legitimacy-protecting cast. Imagine, for example, that a court faced with a discrimination claim by the only African American senior executive at a bank was asked to hypothesize a comparator to assess the adverse treatment that had been alleged. While a court might be willing to stretch and consider an expert's analysis of actually comparable positions and employees in the industry, the creation of a purely hypothetical comparator, even if by an expert, arguably leaves a court with little to show that it has observed trait-based discrimination rather than simply bad, but permissible, treatment.

Alternately, a hypothetical comparator might elide these concerns if legislative bodies were to provide an "elaboration . . . of criteria of assessment," as the European Court of Justice has suggested.[258] Courts could then point to these bodies, rather than their own views, as driving the comparison. Yet again, while this could conceivably work in the equal pay area (though the comparable worth movement's experience suggests that this would not be feasible in the United States),[259] a general statement of acceptable workplace behavior would be exceedingly difficult to conceptualize in a way that would capture discriminatory conduct but not workplace behavior that is offensive but permissible. Even if one could be created, it would face serious challenges from extant political and jurisprudential commitments to employer discretion in workplace governance.

C. Moving Beyond Comparators

The discrimination case law and literature also contain the seeds of methodologies that could displace or supplement comparators as the primary heuristic for locating and evaluating discrimination and, in doing so, alleviate the effects of comparators' limitations on both first- and second-generation cases. This section looks first to experts and then to contextual analysis as the methodological alternatives most likely to succeed because of their sensitivity to the legitimacy and accountability concerns set out above.

assessment of different positions with different duties" (citing EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264, 1333 (N.D. Ill. 1986))). *See generally* MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994).

258. *See* Case 129/79, Macarthys Ltd. v. Smith, 1980 E.C.R. 1275, 1289.

259. *See supra* note 257.

The value of experts, not just to expand conceptions of comparators but to serve, themselves, as a lens for observing discriminatory intent emerges directly from the second-generation scholarship. Both the implicit bias and structural discrimination literature show that expert analysis can aid courts in seeing which particular structures may foster discrimination.[260]

The difficulty with experts, relative to the legitimacy concerns, comes in drawing the link from the insights of the implicit bias and structurally focused literatures to the dynamics of a specific workplace and the adverse treatment of a particular employee.[261] Although this can be done, methods for seeing discrimination are likely to be more attractive to courts to the extent that the experts, rather than the court, appear to be illuminating the discrimination within the workplace at issue.

Yet another possibility—and the one that I advocate most strongly here—would be simply to put comparison in its place as one technique among many for observing discrimination rather than to view it as *the* technique that must be used before discrimination can be seen.[262] This change would also move contextual evaluation from its confined role in stereotyping and harassment cases to a new status as a legitimate analytic option in all cases. Even in its simplicity, this type of frame-shift in the way in which we see discrimination cases could be transformative in diminishing some of the worst offenses of the comparator paradigm. It would do so by more closely matching the

260. *See supra* note 230; *see also* William T. Bielby, *Can I Get a Witness? Challenges of Using Expert Testimony on Cognitive Bias in Employment Discrimination Litigation*, 17 EMP. RTS. & EMP. POL'Y J. 377 (2003).

261. If the research showing the general pervasiveness of implicit bias were accepted as sufficient to show discrimination in a specific case, then anyone with a trait that is the subject of an implicit bias in a particular context would conceivably be able to prevail on a discrimination claim. The vast potential reach of this type of reliance on experts would inevitably produce its own powerful legitimacy-threatening concerns related to judicial overregulation of the workplace. These would be separate from questions about whether employers should be held accountable for acting on biases about which they are unaware. *See* Samuel R. Bagenstos, *Implicit Bias, "Science," and Antidiscrimination Law*, 1 HARV. L. & POL'Y REV. 477, 479 (2007) (responding to the critique of implicit bias evidence as scientifically invalid and noting that "the case for using the law to respond to the problem of implicit bias remains strong"); Michael Selmi, *Response to Professor Wax, Discrimination as Accident: Old Whine, New Bottle*, 74 IND. L.J. 1233 (1999) (maintaining that it is well settled that discrimination law can and should respond to subtle forms of discrimination, including those exposed by implicit bias research); Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1132-33 (1999) (arguing against employer liability for "unconscious disparate treatment" because "employers have little effective control over unconscious bias"); *cf.* Nagareda, *supra* note 26, at 156-61 (discussing critiques of implicit bias and structural discrimination theories in the context of evaluating discrimination class actions).

262. This would be outside the context of harassment and stereotyping cases, of course.

observational tools courts use with both the refinements to theory that have taken place in recent decades and our expanded knowledge of the dynamics of discrimination.

Indeed, if comparators are properly understood to be one among a set of imperfect methodological choices for seeing discrimination, courts' cordoning off "stray" remarks from consideration, rather than looking holistically at all incidents in the work environment as they do in harassment and stereotyping cases, no longer seems so sensible (if it ever did).[263] In short, a contextual approach would free courts from the artificial blinders imposed by the comparator jurisprudence that short-circuit the analysis of discrimination claims and produce constricted outcomes without explanation or justification.

This move would obviously be beneficial for first-generation cases because it would expand the means by which employees could seek to shed light on discriminatory intent. Discrimination claimants would no longer need to produce a comparable coworker to overcome the prima facie threshold; nor would comparators be seen as the gold standard for proving discriminatory intent. Instead, a picture of the entire work environment, including statements by supervisors and coworkers, the demographics of the firm and the surrounding workforce, and the dynamics of the relationship between the employee and other relevant employees would all be appropriately considered by courts deciding whether to allow an employee to proceed to trial.

For second-generation claims, an escape from the comparator demand similarly could prove invaluable by enabling exposure of the nuanced, contextually rooted, and complex forms of discrimination not reached by first-generation theories and foreclosed by a demand for comparators. As would be true for first-generation cases, the removal of the comparator demand as part of the prima facie case, or even as an essential part of the proof of pretext, would enable plaintiffs to turn to other sources to shed light on the discriminatory work environment. Again, comments and acts by other employees, firm demographics, and firm policies, among other aspects of workplace life and governance, could all be deemed worthy of consideration in deciding whether to allow a discrimination claim to proceed. Employers who single out some members of a protected class for adverse treatment could no longer immunize themselves solely on the ground that others with similar characteristics had not been similarly harmed. In other words, releasing the comparator's grip on discrimination analysis reopens the possibility that discrimination jurisprudence could develop in ways that recognize more than just the most formalistic and easily legible violations of discrimination laws.

263. *See supra* Part IV.

A skeptic might object that context-based methodology should be used sparingly, just as heightened scrutiny of identity-based classifications is limited. On this view, while we can be reasonably sure that impermissible bias is at work where there has been harassment or stereotyping, just as we are willing to suspect similar bias in the use of certain classifications,[264] other situations will not give us the same basis to doubt the employer's actions. The concern, from this perspective, would be that if we enable an employee to trigger a contextual inquiry outside the presence of harassment or stereotyping remarks (as in a challenge to a breastfeeding ban, for example), courts would lack the constraints necessary to prevent them from unduly infringing employer freedom.[265]

The analogy is misplaced, however, because a context-focused analysis of a discrimination claim is concerned with what types of evidence will be considered; it does not come with a heightened-scrutiny-style presumption that the employer has acted impermissibly. Indeed, as discussed earlier, even the presence of overtly sexualized or racialized comments or acts does not necessarily produce an inference of discriminatory intent related to an employee's protected characteristic.[266] There is no reason to think that a shift to a contextual analysis in cases without stereotyping or harassment claims will alleviate the doctrine's burden on the plaintiff to show that the conduct at issue is both serious and linked to the employee's protected characteristic(s). That is, in a case where an employee lacks a comparator but can point to an adverse

264. For extended discussion about the relationship between heightened scrutiny and rational basis review in the equal protection context, see, for example, Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481 (2004). For discussion of context-sensitive review in other constitutional contexts, see, for example, Cnty. of Allegheny v. ACLU, 492 U.S. 573, 629 (1989) (O'Connor, J., concurring in part and concurring in the judgment), which discusses context-sensitivity with respect to standards for reviewing Establishment Clause violations as well as "many [other] standards in constitutional law"; and Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1655 n.106 (2006), which describes the "context-sensitive, rough balancing of incommensurable values that is typical of doctrinal analysis in constitutional law."

265. Extending the analogy, the skeptic might also argue that a comparator's presence gives the court some reason, though not as much as in the case of harassment or stereotyping, to be suspicious of the workplace conduct at issue. Thus the presence of a comparator, on this view, could reasonably trigger something similar to a strong form of rational basis review. Without harassment, stereotyping, or a near-identical comparator, the skeptic would argue that courts should have no reason to be suspicious and, therefore, no reason to subject the employer's actions to the relatively more searching contextual assessment. Indeed, we could characterize the approach courts take in the no-comparator cases as analogous to the weakest form of rational basis review, which gives the employer's adverse action the strongest presumption of legitimacy.

266. *See supra* note 173 and accompanying text.

action—for example, some arguably trait-related remarks from coworkers—and perhaps other circumstances, such as a pattern of exclusion from important events, the discrimination claim will not gain a free pass under a contextual review. Instead, it will merely, but importantly, have a chance to be heard, where under a comparator framework, it would be foreclosed from the outset.

Of course, a move like this, which broadens the pool of potentially successful discrimination cases, has certain costs. With more cases surviving into later stages of litigation, employers are likely to pay employees more, and perhaps more quickly, to settle cases. Courts, too, will face greater burdens to the extent they are charged with overseeing a potential growth in longer-lasting litigation.[267] But, I would argue, these costs are more than matched by the benefit of having open jurisprudential discussion and debate about the proper reach of discrimination doctrine. This is not to say that courts (or employers) would easily embrace the kinds of complex, or even first-generation, discrimination cases that currently lose because the plaintiff lacks a comparator. But under the current comparator regime, these cases, and the theories on which they rely, do not even get to the point of having a meaningful hearing absent a comparator. A move to a contextual evaluation would open the possibility of conversation and perhaps lead to refinement of the jurisprudence.

Further, if we admit that the way in which we see discriminatory intent—in harassment and stereotyping cases as well as cases with comparators—rests on judicial judgment calls aided by whatever heuristics have been deployed, rather than being factually or legally compelled, then maintaining such different approaches begins to make less sense. A move toward contextualized assessment of all types of workplace rules starts to seem both more sensible and less troubling.

267. For plaintiffs, by contrast, the cost of a move to a context-focused regime would be virtually nil. If the production of a comparator were enough, on its own, to enable an employee to prevail, we might be concerned that employers would seek to invoke a contextual analysis to impede potentially successful comparator-based claims. But the comparator alone does not secure victory for the employee; instead, at most, the employee wins the right to survive summary judgment and bring his or her case to a jury. A context-focused analysis simply opens room for the employee to produce additional evidence of discrimination, which at most could supplement, but could not undermine, whatever observations about discrimination a court would make via a comparator.

CONCLUSION

Judicial concerns about sociological inquiries and undue incursions into employer discretion, as well as comparators' intuitive appeal as a means for observing discriminatory intent, will no doubt enable the comparator methodology to retain a central place in discrimination jurisprudence. Still, the methodology's embedded expectation that identities are simple and that workers are easily comparable belies contemporary understandings of both identity and the modern workforce. Consequently, the comparator demand has foreclosed most discrimination claims and, further, shrunk the very idea of discrimination, both truncating traditional discrimination jurisprudence and all but guaranteeing that second-generation discrimination theories will not translate into law.

Because comparators are, in this sense, so mismatched to their task of revealing trait-based discrimination, it is time to recognize them as but one among several imperfect methodologies rather than as foundational to discrimination itself. By dethroning comparators in this way and incorporating the contextual methodology used to observe discrimination in harassment and stereotyping cases, we may yet be able to diminish the damage caused by their troubling stranglehold over American discrimination law and theory.