Courts' Misuse of the Similarly Situated Concept in Employment Discrimination Law, The

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The Courts' Misuse of the Similarly Situated Concept in Employment Discrimination Law

Ernest F. Lidge III

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I. INTRODUCTION

An employment discrimination plaintiff must show that the employer discriminated against her because of her membership in a protected group. A

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common way of proving this is for the plaintiff to point to a similarly situated employee (comparator) whom the employer treated differently. Many courts, however, have misused this “similarly situated” concept. First, a number of courts have required the plaintiff to prove, as part of her prima facie case, that she was treated differently than similarly situated employees who were not members of the protected group. There are, however, several problems with this. Such a requirement frustrates the purposes of the prima facie case; it contradicts Supreme Court case law allowing plaintiffs to demonstrate a prima facie case in a variety of ways; it fails to account for the fact that distinctions between employees can always be recognized; and it denies certain types of plaintiffs the protection of the employment discrimination laws.

Second, courts often define “similarly situated” in an unjustifiably narrow fashion. This results in courts finding that potential comparators are not similarly situated because of relatively minor, or irrelevant, distinctions between the comparators and the plaintiff. This, in turn, may cause a court to find that the plaintiff cannot articulate a prima facie case. Even if a court does not impose this requirement as part of the plaintiff’s prima facie case, a rigorous similarly situated definition may cause courts to improperly grant summary judgment to the employer.

This Article discusses the courts’ misuse of the similarly situated concept. Part II is a short summary of the employment discrimination laws, concentrating on the system developed by the Supreme Court for indirectly proving an individual disparate treatment case. Under the Supreme Court’s methodology, one way that a plaintiff may prove a prima facie case is to point to a similarly situated employee who the employer treated differently. Some courts, however, require a similarly situated showing as an element of the plaintiff’s prima facie case. Part III discusses the problems with such a requirement. Part III.A briefly surveys the caselaw from the twelve federal circuits. Part III.B discusses the problems with imposing a similarly situated requirement as part of the plaintiff’s prima facie case. Such a requirement frustrates the purposes of a prima facie case and fails to account for the fact that the employer’s intent can be proven in a variety of ways. In addition, courts can always recognize distinctions between employees, sometimes making it unnecessarily difficult for a plaintiff to establish a prima facie case. Finally, such a requirement can improperly exclude certain types of employees from the protection of the employment discrimination laws.

The second way that courts misuse the similarly situated concept is to define the concept too narrowly. Courts often recognize distinctions between the plaintiff and a comparator that may or may not be relevant. If courts are too quick to recognize such distinctions and find them determinative, the court will find that the plaintiff and the comparator are not similarly situated. If the court requires a similarly situated showing as an element of the plaintiff’s prima facie case, then the court will find that the plaintiff has not established a prima facie
case. Even if the court does not have such a requirement, an overly-rigorous similarly situated test will result in courts improperly granting summary judgment. Part IV discusses the manner in which some courts impose a very narrow definition of the similarly situated concept. Courts sometimes find that employees are not similarly situated based on the fact that they have different supervisors, different job responsibilities, or have engaged in different conduct. In some cases, these differences may be relevant, but, in granting summary judgment to the employer, courts often fail to draw all inferences in favor of the plaintiff. These issues are also discussed in Part IV.

This Article concludes that courts should not require a similarly situated showing as an element of the plaintiff’s prima facie case. In addition, courts should be more cautious about misusing the similarly situated concept when granting summary judgment to employers.

II. A SHORT SUMMARY OF EMPLOYMENT DISCRIMINATION LAW

A. Types of Employment Discrimination Claims

Employment discrimination claims fall into two categories—disparate treatment (or intentional discrimination) and disparate impact (non-intentional discrimination). In a disparate impact case, the plaintiff identifies a facially neutral employment practice that has a significant impact on one of the protected groups. The plaintiff does not have to prove that the employer intended to discriminate.

Disparate treatment cases, on the other hand, require proof of intent. Disparate treatment claims come in two varieties—individual disparate treatment and pattern and practice discrimination which involves systemic discrimination against a protected class. In a pattern and practice case, the plaintiffs allege that


2. See United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713 n.1 (1983) (stating that the Supreme Court had “consistently distinguished” these two types of claims); 1 CHARLES A. SULLIVAN ET AL., EMPLOYMENT DISCRIMINATION § 2.2, at 38 (2d ed. 1988) (noting that there are two kinds of discrimination claims—disparate treatment and disparate impact).


4. See SULLIVAN ET AL., supra note 2, § 2.2, at 38 (identifying two types of disparate treatment discrimination—systemic disparate treatment and individual disparate
the employer systematically and intentionally uses "race, gender, religion, or national origin to make a range of employment decisions." This Article deals with individual disparate treatment cases.

B. The Statutes

Section 703(a) of Title VII states:

It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge an 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; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.6

Both the Americans with Disabilities Act ("ADA") and the Age Discrimination in Employment Act ("ADEA") contain similar provisions.7

C. Proving an Individual Disparate Treatment Case

When an individual plaintiff alleges disparate treatment, the plaintiff must show that the employer engaged in intentional discrimination.8 The plaintiff may

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5. SULLIVAN ET AL., supra note 2, § 2.3, at 39.


8. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (stating that in disparate treatment cases, proving "discriminatory motive is crucial, although it
prove that the employer engaged in intentional discrimination by producing direct evidence or circumstantial (indirect) evidence. In most cases alleging individual disparate treatment, the plaintiff does not possess direct evidence. Most plaintiffs, therefore, use circumstantial evidence to establish the employer’s discriminatory intent. In a line of cases beginning with McDonnell Douglas Corp. v. Green, the Supreme Court developed a method for plaintiffs to use indirect evidence to prove discrimination. This method involves the allocation of shifting burdens of proof and the drawing of inferences. Under this system, the plaintiff first must prove "by the preponderance of the evidence a prima facie case of discrimination." If the plaintiff establishes a prima facie case, the burden shifts to the defendant to produce evidence of a "legitimate, nondiscriminatory reason" for the employment action. If the employer produces evidence of a legitimate, nondiscriminatory reason, the plaintiff "must then have the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination."

Courts have struggled with defining the elements of the plaintiff’s prima facie case. In McDonnell Douglas, the employer refused to re-hire the plaintiff. In another individual disparate treatment case decided by the Supreme Court, Texas Department of Community Affairs v. Burdine, the employer had refused to promote the plaintiff. In these types of cases, the Supreme Court stated that, to establish a prima facie case, the plaintiff had to prove that: (1) he belonged to a protected class; (2) he applied and was qualified for an available job; (3) the employer rejected him; and (4) the employer continued to seek applicants for the

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10. SULLIVAN ET AL., supra note 2, § 2.5, at 45.


13. Id. at 253 (quoting McDonnell Douglas Corp., 411 U.S. at 802).

14. Id. In addition, courts apply the McDonnell Douglas formula to individual disparate treatment cases brought under other employment discrimination statutes. See, e.g., Loeb v. Textron, Inc., 600 F.2d 1003, 1014-16 (1st Cir. 1979) (stating that the McDonnell Douglas formula is applicable to ADEA cases).

open position. The Court stated, however, that these requirements were "not inflexible" and that, because the facts varied in different discrimination cases, these factors were not necessarily always applicable.

Courts have developed different standards to fit other fact patterns. In discharge cases, for example, a terminated plaintiff must show that: (1) she is a member of the protected group; (2) she was performing her job satisfactorily; (3) she was discharged; and (4) the employer sought a replacement.

Other factual contexts require even greater flexibility. For example, a plaintiff may allege that the employer, during a reduction-in-force ("RIF"), discriminated in the way it carried out the RIF or in the manner it chose who would be terminated. If the employer simply eliminated her position, the plaintiff will not be able to show that the employer replaced her. Courts, therefore, have said that the plaintiff can establish a prima facie case for her discriminatory discharge during a RIF by showing: (1) she belonged to a protected group; (2) the employer discharged her; (3) she was qualified for the position; and (4) evidence from which a fact finder could reasonably conclude that the employer intended to discriminate.

All the federal courts of appeal, except the Fourth and District of Columbia, have explicitly held that a plaintiff does not have to show that she was replaced by someone outside of her protected class in order to establish a prima facie case. Furthermore, in O'Connor v. Consolidated Coin Caterers Corp.,

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16. Id. at 254 n.6 (quoting McDonnell Douglas Corp., 411 U.S. at 802).
17. See id. (quoting McDonnell Douglas, 411 U.S. at 802 n.13).
18. See Loeb, 600 F.2d at 1014; Matthews v. Allis-Chalmers, 769 F.2d 1215, 1217 (7th Cir. 1985), overruled by Oxman v. WLS-TV, 846 F.2d 448 (7th Cir. 1988).
20. See Williams v. Trader Publ'g Co., 218 F.3d 481, 485 (5th Cir. 2000) ("[I]t is well settled that, although replacement with a non-member of the protected class is evidence of discriminatory intent, it is not essential to the establishment of a prima facie case under Title VII."); Amro v. Boeing Co., 232 F.3d 790, 796 (10th Cir. 2000) ("The plaintiff is not required to show that [a position] was filled by someone outside the plaintiff's protected class."); Fernandes v. Costa Bros. Masonry Inc., 199 F.3d 572, 584 (1st Cir. 1999) ("[A] plaintiff need not show as part of his prima facie case that the employer either recalled similarly situated non-minority employees or otherwise treated employees of different ethnic backgrounds more favorably."); Pivrotto v. Innovative Sys., 191 F.3d 344, 353-54 (3d Cir. 1999) (noting that seven of the eight federal courts of appeal have held that a plaintiff in a termination case does not have to prove, as part of his case, that he was replaced by someone outside of the protected class and stating that "[t]he fact that a female plaintiff claiming gender discrimination was replaced by another woman might have some evidentiary force, and it would be prudent for a plaintiff in this situation to counter (or explain) such evidence . . . . But this fact does not, as a matter of law or logic, foreclose the plaintiff from . . . .")
the Supreme Court held that the plaintiff in an age discrimination termination case does not have to prove, as part of his prima facie case, that he was replaced by someone outside the protected class.

proving that the employer was motivated by her gender (or protected characteristic) when it discharged her."; Leffel v. Valley Fin. Servs., 113 F.3d 787, 793 (7th Cir. 1997), cert. denied, 522 U.S. 968 (1997) ("[W]e have disavowed prior cases from this circuit suggesting that a Title VII plaintiff must show that she was replaced by someone of a different race, sex, and so on."); Chock v. Northwest Airlines, Inc., 113 F.3d 861, 863 n.1 (8th Cir. 1997) ("[W]e do not require a plaintiff to demonstrate replacement by a person outside any protected class for a prima facie case."); Tarin v. County of Los Angeles, 123 F.3d 1259, 1264 n.3 (9th Cir. 1997) (recognizing that Diaz v. AT&T, 752 F.2d 1356, 1360 (9th Cir. 1985) modified the prima facie case by allowing a plaintiff to establish a prima facie case even though individual promoted instead of the plaintiff is member of the same protected class); Edward v. Wallace Cmty. Coll., 49 F.3d 1517, 1521 (11th Cir. 1995) (a minority plaintiff may have a prima facie case when the employer replaces him with another minority person, but "[t]he court must consider whether the fact that a minority was hired overcomes the inference of discrimination otherwise created by the evidence presented by the plaintiff"); Jackson v. Richards Med. Co., 961 F.2d 575, 587 n.12 (6th Cir. 1992) ("We wish to make clear, however, that the fact that an employer replaces a Title VII plaintiff with a person from within the same protected class as the plaintiff is not, by itself, sufficient grounds for dismissing a Title VII claim. Unlike the ADEA statute, Title VII does not require that the plaintiff, as part of a prima facie case, show that he or she was replaced by a person outside the protected class."); Meiri v. Dacon, 759 F.2d 989, 995-96 (2d Cir. 1985) ("[R]equire[ng] an employee, in making out a prima facie case, to demonstrate that she was replaced by a person outside the protected class . . . is inappropriate and at odds with the policies underlying Title VII."). The District of Columbia Circuit has not yet decided the issue. See Willingham v. Abraham, No. 00-5125, 2001 U.S. App. LEXIS 7533, at **2-3 (D.C. Cir. Mar. 29, 2001) (choosing not to address this issue because the district court found that the plaintiff was not qualified for the position, but recognizing that in O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 312 (1996), the Supreme Court held that "[t]he fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out because of his age"). The Fourth Circuit is the only court of appeals to impose this requirement on plaintiffs. See Brown v. McLean, 159 F.3d 898, 905 (4th Cir. 1998) ("In order to make out a prima facie case of discriminatory termination, a plaintiff must ordinarily show that the position ultimately was filled by someone not a member of the protected class." However, three situations in which a plaintiff does not have to meet this requirement are: (1) age discrimination cases in which the plaintiff is replaced by a younger person of the same protected class, (2) when there is a significant time lapse between the adverse action against the plaintiff and the decision to hire another person of the same protected class, and (3) when the employer intended to disguise discrimination by hiring another member of the same protected class.")

If a plaintiff establishes a prima facie case, it "creates a presumption that the employer unlawfully discriminated." 22 If the defendant does not respond with evidence of a legitimate, nondiscriminatory reason, the trial court must enter judgment for the plaintiff. 23

The Supreme Court said in Burdine that the plaintiff's burden in proving the elements of a prima facie case is "not onerous." 24 The purpose of the prima facie case is to eliminate "the most common nondiscriminatory reasons for the plaintiff's rejection." 25 The employer's actions, "if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." 26 Indeed, the purpose of the McDonnell Douglas scheme allocating the burdens of proof is to progressively "sharpen the inquiry into the elusive factual question of intentional discrimination." 27 To accomplish this, the Supreme Court has made it easy for the plaintiff to produce evidence creating a legal presumption in order to bring out the evidence most probative of the defendant's intent.

The employer, however, does not have a difficult job task in rebutting the presumption. Once the plaintiff establishes a prima facie case, the employer must produce "evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason." 28 The employer's burden is not a burden of persuasion—the employer only has to produce evidence of its reason for the employment action that creates a genuine issue of fact about whether the employer intended to discriminate. Once the employer produces such evidence, the "factual inquiry proceeds to a new level of specificity" 29—the court must give the plaintiff an opportunity to demonstrate that the employer's justification was not the actual reason for the employment action, but a pretext for discrimination. This burden "merges" with the plaintiff's ultimate burden of proving that the employer intentionally discriminated. 30

22. Burdine, 450 U.S. at 254.
23. See id.
24. Id. at 253.
25. Id. at 253-54.
27. Id. at 256 n.8.
28. Id. at 254.
29. Id. at 255.
30. See id. at 256. The courts do not partition trials involving disparate treatment into three parts—prima facie case, legitimate nondiscriminatory treatment, and pretext. Instead, these mechanisms "frame the ultimate issue of intent." 1 SULLIVAN ET AL., supra note 2, § 5.7, at 278. Disparate treatment cases generally proceed in the same manner as other civil trials. See id. First, the plaintiff presents evidence on matters necessary to prove the elements of her case. Second, the employer presents evidence countering the plaintiff's case. Finally, the court may permit rebuttal and surrebuttal evidence.
III. PROBLEM I—REQUIRING A SIMILARLY SITUATED SHOWING AS AN ELEMENT OF THE PRIMA FACIE CASE

A number of courts require that plaintiffs show, as part of their prima facie case, that the employer treated similarly situated individuals differently. Such a requirement violates the statutory language and also has a number of other problems. Before discussing these problems, however, a survey of the circuit courts of appeal would be helpful.

A. A Brief Survey of the Circuits

1. First Circuit

The First Circuit has apparently abandoned an earlier requirement that plaintiffs prove, as part of their prima facie case, that the employer treated similarly situated persons differently. In Molloy v. Blanchard, a 1997 Title VII disparate treatment case, the court noted that if a plaintiff has no direct evidence of intentional discrimination, the plaintiff must first establish a prima facie case. The plaintiff, as part of her prima facie case, must "identify and relate specific instances where persons situated similarly in 'all relevant aspects' were treated differently."33

In recent cases, however, the First Circuit has not required that the plaintiff prove the existence of a similarly situated individual as a requirement for establishing a prima facie case. In Fernandes v. Costa Bros. Masonry, Inc., a 1999 case, the plaintiff alleged that the employer had discriminatorily refused to rehire him. The employer contended that the plaintiff, as part of his prima facie case, had to show that the employer either rehired similarly situated non-minority workers or treated other non-minority employees more favorably. The Fernandes court rejected this, noting that under McDonnell Douglas Corp. v. Green, the plaintiff only had to show "that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications."35 The Fernandes court found that the plaintiff had

31. 115 F.3d 86 (1st Cir. 1997).
32. Id. at 91.
34. 199 F.3d 572 (1st Cir. 1999).
36. Fernandes, 199 F.3d at 584 (quoting McDonnell Douglas, 411 U.S. at 802).
met the elements of a prima facie case despite his failure to point to a similarly situated individual who had not been rehired.37

Similarly, in Conward v. Cambridge School Committee,38 the First Circuit found that the trial court had erred in requiring the plaintiff to show as part of his prima facie case that the conduct for which he was terminated "was nearly identical" to that committed by another employee outside of the protected class.39 The appellate court stated that such comparative evidence should be considered "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."40

2. Second Circuit

In Abdu-Brisson v. Delta Air Lines, Inc.,41 the Second Circuit noted that its courts had struggled with the similarly situated element of the prima facie case and had "occasionally adopted apparently inconsistent positions—even within a single case."42 In Abdu-Brisson, however, discussed at length below,43 the Second Circuit concluded that while a showing of disparate treatment of similarly situated employees was a "common and especially effective method" of establishing a prima facie case, it was not the only way.44

3. Third Circuit

In 1996, the Third Circuit rejected a similarly situated requirement in Marzano v. Computer Science Corp.45 In a well-reasoned opinion, discussed below, the court said that such a showing would strengthen the plaintiff's case but was not required.46

37. Id.
38. 171 F.3d 12 (1st Cir. 1999).
39. Id. at 19.
40. Id.; see also Rodriguez-Cuervos v. Wal-Mart Stores, Inc., 181 F.3d 15, 20-21 (1st Cir. 1999) (assuming that plaintiff had established a prima facie case of race and national origin discrimination but finding, at the pretext stage, that plaintiff failed to establish that the employer treated similarly situated non-Puerto Rican managers differently).
41. 239 F.3d 456 (2d Cir. 2001).
42. Id. at 467.
43. See infra notes 108-24 and accompanying text.
44. Id. at 468.
45. 91 F.3d 497 (3d Cir. 1996). For a discussion of Marzano, see infra note 152 and text accompanying notes 161-63.
46. Id. at 510.
Similarly, in *Matczak v. Frankford Candy & Chocolate Co.*, the plaintiff alleged, in an ADA case, that the employer had discriminated against him because it regarded him as disabled. The federal district court granted summary judgment to the defendant, holding that the plaintiff had not established a prima facie case because he had failed to show that the employer had treated employees outside the protected class more favorably. The Third Circuit, however, held that this was not a required element of a prima facie case, but, rather, only an alternative element.

In spite of the clear statements in *Marzano* and *Matczak* rejecting a similarly situated requirement, a subsequent Third Circuit case, in dicta, purported to impose such a requirement. In *Goosby v. Johnson & Johnson Medical, Inc.*, a 2000 case, the court set out the standards for a prima facie case, including that the plaintiff show that “nonmembers of the protected class were treated more favorably.” In *Goosby*, however, the court found that the plaintiff had established a prima facie case and this element was not at issue. The confusion, however, is reflected in district court cases in the Third Circuit.

In *Miller v. Delaware*, for example, a 2001 case, the court, relying on *Goosby*, stated that an employment discrimination plaintiff must demonstrate, as part of his prima facie case, that the employer treated nonmembers of the protected class more favorably. The *Miller* court found that the plaintiff in that case had failed to establish a prima facie case of race discrimination because he had not shown that the employer had treated similarly situated white employees more favorably. Several other district court cases, decided both before and after *Goosby*, have also imposed a similarly situated requirement.

47. 136 F.3d 933 (3d Cir. 1997).
48. Id. at 935, 938.
49. Id. at 940.
50. 228 F.3d 313 (3d Cir. 2000).
51. Id. at 318-19.
52. Id. at 319.
54. Id. at 411.
55. Id. at 411-12.
56. See Fullman v. Henderson, 146 F. Supp. 2d 688, 697 n.4 (E.D. Pa. 2001) (plaintiff’s Title VII claim alleging sex discrimination in his termination is time barred; however, even if it had been timely, summary judgment would still have been granted because “[i]n order for [plaintiff] to make out a prima facie case for disparate treatment, he must demonstrate that similarly situated non-protected persons were treated more favorably than himself”); Pittman v. Continental Airlines, Inc., 35 F. Supp. 2d 434, 443 (E.D. Pa. 1999) (“To state a prima facie case of disparate treatment under Title VII... a plaintiff must demonstrate... that non-members of the protected class were treated more favorably... [and] a female sexual discrimination plaintiff must show that male
Still other district courts in the Third Circuit have taken the opposite approach. For example, in *Bray v. L.D. Caulk Dentsply International*, a 2000 case, the court rejected the employer's contention that the plaintiff had to point to a similarly situated person outside the protected group as a necessary element of a prima facie case. The court stated that "[s]uch a requirement flies in the face of recent Third Circuit case law." The plaintiff, instead, had to demonstrate "that she was subjected to an adverse employment action under circumstances that give rise to an inference of unlawful discrimination." Thus, the Third Circuit's position toward a similarly situated requirement is in a state of disarray.

4. Fourth Circuit

The majority of Fourth Circuit cases impose a similarly situated requirement as part of the plaintiff's prima facie case. In *Taylor v. Virginia Union University*, the Fourth Circuit stated that in order to state a Title VII prima facie case of disparate discipline, a sex discrimination plaintiff must show that "she suffered more severe discipline for her misconduct as compared to those employees outside the protected class." Similarly, in *Cook v. CSX Transportation Corp.*, the African-American plaintiff contended that his employees did not suffer similar adverse employment actions, despite displaying the same problem which provoked and supported the adverse actions suffered by the plaintiff.

58. Id. at *5.
59. Id.; see also *Maull v. Div. of State Police*, 141 F. Supp. 2d 463, 478 (D. Del. 2001) ("While there does not appear to be a requirement that a plaintiff prove that similarly situated individuals were treated differently at the prima facie case stage of a race discrimination claim, the Third Circuit does require the plaintiff to show circumstances which give rise to an inference of discrimination . . . . [Such circumstances include the more favorable treatment of individuals who are not in the plaintiff's protected class."); *Fullard v. Argus Research Labs., Inc.*, No. Civ. A. 00-509, 2001 WL 632932, at *3 (E.D. Pa. June 6, 2001) (stating that the plaintiff may establish a prima facie case with evidence that the employer treated similarly situated individuals more favorably but that such evidence was not required).
60. 193 F.3d 219 (4th Cir. 1999), cert. denied, 528 U.S. 1189 (2000).
61. Id. at 234 (citing *Cook v. CSX Transp. Corp.*, 988 F.2d 507, 511 (4th Cir. 1993)).
62. 988 F.2d 507 (4th Cir. 1993).
employer engaged in racial discrimination when it disciplined him. The Fourth Circuit stated that, “[t]o establish a prima facie case of racial discrimination in the enforcement of employee disciplinary measures under Title VII, the plaintiff must show . . . that the disciplinary measures enforced against him were more severe than those enforced against other employees.”

In Moore v. City of Charlotte, the Fourth Circuit reversed a district court’s judgment that the employer had engaged in racial discrimination when it demoted a black police officer from sergeant to patrolman in violation of Title VII. The Fourth Circuit stated that for the plaintiff to establish a prima facie case of discriminatory discipline, he had to prove that an employee of another race had engaged in similar conduct and that the employer enforced disciplinary measures against him more severely than against the other person. The test was whether the other employee’s acts were of “comparable seriousness.” Since the court believed that the plaintiff’s conduct was much more serious than the white comparator’s conduct, it found that the plaintiff had failed to make out a prima facie case.

63. Id. at 509.
64. Id. at 511 (citing Moore v. City of Charlotte, 754 F.2d 1100, 1105-06 (4th Cir. 1985), cert. denied, 472 U.S. 1021 (1985)).
65. 754 F.2d 1100 (4th Cir. 1985).
66. Id. at 1102.
67. Id. at 1105-06.
68. Id. at 1107 (quoting McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 283 n.11 (1976)).
69. Id. at 1107-09; see also Brown v. Runyon, No. CA-96-162, 1998 WL 85414, at *1 (4th Cir. Feb. 27, 1998) (to make out a prima facie case the plaintiff had to show that she was “treated less favorably in the employment decision at issue than a similarly-situated employee or job applicant from outside of the plaintiff’s protected Title VII class”); Spratley v. Hampton City Fire Dep’t, No. CA-95-91-4, 1997 WL 592736, at *2 (4th Cir. Sept. 26, 1997) (as part of his prima facie case the plaintiff had to show that “the discipline imposed on him was more severe than that imposed on the similarly situated employees”). But see Dickens v. MCI Telecomms. Corp., CA-94-113-A, 1996 WL 93810, at *1, *3 (4th Cir. Mar. 5, 1996) (Plaintiff could establish a claim of discrimination under the ADEA and Title VII in one of two ways. First, he could bring in direct evidence of discrimination or “circumstantial evidence of sufficient probative force to support an inference of discrimination.” Second, the plaintiff could elucidate a prima facie case by proving he was a member of a protected group, he was qualified for the position and had been performing up to the “employer’s legitimate expectations,” the employer had demoted him, and the employer had replaced him “by someone of comparable qualifications outside the protected class” or had retained “persons outside the protected class in the same position” or by bringing in “some other evidence that age or race was not treated neutrally.”).
5. Fifth Circuit

The Fifth Circuit usually requires that, absent direct evidence, a plaintiff must point to a similarly situated employee as part of his prima facie case. Occasionally, however, the court has implied that this is not a rigid requirement.

6. Sixth Circuit

The Sixth Circuit has sent out mixed signals. In termination cases, the court has required that a plaintiff, as part of his prima facie case, show either that the employer replaced him with someone not in the protected group or treated him less favorably than a similarly situated employee. Thus, in Mitchell v. Toledo Hospital, the Sixth Circuit acknowledged that the plaintiff Mitchell had established the first three elements of a prima facie case. She had shown that: (1) she was a member of a protected class; (2) she was discharged; and (3) that she was qualified for the position. The court then focused on the fourth element stating that, in a discharge case, the plaintiff could show either that she was replaced by a white (in a race discrimination case) or a younger person (in

70. See Rutherford v. Harris County, 197 F.3d 173, 183-84 (5th Cir. 1999) (To establish a prima facie case of discrimination, plaintiff must show "others similarly situated were more favorably treated"); Urbano v. Cont'l Airlines, Inc., 138 F.3d 204, 206 (5th Cir. 1998), cert. denied, 525 U.S. 1000 (1998) (plaintiff must show "that others similarly situated were more favorably treated"); Rohde v. K.O. Steel Castings, Inc., 649 F.2d 317, 322 (5th Cir. 1981) ("[T]o successfully establish a prima facie case of sex discrimination based on disparate treatment the complainant must show . . . she and a similarly placed male received dissimilar treatment"); Jackson v. Univ. of Tex. M.D. Anderson Cancer Ctr., 172 F. Supp. 2d 860, 872 (S.D. Tex. 2001) (to establish prima facie case, plaintiff must show "that others similarly situated were treated more favorably than her"); cf. Williams v. Trader Publ'g Co., 218 F.3d 481, 484 (5th Cir. 2000) ("[A] plaintiff may use circumstantial evidence that she has been treated differently than similarly situated non-members of the protected class.").

71. See Mayberry v. Vought Aircraft Co., 55 F.3d 1086, 1090 (5th Cir. 1995) (when an employer disciplines an employee for a breach of a work rule, a plaintiff could establish a Title VII prima facie case "by showing 'either that he did not violate the rule or that, if he did, white employees who engaged in similar acts were not punished similarly'" (quoting Green v. Armstrong Rubber Co., 612 F.2d 967, 968 (5th Cir. 1980), cert. denied, 449 U.S. 879 (1980)); Eugene v. Rumsfeld, 168 F. Supp. 2d 655, 669-70 (S.D. Tex. 2001) (plaintiff may either show another similarly situated employee or "evidence, either circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate").

72. 964 F.2d 577 (6th Cir. 1992).

73. Id. at 582.
an age discrimination case), or she could establish that "a comparable non-protected person was treated better."\textsuperscript{74}

In \textit{Ercegovich v. Goodyear Tire & Rubber Co.},\textsuperscript{75} however, the Sixth Circuit took a different approach. The court stated that a plaintiff who is not given an opportunity to transfer can establish a prima facie case when he shows that:

1) he or she is a member of a protected class; 2) at the time of his or her termination he or she was qualified for other available positions within the corporation; 3) the employer did not offer such positions to the plaintiff; and 4) a similarly-situated employee who is not a member of the protected class was offered the opportunity to transfer to an available position, or other direct, indirect or circumstantial evidence supporting an inference of discrimination.\textsuperscript{76}

Thus, the \textit{Ercegovich} court, in a case involving an allegedly discriminatory transfer, did not impose a similarly situated requirement.

7. Seventh Circuit

The Seventh Circuit has been relatively consistent in recent years. In almost all cases, absent direct evidence, the Seventh Circuit requires a plaintiff to produce evidence of a similarly situated non-protected employee in order to establish a prima facie case.\textsuperscript{77}

\textsuperscript{74} Id.; \textit{see also} Hall v. Baptist Mem'l Health Care Corp., 215 F.3d 618, 626 (6th Cir. 2000) (to establish a prima facie case of discrimination in a termination case, the plaintiff had to show that she was "replaced by someone outside the protected class or was treated less favorably than a similarly-situated employee outside the protected class"); Beene v. St. Vincent Mercy Med. Ctr., 111 F. Supp. 2d 931, 937 (N.D. Ohio 2000) (to establish prima facie case of suspension or termination, plaintiff must show employer filled position with a non-minority employee after plaintiff's discharge or employer suspended or terminated a similarly situated non-minority employee).

\textsuperscript{75} 154 F.3d 344 (6th Cir. 1998).

\textsuperscript{76} Id. at 351.

\textsuperscript{77} \textit{See} Spearman v. Ford Motor Co., 231 F.3d 1080, 1087 (7th Cir. 2000), \textit{cert. denied}, 532 U.S. 995 (2001) (to establish a prima facie case of sex discrimination under Title VII, the male plaintiff must show that the employer "treated similarly situated female employees more favorably"); Stockett v. Muncie Ind. Transit Sys., 221 F.3d 997, 1001 (7th Cir. 2000) (to establish a Title VII prima facie case, plaintiff must show that employer "treated similarly-situated employees outside of his protected class more favorably"); Johnson v. Zema Sys. Corp., 170 F.3d 734, 742-43 (7th Cir. 1999) ("[T]o establish a prima facie case of racial discrimination under Title VII, a plaintiff must produce evidence that . . . the employer treated similarly situated persons not in the protected class more favorably."); Cheek v. Peabody Coal Co., 97 F.3d 200, 204 (7th Cir.
8. Eighth Circuit

The Eighth Circuit has sent out mixed signals. While some cases have stated that a plaintiff is not required to show the existence of a similarly situated employee, the language of other cases mandates such a requirement.

1996) (to meet burden of establishing a prima facie case plaintiff must show that "her employer treated similarly situated males more favorably"); Sarsha v. Sears, Roebuck & Co., 3 F.3d 1035, 1042 (7th Cir. 1993) ("[T]o make out a prima facie case of sex discrimination under Title VII, [the plaintiff] must show that he was treated differently from a similarly situated female."); Wislocki-Goin v. Mears, 831 F.2d 1374, 1379-80 (7th Cir. 1987) (plaintiff did not make out Title VII prima facie case when she failed to show that employer treated similarly situated male employees differently), cert. denied, 485 U.S. 936 (1988); cf. Bellaver v. Quanex Corp., 200 F.3d 485, 495 (7th Cir. 2000) (in an individual discharge case, plaintiff may either show that similarly situated employees were treated better than he, or that he was constructively replaced by workers outside of the protected class when they took over his job duties); Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394, 1398-1400 (7th Cir. 1997) (rejecting district court's imposition of similarly situated requirement, but only when plaintiff had direct evidence of discrimination). But see Cowan v. Glenbrook Sec. Servs., Inc., 123 F.3d 438, 445 (7th Cir. 1997) ("Under McDonnell Douglas, a plaintiff can establish a prima facie case of discriminatory discharge by showing that he is a member of a protected class, that he was discharged, despite having performed his job satisfactorily, and that other similarly situated employees outside his race were treated more favorably.") (emphasis added).

78. See, e.g., Taylor v. Southwestern Bell Tel. Co., 251 F.3d 735, 740 (8th Cir. 2001) (to establish prima facie case, plaintiff must show that "there are facts that permit an inference of discrimination . . . [and such] an inference may be drawn from evidence that a plaintiff was treated less favorably than other similarly situated employees"); Bailey v. Armsted Indus., Inc., 172 F.3d 1041, 1045 (8th Cir. 1999) (same in ADA case); Williams v. Ford Motor Co., 14 F.3d 1305, 1310 n.4 (8th Cir. 1994) ("We note that a showing of 'similarly situated' is not necessarily required in every discriminatory reinstatement case.").

79. See, e.g., LaCroix v. Sears, Roebuck & Co., 240 F.3d 688, 693 (8th Cir. 2001) (in establishing a prima facie case of sex discrimination involving indirect evidence, the plaintiff must show that the employer treated her "differently than similarly situated persons of the opposite sex"); Clark v. Runyon, 218 F.3d 915, 918 (8th Cir. 2000) ("In order to establish a prima facie case of racial discrimination, the plaintiff must show that . . . similarly situated employees, who are not members of the protected group were treated differently."); Harlston v. McDonnell Douglas Corp., 37 F.3d 379, 383 (8th Cir. 1994) (plaintiff failed to establish prima facie case in age and race discrimination claim because she failed to "identify any individuals who were similarly situated and received better evaluations").
9. Ninth Circuit

Most Ninth Circuit cases impose a similarly situated requirement. Thus, in *Chuang v. University of California Davis, Board of Trustees*, the Ninth Circuit stated that, in order to establish a prima facie case, the plaintiff had to show that "similarly situated individuals outside his protected class were treated more favorably." A number of other Ninth Circuit unpublished opinions have also followed this approach.

10. Tenth Circuit

In recent years, the Tenth Circuit has not imposed a similarly situated requirement. In *Ortiz v. Norton*, the plaintiff alleged that the employer had terminated him because of his national origin. The district court found that the plaintiff had presented enough evidence regarding the first three elements of a prima facie case: he belonged to a protected class; he suffered an adverse employment action; and he was performing satisfactorily. The district court, however, granted summary judgment to the employer because the plaintiff failed to establish the fourth element of a prima facie case—that the employer treated him less favorably than other employees outside the protected class. The Tenth Circuit reversed the district court's grant of summary judgment, finding that the plaintiff could satisfy the fourth element of a prima facie case in a variety of ways. Ortiz had satisfied this burden by showing that the employer did not eliminate his job position. Thus, the court emphatically rejected a similarly situated requirement.

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80. 225 F.3d 1115 (9th Cir. 2000).
81. *Id.* at 1123.
82. *See* Burgess v. Wash.-Dep't of Corrections, No. 98-35417, 1999 WL 974182, at *3 (9th Cir. Oct. 22, 1999) (to establish a prima facie case of disparate treatment, plaintiff must show "that a similarly situated unprotected person was treated differently than he"); Green v. King County Solid Waste, No. 98-35076, 1998 WL 668031, at *1 (9th Cir. Sept. 18, 1998) (because plaintiff did not create factual issue as to whether employer treated him differently than similarly situated individuals, he failed to establish a prima facie case); Coleman v. Cal. Sch. for the Deaf, No. CV-88-2969-TEH, 1991 WL 45253, at *2 (9th Cir. Mar. 27, 1991) (plaintiff bears initial burden of proving prima facie case by showing employer treated him less favorably than others who were similarly situated). *But see* Schneider v. United States Dep't of Transp., No. 96-15141, 1997 WL 124346, at *1 (9th Cir. Mar. 13, 1997) (acknowledging that a similarly situated showing is not the sole means of establishing a prima facie case).
83. 254 F.3d 889 (10th Cir. 2001).
84. *Id.* at 893-94.
85. *Id.* at 895, 900; *see also* EEOC v. Horizon/CMS Healthcare Corp., 220 F.3d
11. Eleventh Circuit

The Eleventh Circuit requires plaintiffs to point to a similarly situated employee to establish a prima facie case. In Holifield v. Reno,86 for example, the plaintiff Edward Holifield alleged that his former employer, the Bureau of Prisons, discriminated against him because of his race when it terminated him.87 The Eleventh Circuit affirmed the district court’s judgment, adopted its reasoning, and attached its opinion as an appendix.88 According to the court, because the plaintiff had no direct evidence, he had to establish a prima facie case under Title VII by showing that the employer “treated similarly situated employees outside his classification more favorably.”89

1184, 1195 n.6 (10th Cir. 2000) (“Nothing in the case law in this circuit requires a plaintiff to compare herself to similarly-situated co-workers to satisfy the fourth element of a prima facie case . . . [indeed, she can satisfy this element] in a number of ways.”); Kendrick v. Penske Transp. Servs., Inc., 220 F.3d 1220, 1225-26, 1229 (10th Cir. 2000) (applying McDonnell Douglas Title VII burden shifting analysis to African-American truck driver’s suit for racial discrimination under Section 1981, 42 U.S.C. § 1981 (1994), and stating that district court had erred in requiring the plaintiff to show that the employer had treated similarly situated white employees differently in order for the plaintiff to make out a prima facie case; instead, plaintiff only had to show that “(1) he belongs to a protected class; (2) he was qualified for his job; (3) despite his qualifications, he was discharged; and (4) the job was not eliminated after his discharge”). Older cases from the Tenth Circuit, however, did impose a similarly situated requirement. See, e.g., Lowe v. Angelo’s Italian Foods, Inc., 87 F.3d 1170, 1175 (10th Cir. 1996) (because female plaintiff did not adduce evidence that “male co-workers were similarly situated with respect to their job functions, she has failed to establish a prima facie case of disparate treatment”).

86. 115 F.3d 1555 (11th Cir. 1997).
87. Id. at 1557.
88. Id. at 1556-57.
89. Id. at 1562; see also Lathem v. Dep’t of Children and Youth Servs., 172 F.3d 786, 792 (11th Cir. 1999) (plaintiff, as part of her prima facie case, had to demonstrate “that the misconduct for which the employer discharged the plaintiff was the same or similar to what a similarly situated employee engaged in, but that the employer did not discipline the other employee similarly”); Maniccia v. Brown, 171 F.3d 1364, 1368 (11th Cir. 1999) (as part of her prima facie case the plaintiff “must” show that “her employer treated similarly situated male employees more favorably”); Marshall v. W. Grain Co., 838 F.2d 1165, 1167-68 (11th Cir.), cert. denied, 488 U.S. 852 (1988) (“To establish a prima facie case of racial discrimination under Title VII, the plaintiffs must show that they are members of a racial minority and that they were treated differently from similarly situated non-minority members” and “the question of whether the plaintiffs are similarly situated” was “crucial.”).

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THE SIMILARLY SITUATED CONCEPT

12. District of Columbia Circuit

Courts in the District of Columbia Circuit impose a similarly situated requirement on employment discrimination plaintiffs. Thus, for example, in Keith v. Duffey,90 the court said that in order for a plaintiff to establish a prima facie case of discrimination, he must show that "other similarly situated employees from outside the protected class were not subject to that action."91 Since the black plaintiff was unable to point to any similarly situated white employee that the employer treated differently, the court dismissed his racial discrimination claim.92

13. Summary

To summarize, the circuits are widely split about whether employment discrimination plaintiffs must point to a similarly situated plaintiff as part of their prima facie case. In six circuits—the Fourth, Fifth, Seventh, Ninth, Eleventh, and District of Columbia—the courts generally impose such a requirement. Three circuits—the First, Second, and Tenth—for the most part reject the requirement. In three circuits—the Third, Sixth, and Eighth—the caselaw goes both ways.

B. The Problems with Imposing the Similarly Situated Requirement as an Element of the Prima Facie Case

There are several problems with the imposition of a similarly situated requirement. First, the requirement frustrates the purposes of the prima facie case. Second, it violates the principle that intent can be proven in many different

91. Id. at 50.
92. Id. at 50-51; see also Holbrook v. Reno, 196 F.3d 255, 261 (D.C. Cir. 1999) (in order to establish a prima facie case with indirect evidence under the McDonnell Douglas scheme, the plaintiff must show that "she was similarly situated to an employee who was not a member of the protected class . . . [and] that she and the similarly situated person were treated disparately"); Batson v. Powell, 21 F. Supp. 2d 56, 58 (D.D.C. 1998), aff'd, 203 F.3d 51 (D.C. Cir. 1999) (in order for the plaintiff to establish a prima facie case of disparate treatment discrimination, the plaintiff, a female guard, had to "show (1) that the defendants treated male guards differently than female guards, and (2) that the male guards who received different treatment were similarly situated to the female guards to whom they are compared"); cf. Coward v. ADT Sec. Sys., Inc., 140 F.3d 271, 273 (D.C. Cir. 1998) (to establish a prima facie case of discrimination in the payment of wages, the plaintiffs had to show that they were performing substantially equal work to that of white employees whom the employer paid at a higher rate).
ways. Third, the requirement fails to account for the fact that there are always distinctions of some kind between employees. Fourth, the requirement potentially excludes classes of employees from the protection of the employment discrimination laws.

Before discussing these problems with the similarly situated requirement, an examination of two cases in which the Tenth and Second Circuit Courts of Appeal rejected the district courts’ imposition of the requirement will prove helpful. After a discussion of these cases, the four problems will be discussed in turn.


In Ortiz v. Norton, the plaintiff Ortiz alleged that his employer, the Department of Interior, had discriminated against him because of his Hispanic national origin. While an employee of the department, Ortiz was convicted of aggravated battery and sentenced to 364 days in jail. In February 1995, he was informed that he would have to begin serving his sentence in a few days. Ortiz asked his supervisor for a leave of absence without pay. The supervisor denied the request on the ground that the employer needed to meet deadlines on projects that were under the plaintiff’s responsibility. The employer subsequently terminated the plaintiff’s employment for his being absent without leave.

In considering the defendant’s motion for summary judgment, the district court found that the plaintiff had either proven or presented sufficient evidence in regard to the first three elements of a prima facie case. He had shown that he belonged to a protected class, that the employer committed an adverse action against him, and that he was performing satisfactorily. The district court, however, granted summary judgment to the defendant because the plaintiff had failed to present sufficient evidence regarding the fourth element of a prima facie case. According to the court, the plaintiff had failed to show that the employer treated him less favorably than other similarly situated employees.

The district court said that, although the comparators did not have to be identical, they had to be “similarly situated in all respects relevant to the employer’s decision.” The employer’s reasons for denying the leave request were Ortiz’s significant responsibility for an important project, the length of his leave, and his failure to give a specific reason for the leave. Based on these

93. 254 F.3d 889 (10th Cir. 2001).
94. Id. at 892.
95. Id.
96. Id. at 894.
97. Id. (quoting the district court’s memorandum opinion).
98. Id. Ortiz had told the employer merely that he had a personal, family
reasons, the court concluded that "a similarly situated employee would be an employee with significant management responsibilities who requested an extended leave on short notice without providing the reason for the leave."99 Because the plaintiff could not point to such a person, the district court found that the plaintiff failed to establish a prima facie case and, therefore, granted summary judgment to the defendant.100

The Tenth Circuit said that the district court’s requirement “made the playing field unlevel” and violated the principle that the plaintiff’s prima facie burden was “not onerous.”101 The appellate court noted that the district court had used the employer’s rationale for the denial of leave and the discharge as the basis for defining who was similarly situated.102 According to the Tenth Circuit, this unfairly short-circuited the analysis at the prima facie stage and frustrated the plaintiff’s opportunity to prove that the employer’s rationale was pretextual.103

Contrary to the district court’s decision, the Tenth Circuit stated that a plaintiff could establish the fourth element of a prima facie case in a variety of ways, including, in a termination case, by showing that the employer had not eliminated his position.104 The discharge of a qualified minority worker raised “an inference of discrimination because it [was] facially illogical for an employer to randomly fire an otherwise qualified employee and thereby incur the considerable expense and loss of productivity associated with hiring and training a replacement.”105 The district court had “erred by making the prima facie burden not just onerous but virtually impossible for plaintiff to meet, defining ‘similarly situated’ employees so that there were no employees against whom comparison could be made.”106 The Tenth Circuit found that the plaintiff had raised genuine issues of material fact and, therefore, reversed the district court’s grant of summary judgment.107

Abdu-Brisson v. Delta Air Lines, Inc.108 arose from Delta’s hiring of the emergency.

99. Id. at 894 (emphasis omitted).
100. Id. at 891, 894.
101. Id. at 894; see also Tex. Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1980) (holding the burden of establishing a prima facie case is “not onerous”).
102. Ortiz, 254 F.3d at 894.
103. Id. at 895 (citing MacDonald v. E. Wyo. Mental Health Ctr., 941 F.2d 1115, 1119 (10th Cir. 1991)).
104. Id. at 895 (citing Perry v. Woodward, 199 F.3d 1126, 1140 (10th Cir. 1999), cert. denied, 529 U.S. 1110 (2000)).
105. Id. (quoting Perry, 199 F.3d at 1140).
106. Id.
107. Id. at 898, 900.
defunct Pan American World Airway’s pilots after Pan Am declared bankruptcy. The plaintiffs, several hundred of Pan Am’s former pilots, alleged that Delta knew that most of them were more senior than Delta’s pilots and that Delta designed their terms of employment with the specific intent of discriminating against them on the basis of age versus their younger Delta counterparts. The former Pan Am pilots pointed to three ways in which Delta had discriminated against them. First, when Delta hired them, it used a formula based on the number of Delta pilots versus the number of Pan Am pilots. The ratio was approximately twelve to one. For seniority purposes, Delta integrated one Pan Am captain beneath every twelve Delta captain positions. The company employed a similar arrangement for the positions of first officer and flight engineer. While this methodology gained the former Pan Am pilots greater seniority than new hires, it also caused them to be placed in spots below Delta pilots with less experience.

Second, the plaintiffs alleged that Delta had discriminated against them in regard to post-retirement medical benefits. Prior to the Pan Am acquisition, Delta had required ten years of service before pilots qualified for these benefits. In August 1991, Delta waived this requirement for pilots who were fifty years old by January 1992, but only if they were on the Delta seniority list on August 27, 1991. Delta did not offer this waiver to the plaintiffs, however, because they were not integrated into the seniority list until November 1991.

Finally, the plaintiffs alleged age discrimination in regard to pay rates. When Delta hired the former Pan Am pilots, it employed them at their pre-existing (lower) Pan Am wage rate with scheduled incremental increases that eventually reached parity with Delta’s scale over a period of three years. Because Delta’s pension benefits were based on the pilot’s average income over the final years of employment, former Pan Am pilots who retired within six years of the take-over received a smaller pension than similarly situated Delta pilots.

The federal district court granted summary judgment to the employer, finding that the plaintiffs had failed to establish the fourth element of a prima facie case because they “were not similarly situated to the Delta pilots in all material respects.” On appeal, the plaintiffs contended that, although showing

109. Id. at 461-65.
110. Id. at 462-63.
111. Id. at 463-64.
112. Id. at 464.
113. Id.
law doctrine of respondeat superior, 32 for instance, an employee would have a claim against an employer for a fellow worker's negligent acts. 33

In an attempt to encourage enterprise, however, the common law began to limit available tort remedies and forced workers to bear the costs of work-related injuries, uncompensated by their employers. 34 The courts reasoned that holding employers liable would not serve the general good in terms of policy considerations. 35 The common view was that the legal system should not intervene on behalf of people fortunate enough to be employed and workers should not receive extra legal protection in addition to gainful employment. 36 Thus, under the common law, laws were designed to limit the liability of businesses and effectively relieved employers of the legal consequences of workplace accidents, leaving workers without any effective recourse. 37 Under the common law, employers owed no duty of care to an employee and an employee assumed the risk of employment. 38

Rules such as the fellow-servant rule, assumption of the risk, and contributory negligence 39 prevented an employee from suing an employer for injuries resulting from a fellow worker's negligence, only allowing for claims resulting from the employer's own personal misconduct. 40 A Massachusetts' case from 1842, Farwell v. Boston & Worcester Railroad Corp., is generally acknowledged as the leading fellow-servant case in the United States. 41 In Farwell, a railroad engineer lost his hand when, due to a switchman's negligence, his train ran off the track. 42 Chief Justice Shaw saw Farwell not as a negligence action, but rather, as a contract dispute. 43 The court held that the employee assumed the risk of injury, because the market had already made an adjustment

32. Respondeat superior is a fundamental tort law principle, where a principal is liable for an agent's negligent acts. Id.
33. Id.
34. Id. at 53.
35. ARTHUR LARSON & LEX LARSON, 1 LARSON'S WORKERS' COMPENSATION § 2.03, at 2-4 (Desk ed., Mathew Bender & Co., 2002).
37. Id.
38. Id. at 777.
39. LARSON & LARSON, supra note 35, §§ 2.02, 2.03, at 2-2 through 2-6. Contributory negligence prevented recovery in cases where the employer was negligent, if the employee was also negligent. Id.
40. Friedman & Ladinsky, supra note 30, at 53.
41. Friedman & Ladinsky, supra note 30, at 55 (citing Farwell, 45 Mass. 49 (1842)); see Epstein, supra note 36, at 777-86. See text accompanying note 39.
42. Friedman & Ladinsky, supra note 30, at 55.
43. Friedman & Ladinsky, supra note 30, at 55.
in the employee’s wage rate to compensate for the dangerous nature of the job and the increased risk of injury. The court did announce that a cause of action would be proper against the employer if there had been a defect in the choice of equipment, in the selection or supervision of an employee, or in the design of the tracks. The rule of common employment left the worker with only an empty claim against fellow employees who likely were without insurance or money.

Ultimately, the common law employment rules did not result in the intended reduction of lawsuits by injured employees against their employers. In actuality, the number of industrial injury suits continued to rise, which may have been the result of a combination of several factors. Most significantly, the number of work-related injuries occurring annually continued to be large. Most injuries resulted in death or permanent disability so a family had nothing to lose by filing suit against the employer. Finally, an important contributing factor was the development of the contingent fee system, which encouraged attorneys to represent injured workers in suits against an employer.

With the swell of lawsuits came an abrogation of many of the restrictions on an employee’s ability to recover. By the beginning of the nineteenth century, courts and juries had begun to create exceptions to the common law doctrines and allow for recovery by injured workers. Courts began to move away from the fellow-servant rule, and toward placing a share of responsibility for the physical wellbeing of employees on the employer. By 1891, one Missouri court observed that judges had already begun limiting the range of the fellow-servant ruled and acknowledged the “hardship and injustice” that resulted from its application. Whether it was sympathy for the injured workers and the working class, a response to employers’ disregard for safety, or retaliation for the monopolistic hold of certain industries on the market, the fellow-servant rule was...
such differing treatment to similarly situated employees was "the most common way to create an inference of discrimination, it [was] not the only method."\textsuperscript{115} The plaintiffs pointed to other evidence, including the fact that, prior to the acquisition of Pan Am, Delta management had focused heavily on the age and retirement schedules of the Pan Am pilots and had made several written derogatory comments that raised an inference of age discrimination.\textsuperscript{116}

The Second Circuit echoed the Supreme Court in stating that the requirement of establishing a prima facie case was not "intended to be rigid, mechanized or ritualistic"\textsuperscript{117} or "onerous."\textsuperscript{118} The Second Circuit noted that courts in the circuit had struggled with this fourth element of the prima facie case and had "occasionally adopted apparently inconsistent positions—even within a single case."\textsuperscript{119} In most cases this misunderstanding was of little consequence because plaintiffs could easily show discrimination by pointing to similarly situated employees who suffered no adverse employment action. There were cases, however, in which employees could suffer discrimination without being

\textsuperscript{115} \textit{N.Y. City Admin. Code} § 8-107 (1)(a) ("City HRL"). \textit{Id.} at 465. The Second Circuit noted that although there were differences between the State HRL, the City HRL, and the federal Age Discrimination in Employment Act ("ADEA"), they were subject to the same analysis. \textit{Id.} at 466. The courts, thus, analyzed the ADEA claim under the McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), burden shifting analysis. \textit{Id.} at 467.

\textit{Id.} at 467.


\textit{Id.} (quoting Fisher v. Vassar Coll., 114 F.3d 1332, 1335 (2d Cir. 1997) (quoting Tex. Dep't of Cnty. Affairs v. Burdine, 450 U.S. 248, 253 (1981)) (internal quotation marks omitted). The Second Circuit stated that in order to prove a prima facie case plaintiff had to show: "(1) he is a member of the protected class; (2) he is qualified for his position; (3) he has suffered an adverse employment action; and (4) the circumstances surrounding that action gave rise to an inference of age discrimination." \textit{Id.} (quoting McDonnell Douglas Corp., 411 U.S. at 802; Wienstock v. Columbia Univ., 224 F.3d 33, 42 (2d Cir. 2000)).

\textit{Id.} The \textit{Abdu-Brisson} court noted that in \textit{Shumway v. United Parcel Serv., Inc.}, 118 F.3d 60 (2d Cir. 1997), the court had stated that, "[t]his last element of a prima facie case may be proven by showing that a man similarly situated was treated differently." \textit{Abdu-Brisson}, 239 F.3d at 467 (quoting \textit{Shumway}, 118 F.3d at 63) (emphasis added). Later in the \textit{Shumway} case, however, the Second Circuit stated that "to establish the fourth element of a prima facie case, \textit{Shumway must} show that she was treated differently than 'similarly situated' males." \textit{Id.} at 467 (quoting \textit{Shumway}, 118 F.3d at 64). The \textit{Abdu-Brisson} court also cited another Second Circuit case, \textit{Chambers v. TRM Copy Ctrs. Corp.}, 43 F.3d 29 (2d Cir. 1994), in which the Second Circuit listed the many types of circumstances that could raise an inference of discrimination. \textit{Id.} (citing \textit{Chambers}, 43 F.3d at 37-38).
able to point to similarly situated employees. One example was where an employer had only one employee.120 Another example was the situation in which the Abdu-Brisson plaintiffs found themselves. As the court pointed out, they were in a class all by themselves. All the Pan Am pilots hired by Delta during the Pan Am acquisition were subject to the same employment action and differed materially from the other Delta pilots. Thus, there could be no Delta employees similarly situated to the plaintiffs since the Delta employees did not suffer the alleged adverse employment action. Therefore, if a court rigidly imposed a similarly situated requirement, it would be impossible for the plaintiffs to meet their prima facie burden. The court noted, "[I]t's presents 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."121 The court concluded that while pointing to similarly situated employees was a "common and especially effective method" of proving the fourth element of a prima facie case, it was not the only way for a plaintiff to establish that element.122 The court listed a number of circumstances in which a plaintiff could raise an inference of discriminatory intent. These circumstances included but were not limited to:

[T]he employer's continuing, after discharging the plaintiff, to seek applicants from persons of the plaintiff's qualifications to fill that position; or the employer's criticism of the plaintiff's performance in ethnically degrading terms; or its invidious comments about others in the employee's protected group; or the more favorable treatment of employees not in the protected group; or the sequence of events leading to the plaintiff's discharge.123

The Second Circuit concluded that a number of comments made about the age of Pan Am's pilots, in addition to the intense interest that Delta displayed about the Pan Am pilots' age and projected retirement rates when Delta acquired Pan Am, were enough to meet the fourth element of the plaintiffs' prima facie case.124

120. Id.
121. Id. at 468.
122. Id.
123. Id. (citing Chambers, 43 F.3d at 37).
124. Id. The Second Circuit, however, also found that Delta had met its burden of articulating legitimate and nondiscriminatory reasons for its actions. Id. at 469. The seniority integration methodology was reasonable and likely to be approved by the union.

Id. In addition, Delta could not have extended the post-retirement medical benefits waiver and immediate pay equality to the former Pan Am pilots because of then-existing financial conditions. Id. Furthermore, the court found no evidence that Delta's
The Ortiz and Abdu-Brisson courts identified some of the difficulties with requiring a similarly situated showing as part of the plaintiff’s prima facie case. Both courts noted that such a requirement ignores the fact that plaintiffs can prove discrimination in a variety of ways and that requiring a similarly situated showing violated the Supreme Court’s mandate that the plaintiff’s burden in proving a prima facie case was not onerous. In addition, the Ortiz court criticized the district court for defining “similarly situated” in such a way that minor distinctions between employees would prevent the plaintiff from comparing himself to anyone. Furthermore, the Abdu-Brisson court recognized that a narrow similarly situated requirement could exclude classes of employees from the protection of the employment discrimination laws. These problems with the similarly situated requirement are discussed in detail in the next section.

2. The Problems with the Similarly Situated Requirement

a. The Requirement Frustrates the Purposes of the Prima Facie Case

First, the similarly situated requirement frustrates the purposes of the prima facie case. As discussed above, the Supreme Court established the McDonnell Douglas/Burdine scheme to progressively “sharpen the inquiry into the elusive factual question of intentional discrimination.” Plaintiff’s establishment of a prima facie case “eliminates the most common nondiscriminatory reasons” for the challenged action. In other words, the scheme is designed to force the parties and the court to focus on the actual reason for the decision, that is, was the employer motivated by intentional discrimination or a nondiscriminatory reason? Therefore, according to the Supreme Court, the plaintiff’s burden was “not onerous.” The Supreme Court “never intended” the requirements for a prima facie case “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.”

The similarly situated requirement violates these principles. Instead of a burden that is “not onerous,” the requirement can make it extremely difficult, even impossible, for a plaintiff to articulate a prima facie case.

The purpose of the prima facie case is to eliminate the most common

justifications were a pretext for discrimination. Id. at 470. Thus, it affirmed the district court’s grant of summary judgment to the defendant. Id. at 469-70.

125. See supra notes 24-27 and accompanying text.
127. Id. at 254.
128. Id. at 253.
reasons for the adverse action so that, at the pretext stage, the focus will be placed on the real reason for the employment action. The similarly situated requirement frustrates this purpose by making courts exert a lot of effort focusing on fine—and sometimes irrelevant—distinctions between employees. For example, in *Ortiz v. Norton*,\(^{130}\) the district court focused on the plaintiff’s responsibilities, the length of his leave, and the fact that the plaintiff only explained that he needed the leave for personal, family reasons.\(^{131}\) It is entirely possible that these distinctions may have been on the employer’s mind when it denied Ortiz’s leave and terminated him. This inquiry should be at the pretext stage, however, rather than in the prima facie case. It is inappropriate for courts to mechanically dismiss the plaintiff’s case because the plaintiff failed to point to a similarly situated employee or because the plaintiff did point to another employee and the court can find some minor distinction between that employee and the plaintiff. In *Marzano v. Computer Science Corp.*,\(^{132}\) the court stated that while such distinctions are relevant, they go “to the employer’s reason for its action, and may be presented to the judge after the plaintiff has made his or her *prima facie* case, when the burden switches to the employer to proffer a nondiscriminatory reason for its action.”\(^{133}\)

In deciding on an employer’s motion for summary judgment, saving the analysis of these distinctions for the pretext stage has important consequences. This forces the court to go through traditional summary judgment analysis. In order to grant summary judgment to the defendant, the court will look at the distinctions, make all inferences in favor of the plaintiff, and decide whether a reasonable jury could find that the employer discriminated. Requiring a similarly situated showing at the prima facie stage, however, allows the courts to bypass this analysis.

b. Courts Imposing the Requirement Fail to Recognize That Intent May Be Proven in a Variety of Ways

Second, the similarly situated requirement violates the principle that intent can be proven in many different ways. The failure to recognize that discriminatory intent can be proven in a variety of ways is one of the reasons the *Abdu-Brisson* court rejected the similarly situated requirement. The court acknowledged that pointing to similarly situated employees was the most common way of proving discrimination, but it was not the only way.\(^{134}\) The

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130. 254 F.3d 889 (10th Cir. 2001).
131. *Id.* at 892, 894.
132. 91 F.3d 497 (3d Cir. 1996).
133. *Id.* at 511.
134. Abdu-Brisson v. Delta Airlines, 239 F.3d 456, 468 (2d Cir.), *cert. denied*, 122
employment discrimination statutes demand only that the employee prove that the employer discriminated against him in terms or conditions of employment because of his membership in a protected group. The statutory language does not require a plaintiff to prove that the employer treated a similarly situated employee differently and Supreme Court cases bear this out. The McDonnell Douglas formulation only requires that, to meet the fourth element of a prima facie case, the plaintiff show that the employer continued to seek applicants after it rejected him. The McDonnell Douglas court also stated that, at the pretext stage, the employee could show discrimination in a number of ways. One way was pointing to similarly situated employees whom the employer treated differently. In addition, the plaintiff could point to how the employer treated him in the past and how the employer treated minority employees in general.

Furthermore, in two other well-known cases, Oncale v. Sundowner Offshore Services, Inc. and County of Washington v. Gunther, the Supreme Court recognized the possibility of plaintiffs proving discrimination without pointing to similarly situated employees. In Oncale, the male plaintiff alleged that his fellow male employees had sexually harassed him and the Supreme Court held that same-sex harassment could be a form of sex discrimination banned by Title VII, so long as the plaintiff proved that the harassment was because of the employee's sex. The Court said that there were a variety of ways to prove sex discrimination under the statute and listed several ways of proving the type of sex discrimination called sexual harassment:

1. Most cases of male sexual harassment of females involved implicit or explicit proposals of sexual activity. Therefore, it was reasonable

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S. Ct. 460 (2001). The Abdu-Brisson court listed several factual circumstances that could raise an inference of discriminatory intent. Id; see supra text accompanying note 123.

135. Title VII bans the employer from “discriminat[ing] 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.” Title VII of Civil Rights Act of 1964 § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (2000). For the complete text of Section 703(a), see supra text accompanying note 6.


141. Oncale, 523 U.S. at 77.

142. Id. at 82.
to draw the inference that the harasser’s actions were because of the plaintiff’s sex.
2. If there was credible evidence that the harasser was homosexual, then a plaintiff alleging same-sex harassment could use the same chain of inference discussed in Number 1.
3. If a female harassed another female in derogatory, sex-specific terms, this could indicate that she was hostile to other females in the workplace.
4. In a mixed sex workplace, an employee “may” point to how the harasser treated members of both sexes.¹⁴³

The Court concluded that “[w]hatever evidentiary route the plaintiff chooses to follow,” the plaintiff had to prove that the harassment was “discriminat[ion] . . . because of . . . sex.”¹⁴⁴

In Oncale, the Supreme Court said that pointing to similarly situated employees was only one of several ways of proving discrimination. Indeed, in Oncale it would have been impossible for the plaintiff to meet the similarly situated requirement because the plaintiff’s workplace was a single-sex environment. Only males were present, so the plaintiff could not have identified any similarly situated females.¹⁴⁵

Similarly, in Washington County v. Gunther,¹⁴⁶ the plaintiffs, female guards, alleged that the employer had engaged in intentional sex discrimination by paying them less than male guards.¹⁴⁷ The employer argued that the Equal Pay Act’s equal work standard should be applied to the plaintiffs’ Title VII claim.

¹⁴³. Id. at 80-81.
¹⁴⁴. Id. at 81 (emphasis added).
¹⁴⁵. The Oncale Court, at one point, quoted Justice Ginsburg’s concurrence in a prior sex harassment case and that quote superficially buttresses the argument for a similarly situated requirement. In Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993), Justice Ginsburg asserted that “[t]he critical issue . . . [was] whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.” Id. at 25, quoted in Oncale, 523 U.S. at 80. The Oncale Court immediately followed the Harris quotation, however, with a paragraph delineating some of the different ways the plaintiff could prove discrimination and making clear that there were a variety of evidentiary routes available to employment discrimination plaintiffs. See also Rebecca Hanner White, There's Nothing Special About Sex: The Supreme Court Mainstreams Sexual Harassment, 7 WM. & MARY BILL RTS. J. 725, 735 (1999) (noting that, if the Oncale court had intended to require a similarly situated showing, it would have dismissed the plaintiff’s claim, since he worked in a single sex environment).
¹⁴⁷. Id. at 161. For a slightly more detailed discussion of Gunther, see generally Lidge, supra note 140.
Because the plaintiffs supervised significantly fewer inmates than the male guards, their claim would not be cognizable if the Court applied the equal work standard. In essence, the employer was demanding that the plaintiffs point to similarly situated males who were being paid less. The Supreme Court, however, refused to reject the plaintiffs’ Title VII claim simply because they did “not perform work equal to that of male jail guards.” The Court reasoned that if the Equal Pay Act’s standard were applied, discriminatorily underpaid females would be without a Title VII remedy unless the defendant employed a male in a similar position. Furthermore, even women working for an employer who “used a transparently sex-biased system for wage determination” would be without a remedy unless they could point to a male holding a similar job. The Court, thus, rejected a similarly situated requirement and allowed the plaintiffs to prove intentional discrimination in another way.

c. Courts Imposing the Requirement Fail to Recognize That Distinctions Can Always Be Identified Between Employees

Third, the similarly situated requirement fails to account for the fact that distinctions can always be created between employees. As discussed in detail below, courts vary in the amount of rigor that they require and the problem will prove especially onerous when a court imposes a strict test. Any court could find, however, that because of one thing or another an employee is not similarly situated to another employee. The Third Circuit in rejecting a similarly situated requirement pointed out that, “[a]ll employees can be characterized as unique in some ways and as sharing common ground with ‘similarly situated employees’ in some other ways, depending on the attributes on which one focuses, and the degree of specificity with which one considers that employee’s qualifications, skills, tasks and level of performance.” Similarly, the Tenth Circuit, in

149. Id. at 178-79.
150. The plaintiffs alleged that the employer had conducted a survey to determine the market value of their jobs and the male guards’ jobs. The survey indicated that the women should be paid approximately ninety-five percent as much as the males. The employer, however, only paid them about seventy percent as much. Id. at 180-81.
151. See infra notes 152-60 and accompanying text.
152. Marzano v. Computer Sci. Corp., 91 F.3d 497, 511 (3d Cir. 1996). In Marzano, the employer had laid off the plaintiff while she was on maternity leave. The plaintiff, Catherine Marzano, alleged that the employer discriminated against her because of her pregnancy in violation of the New Jersey Law Against Discrimination, N.J. STAT. ANN. § 10:5-12(a). Id. at 501. The district court granted summary judgment to the employer. Id. The Third Circuit, following the practice of the New Jersey Supreme Court, used the methodology governing federal employment discrimination claims. Id.
v. Norton, 153 complained that the district court, by defining a similarly situated employee as someone "with significant project management responsibilities who requested an extended leave on short notice without providing the reason for the leave," had made it "virtually impossible" for the plaintiff to point to a comparator. 154

The possibility of courts finding irrelevant distinctions is demonstrated by the district court's decision described in Hollins v. Atlantic Co. 155 In Hollins, the defendant Atlantic Company ("Atlantic") maintained a grooming policy that required female employees to have "a neat and well groomed hair style." The grooming policy banned the use of "rollers and other hair setting aids" and also stated that the company could require women to tie back their hair for safety reasons. 156 The plaintiff had a series of run-ins and discussions with supervisors about her hair styles. Eventually, Atlantic supervisors required her to obtain pre-approval of any change in her hair style. According to the plaintiff, five white women who worked under the same supervisor on her shift wore a hair style that the supervisor forbade her from wearing. In addition, the employer did not require any of these women to obtain pre-approval for their hair styles. 157

The plaintiff alleged that the company had engaged in racial discrimination when it found she violated the company's grooming policy and required her to obtain pre-approval of changes in her hair style. The district court granted summary judgment to the employer, finding that the plaintiff had failed to establish a prima facie case because she had not proven that the white employees were similarly-situated. Hollins had not presented evidence that "any supervisor . . . determined that [a white woman] wore a comparable hairstyle and was not notified of being in violation of the . . . policy." 158 In other words, it did not matter that the plaintiff alleged that the five white women wore the same hair style as she did. What mattered, according to the district court, was that she had not alleged that a supervisor had determined that they wore the same hair style.

Following this line of reasoning would completely gut the employment discrimination laws. Any company policy could be applied disparately against minorities or females. So long as a supervisor determined that the white or male

at 502. The defendants argued that as part of a prima facie case, the plaintiff had to show that the employer retained similarly situated unprotected employees. Id. at 510. The Third Circuit rejected this test. The court said that such a showing would strengthen the plaintiff's case but it was not a requirement. Id. The court concluded that the district court had erred when it granted the employer summary judgment. Id. at 511.

153. 254 F.3d 889 (10th Cir. 2001).
154. Id. at 894-95.
155. 188 F.3d 652 (6th Cir. 1999).
156. Id. at 655.
157. Id. at 655-57.
158. Id. at 660 (emphasis added by the appellate court).
employees had not violated the policy, then a minority employee or a female employee disciplined under the policy would fail to enunciate a prima facie case. Such a discriminatory application of a company policy, however, is a classic example of disparate treatment.\footnote{159}{The Sixth Circuit reversed the district court’s grant of summary judgment to the defendant. \textit{Id.} The court noted that, according to the facts presented by the plaintiff, white women wore the same hair style but received differing treatment. Furthermore, these women interacted with the same supervisor and were subject to the same grooming standards. \textit{Id.} The court also found that the plaintiff Hollins had raised an issue of fact in regard to pretext. Two of the defendant’s employees who had served as foremen testified that the plaintiff’s hair was well groomed and neat, but still had “violated a separate unwritten expression of policy, apparently developed specifically for Hollins, related to whether the styles were ‘eye catching’ or otherwise called attention to her.” \textit{Id.} at 661. The Sixth Circuit concluded that, “[u]nder these circumstances, a jury could reasonably infer that Atlantic applied its grooming policy to Hollins in an unlawfully discriminatory manner when it singled her out for different treatment.” \textit{Id.}}

Indeed, the similarly situated requirement provides an incentive for employers to create distinctions between employees in order to prevent employees from establishing a prima facie case. An employer could create jobs with minor differences, each held by a different employee.\footnote{160}{The requirement also creates an incentive for other types of manipulation. \textit{See} Abdu-Brisson v. Delta Air Lines, Inc., 239 F.3d 456, 468 (2d Cir. 2001) (an employer could immunize itself by being “so thorough in its discrimination that all similarly situated employees are victimized’’); Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394, 1397 (7th Cir. 1997) (employer should not be entitled to prevent plaintiff from establishing a prima facie case by “fractionating” employee’s job duties and, thus, avoiding “replacing” him).} A strict interpretation of the similarly situated requirement would prevent plaintiffs from establishing a prima facie case and, therefore, remove them from the protection of the employment discrimination laws, unless they had direct evidence. Most plaintiffs do not have direct evidence, however, which is the reason the prima facie case was created in the first place.\footnote{161}{\textit{See} notes 9-14 and accompanying text.}

d. The Requirement Unjustly Bars Certain Types of Employees from Statutory Protection

There are certain situations in which the similarly situated requirement prevents some employees, absent direct proof, from ever bringing a discrimination case. Examples include employees who have a unique position or situations in which an employer discriminates against all the employees in a given job category.

The Third Circuit refused to accept the similarly situated requirement for
this reason. In *Marzano v. Computer Science Corp.*, the court said that the requirement "would seriously undermine legal protections against discrimination . . . [because] any employee whose employer [could] for some reason or other classify him or her as ‘unique’ would no longer be allowed to demonstrate discrimination inferentially, but would be in the oft-impossible situation of having to offer direct proof of discrimination." The court saw "no value in, and no mandate in our jurisprudence for, such a requirement."

In addition, if the employer discriminated against an entire category of employees, the requirement could remove the entire class from the protections of the employment discrimination laws. If the employer discriminates against all the similarly situated employees, the employees would not be able to point to similarly situated employees who were being treated worse. In *Abdu-Brisson*, the court noted that the requirement "present[ed] 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." Similarly, imposition of the requirement in *Washington County v. Gunther* would have barred the women from suing about unequal wages because they were not similarly situated to the higher-paid male employees.

A variation of such discrimination against a class was discussed by the Seventh Circuit in *Wallace v. SMC Pneumatics, Inc.* The court rejected a similarly situated requirement, stating:

> If an American employee is mistreated because he is an American, the fact that Japanese employees are also treated badly would not be a defense. The Americans might be better employees, yet, because of discrimination, treated no better. That would be actionable discrimination.

If courts, however, imposed a similarly situated requirement, the American plaintiffs in the court’s hypothetical could not establish a prima facie case.

162. 91 F.3d 497 (3d Cir. 1996).
163. *Id.* at 510-11.
164. *Id.* at 511; see also *Abdu-Brisson*, 239 F.3d at 467 (noting that if an employer only had one employee, the plaintiff would not be able to meet the requirement); *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 353 (6th Cir. 1998) (imposing a strict similarly situated requirement ‘removes from the protective reach of the anti-discrimination laws employees occupying ‘unique’ positions, save in those rare cases where the plaintiff produces direct evidence’).
165. *Abdu-Brisson*, 239 F.3d at 468.
167. 103 F.3d 1394 (7th Cir. 1997).
168. *Id.* at 1398.
There are a number of problems with requiring plaintiffs to make a similarly situated showing as part of their prima facie case. Such a requirement violates the purpose of the prima facie case and fails to account for the fact that the statutes and the caselaw contemplate that plaintiffs can prove intent in a variety of ways. In addition, courts imposing such a requirement fail to recognize that some distinctions exist between all employees and that the requirement would remove categories of employees from the protection of the employment discrimination laws. Even if courts do not impose a similarly situated requirement as part of the plaintiff’s prima facie case, there is another potential problem with the similarly situated concept.

IV. PROBLEM 2—NARROWLY DEFINING “SIMILARLY SITUATED”

Courts misuse the similarly situated concept in another way—by defining it too narrowly. In deciding whether the plaintiff and a comparator are similarly situated, courts often focus on certain differences in conduct or job responsibilities, or the fact that the two employees have different superiors. These differences, however, may or may not be relevant. Courts, nonetheless, sometimes find that these differences are determinative. If a court imposes a similarly situated requirement as part of the plaintiff’s prima facie case, a narrow definition of similarly situated will make this requirement even more onerous. Even if a court does not impose this requirement, a narrow definition of similarly situated may result in the improper grant of summary judgment to the employer. In ruling on an employer’s summary judgment motion, courts are supposed to draw all reasonable inferences in favor of the plaintiff. An overly-narrow definition of similarly situated fails this test; in fact, courts often draw inferences in favor of the employer.

There are three main distinctions courts draw in deciding that the plaintiff and a comparator are not similarly situated: (1) the fact that the plaintiff and comparator had different supervisors; (2) the fact that the two employees had different responsibilities or job titles; and (3) the fact that they were punished for

169. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) (in deciding a summary judgment motion, “evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.”); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986) (“On summary judgment the inferences to be drawn from the underlying facts ... must be viewed in the light most favorable to the party opposing the motion.”) (quoting United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)) (internal quotation marks omitted); cf. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 149-50 (2000) (in deciding a motion for judgment as a matter of law, the “court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence.” This standard mirrors those for summary judgment.).
different conduct. The courts’ use of each of these distinctions will be discussed in turn.

A. Different Supervisors

In finding either that the plaintiff has not proven a prima facie case or in granting summary judgment to the employer, courts sometimes focus on the fact that the plaintiff and the comparator had different supervisors. According to some courts, the existence of different supervisors means that the plaintiff and the comparator are not similarly situated. In Mitchell v. Toledo Hospital,170 the Sixth Circuit found that the plaintiff had not established a prima facie case, in part, because she had not shown that the comparators had the same supervisors.171 This was the case in spite of the fact that a five-member review board made the disciplinary decisions and that the plaintiff and the comparators were all governed by the standards contained in the employee handbook.172 Similarly, the Eleventh Circuit, in Jones v. Bessemer Caraway Medical Center,173 found that the plaintiff had failed to adduce a prima facie case, in part, because the comparators had different supervisors. According to the court, “[d]ifferent supervisors may have different management styles that—while not determinative—could account for the disparate disciplinary treatment that employees experience.”174 The court also said that the plaintiff had failed to cite evidence comparing the management styles of the other employees’ supervisors with that of her own supervisor.175 The analysis of these courts, however, misunderstands the nature of the employment discrimination statutes and the McDonnell Douglas scheme for allocating the burdens of proof.

170. 964 F.2d 577 (6th Cir. 1992).
171. Id. at 583 n.5.
172. Id. at 586-87 (Jones, J., dissenting).
173. 137 F.3d 1306 (11th Cir.), opinion superseded in part on denial of rehearing by 151 F.3d 1321 (1998).
174. Id. at 1312 n.7; see also Bogren v. Minnesota, 236 F.3d 399, 406 (8th Cir. 2000), cert. denied, 122 S. Ct. 44 (2001) (finding plaintiff and comparators were not similarly situated, in part because plaintiff did not show that the supervisors involved in her termination were involved in the comparators’ discipline); Rodriguez-Cuervos v. Wal-Mart Stores, Inc., 181 F.3d 15, 21 (1st Cir. 1999) (finding in demotion case that Puerto Rican manager not similarly situated to non-Puerto Rican manager because comparator’s evaluations covered a different period of time, occurred at a different store, and were given by a different supervisor); Brown v. Runyon, No. 96-2230, 1998 WL 85414, at **2-4 (4th Cir. Feb. 27, 1998) (affirming district court’s grant of summary judgment to the employer, relying, in part, on the fact that the plaintiff and comparator had different supervisors).
175. Jones, 137 F.3d at 1312 n.7.
Title VII defines an "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such person." The Age Discrimination in Employment Act ("ADEA") and the Americans with Disabilities Act ("ADA") also contain the "any agent of such a person" language. The Supreme Court noted in *Burlington Industries, Inc. v. Ellerth*, a sexual harassment case, that, by using this language, Congress wanted the courts to use agency principles in determining when employers should be liable for the acts of their employees. The Court concluded that when a supervisor commits a "tangible employment action," including "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits," the employer should be held strictly liable for the supervisor's actions.

Under these principles, if Supervisor A terminates, demotes, or significantly disciplines a black employee for a rule infraction and Supervisor B does not discipline a white employee who commits a similar infraction, the actions (or inaction) of both supervisors are attributable to the employer. Thus, the employer has treated these two employees differently. Assuming the black employee can show that, prior to the disciplinary action, he was performing the job satisfactorily, courts should find that he has established a prima facie case of racial discrimination.

The burden then shifts to the employer to produce evidence of a legitimate, nondiscriminatory reason. The employer meets its burden if it produces evidence of a reason which, if believed by the factfinder, would justify the termination. Simply showing that the two employees had different supervisors, however, does not in itself constitute a legitimate, nondiscriminatory reason. Because the actions of both supervisors are attributable to the employer, the employer would still have engaged in disparate treatment. The missing element for establishing a legitimate, nondiscriminatory reason is showing that Supervisor B had laxer standards or judgment than Supervisor A. If the employer presents evidence of such laxer standards, then the employer has met its burden of establishing a legitimate, nondiscriminatory reason and the case should proceed to the pretext stage.

Another way of looking at the issue is that there are really two elements of

179. Id. at 754.
180. Id. at 761.
181. Id. at 762-63.
the legitimate nondiscriminatory reason that the employer is attempting to establish. The first element is that the employees have different supervisors; the second is that this difference caused the differing treatment. This second element could be established by showing that the plaintiff's supervisor had tougher disciplinary standards. Courts imposing a strict similarly situated standard, however, ignore this second element by automatically drawing the inference. For example, in *Radue v. Kimberly-Clark Corp.*, 182 the court said that “[d]ifferent employment decisions, concerning different employees, made by different supervisors, are seldom sufficiently comparable to establish a prima facie case of discrimination for the simple reason that different supervisors may exercise their discretion differently.” 183 The court added that, “[t]hese distinctions sufficiently account for any disparity in treatment, thereby preventing an inference of discrimination.” 184 The *Radue* court did not explain how the fact that different supervisors may exercise discretion differently prevented an inference of discrimination. Other courts have made similar statements. 185 These courts, however, are themselves drawing an inference—that the two supervisors did exercise discretion differently. Establishing the existence of different supervisors who may have exercised their discretion differently, however, is not presenting evidence that they did do so. There is no reason to automatically draw such an inference, especially in light of the statutory scheme and the *McDonnell Douglas* system. By automatically drawing the inference, the court is actually creating a presumption. As stated in one treatise, “[i]nferences are by their nature permissive, not mandatory: although the fact proved rationally supports the conclusion the offering party hopes will be inferred, the factfinder is free to accept or reject the inference.” 186 If such a

182. 219 F.3d 612 (7th Cir. 2000).
183. Id. at 618 (emphasis added).
184. Id.
185. *See* Jones v. Gervens, 874 F.2d 1534, 1541 (11th Cir. 1989) ("Courts have held that disciplinary measures undertaken by different supervisors may not be comparable for purposes of Title VII analysis."); Maull v. Div. of State Police, 141 F. Supp. 2d 463, 483 (D. Del. 2001) (citing *Radue*, 219 F.3d at 618); Batson v. Powell, 21 F. Supp. 2d 56, 59-60 (D.D.C. 1998) (granting summary judgment to the employer because, in part, the plaintiffs and the comparator had different supervisors and shifts); *cf.* Kendrick v. Penske Transp. Servs., Inc., 220 F.3d 1220, 1233 (10th Cir. 2000) (stating that the fact that the plaintiff and comparator had different immediate supervisors diminished "the evidentiary value of the comparison between [the company's] treatment of the two employees").
186. 1 CLIFFORD S. FISHMAN, JONES ON EVIDENCE: CIVIL AND CRIMINAL § 4.1, at 299-300 (7th ed. 1992). A court that automatically draws an inference has, in essence, created a presumption. *See id.* § 4.2, at 302 ("In a sense . . . a presumption is an inference which is mandatory unless rebutted."). There may be situations when such an inference is proper, for example if there is a very high likelihood that if Fact A is true,
court uses an automatic inference to find that a plaintiff failed to establish a prima facie case, it frustrates the purposes of the prima facie case and violates the principle that the plaintiff’s prima facie burden is “not onerous.” If courts draw the inference automatically (without additional evidence) as a basis for granting summary judgment to the employer, then they are violating the principle that inferences have to be drawn in favor of the party opposing summary judgment. Of course, if an employer does present evidence that the comparator’s different supervisor had laxer standards, then the employer has presented a possible distinction between the plaintiff and the comparator.

A few courts have recognized that the employer should have to show more than merely the existence of different supervisors. For example, the court in Blackshear v. City of Wilmington recognized that the existence of different supervisors did not necessarily defeat the plaintiff’s contention that he and another employee were similarly situated. In Blackshear, the employer terminated the plaintiff, an African-American. In his race discrimination claim, the plaintiff pointed to a white employee who had not been terminated. The employer argued that the plaintiff and the comparator were not similarly situated

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then Fact B—the presumed fact—is also true and “merely permitting the factfinder to infer the presumed fact does not adequately reflect the substantial likelihood that the presumed fact is true.” Id. § 4.5, at 308. For example, suppose a female employee is absent on July 1 and the employer terminates her for excessive absenteeism. The employee points to a male employee who was also absent on July 1, but was not terminated. If the employer adduces evidence that July 1 was the plaintiff’s fifteenth absence in two months, while the male comparator only had been absent twice in the same time period, then it would be proper for the court to automatically infer that the different absence records were the reason for the differential treatment. Unless the plaintiff could produce some evidence to create an issue of fact that the employer’s explanation was pretextual, then the court could properly grant summary judgment to the employer. Assume, however, that the employer, instead of pointing to their different absence records, pointed to the fact that the two employees had different supervisors. It would not be proper to automatically infer that the different supervisors caused the differential treatment, unless the employer presented some additional evidence regarding the supervisors’ independent authority to administer the attendance policies and the fact that they had different standards.

187. See supra text accompanying notes 127-29.
188. See Cooper v. City of North Olmsted, 795 F.2d 1265, 1271 (6th Cir. 1986) (“[A]lthough a change in managers is not a defense to claims of race or sex discrimination, it can suggest a basis other than race or sex for the difference in treatment received by two employees.”) (emphasis added); Tate v. Weyerhaeuser Co., 723 F.2d 598, 605-06 (8th Cir. 1983), cert. denied, 469 U.S. 847 (1984) (noting in black plaintiff’s race discrimination claim that there was evidence that the white comparators’ manager was not only lenient toward the comparators, but also lenient toward other black employees).
because they had different supervisors. The court said that while this had some probative value, it was not a defense to a race discrimination claim.\textsuperscript{190} The court found that there was little support in the record that the comparator's supervisor was more lenient than the plaintiff's supervisor\textsuperscript{191} and, in a bench trial, the court found that the plaintiff had proven racial discrimination.\textsuperscript{192}

When a plaintiff attempts to establish a prima facie case or oppose the employer's summary judgment motion by pointing to a comparator, the employer may argue that the plaintiff and the comparator are not similarly situated because they have different supervisors. In order to find that the employees are not similarly situated, courts should require additional evidence establishing that the difference in supervisors caused the difference in treatment. An example would be evidence showing that the plaintiff's supervisor had consistently stricter standards than the comparator's supervisor. Even if the employer presents such evidence, if there is a question of fact about whether the plaintiff's supervisor was actually stricter, the case should go to the jury.

\textbf{B. Different Responsibilities and Job Titles}

Courts have also found different job responsibilities prevent a comparator from being similarly situated. One example of this is an unpublished opinion from the Fourth Circuit, \textit{Dickens v. MCI Telecommunications Corp.}\textsuperscript{193} In \textit{Dickens}, the employer demoted the plaintiff, a Senior Manager, during a reduction-in-force. The plaintiff claimed that the employer did not demote the other three (younger) Senior Managers. The Fourth Circuit noted that one of the three Senior Managers was actually older than the plaintiff. In addition, the court found that the plaintiff failed to establish a prima facie case because the comparators were not similarly situated. The court acknowledged that the comparators had the same job title, but "their job responsibilities differed."\textsuperscript{194}

While the Fourth Circuit may have been correct in affirming the district court's grant of summary judgment to the employer because one of the comparator's was older than the plaintiff, the court's definition of similarly situated was too narrow. In \textit{Dickens}, the other Senior Managers had the same job title as the plaintiff. It will be rare that high-level managers will have the exact same job responsibilities. To whom should the plaintiff compare himself? Suppose in the \textit{Dickens} case the company had fifteen Senior Managers, eight of whom were over the age of forty and the remaining seven under the age of forty.

\textsuperscript{190} \textit{Id.} at 424.
\textsuperscript{191} \textit{Id.}
\textsuperscript{192} \textit{Id.} at 432-33.
\textsuperscript{194} \textit{Id.} at *4.
Suppose further that the employer had terminated the entire over-forty group while retaining the under-forty group. Using the Dickens similarly situated test, the terminated employees would not be able to state a prima facie case because they did not have the same job responsibilities. The plaintiffs, however, should be able to get the issue to the factfinder, given the fact that a jury could infer that age discrimination entered into the decision to terminate the older employees.195

This principle was recognized by the court in Pearson v. Macon-Bibb County Hospital Authority.196 The plaintiff, a black senior staff nurse, claimed that her employer engaged in racial discrimination in violation of Title VII when it discharged her. Her termination arose from an event involving several nurses in which unsterilized surgical instruments were left in the operating room. The employer issued oral reprimands to the plaintiff and three other (white) nurses, but only the plaintiff was terminated.197 The district court determined that the plaintiff and the other employees were not similarly situated because the plaintiff had exercised some supervisory responsibilities.198 The court granted summary judgment to the employer.199

The Eleventh Circuit, however, stated that there should not be an emphasis on such “formal differences in job duties” and found that it was relevant that the employees were involved in the same offense but that the employer treated them differently.200 The fact that they had different responsibilities could have an impact at the pretext stage but it should not defeat the plaintiff’s prima facie case.201 In reversing the district court’s grant of summary judgment, the appellate court discouraged the use of summary judgment for resolving employment discrimination claims that “turn on an employer’s motivation and intent.”202

Courts that use the mere existence of different responsibilities to find that a comparator is not similarly situated are making the same mistake that was discussed in the previous section, dealing with situations in which the comparator and plaintiff have different supervisors. These courts are engaging

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195. It is possible that the employer could show that it had a legitimate, nondiscriminatory reason for its decision to terminate the older employees and this decision may have been based on the employees’ different responsibilities. Such differences in responsibilities, however, should not prevent the plaintiff from establishing a prima facie case and should not justify summary judgment for the employer.

196. 952 F.2d 1274 (11th Cir. 1992).
197. Id. at 1276.
198. Id. at 1280.
199. Id. at 1276.
200. Id. at 1280.
201. Id.
202. Id. (quoting Delgado v. Lockheed-Georgia Co., 815 F.2d 641, 644 (11th Cir. 1987)).
in a presumption—that the employer treated the two employees differently because of the different job responsibilities. The missing element is evidence—not simple assumption—that the employer imposed different disciplinary or performance standards on employees with different job responsibilities. As the court said in *Latham v. Department of Children & Youth Services*, 203 “[t]he relevant inquiry is not whether the employees hold the same job titles, but whether the employer subjected them to different employment policies.”204

One factual difference that courts sometimes rely on to find the plaintiff and a comparator are not similarly situated is that one employee is a manager or supervisor and the other employee does not have supervisory status. While this analysis may be superficially attractive, different courts use this analysis to make opposing presumptions. Sometimes (when the plaintiff is a supervisor) courts state that employers are entitled to treat supervisors more harshly.205 In other cases (when the comparator is a supervisor), courts find that the comparator’s

203. 172 F.3d 786 (11th Cir. 1999).
204. *Id.* at 793 (citing Nix v. WLCY Radio/Rahall Comm., 738 F.2d 1181, 1186 (11th Cir. 1984)).
205. In *Sarsha v. Sears, Roebuck & Co.*, 3 F.3d 1035 (7th Cir. 1993), the defendant employer terminated the plaintiff, Kenneth Sarsha, allegedly for violating an informal policy against dating co-employees. The plaintiff sued, alleging both age and sex discrimination. *Id.* at 1037. The district court granted summary judgment to the employer. *Id.* The Seventh Circuit reversed the district court’s grant of summary judgment on the age discrimination claim because the court found that there were genuine issues of fact regarding whether the policy had even existed and whether the plaintiff had been warned about the policy. *Id.* at 1039-42.

In regard to the plaintiff’s sex discrimination claim, however, the Seventh Circuit reached a different result. *Id.* at 1042. The plaintiff claimed that the employer Sears had discriminated against him on the basis of sex because Sears had not terminated the woman with whom he had the affair. *Id.* According to the plaintiff, the employer’s failure to discipline or discharge her constituted unequal treatment. *Id.* According to the court, however, assuming that a no-dating policy existed, Sears was entitled to enforce it against managers who were expected to know better rather than subordinates. *Id.* The court stated that it did not “sit to review a company’s business judgments; unless Sarsha’s gender mattered to Sears—that is, unless, under the circumstances, he would have been kept on in a management position if he were a woman—he is not entitled to relief under Title VII.” *Id.* at 1042. In order to establish a prima facie case, the plaintiff had to show that he was treated differently from a similarly situated woman. Such a similarly situated woman would have to be “a manager who defied either an asserted policy against dating or the commands of her supervisors not to date a co-worker.” *Id.; see also* Watts v. Norman, 270 F.3d 1288, 1293-94 (10th Cir. 2001) (plaintiff and comparator not similarly situated because plaintiff was a supervisor); Neuren v. Adduci, Mastroianni, Meeks & Schill, 43 F.3d 1507, 1514 (D.C. Cir. 1995) (terminated attorney not similarly situated to another associate because, in part, comparator was less senior).
higher status means that he was not similarly situated.206 With cases going both ways, courts should be cautious in finding that the plaintiff and comparator's different status automatically means that there are no issues of fact.

The Sixth Circuit, in a reduction-in-force case, correctly analyzed the relevance of differences between the plaintiff and the comparator's job responsibilities. In Ercegovich v. Goodyear Tire & Rubber Co.,207 the plaintiff, Edward Ercegovich, worked for Goodyear from 1962 until his termination in 1994.208 At the time of his discharge, the plaintiff was fifty-seven years old and worked as a quality systems coordinator in Human Resources Development.209 During 1994 and 1995, Goodyear reorganized Human Resources, eliminating Ercegovich's position and assigning his duties to other employees.210 Although the company claimed that it looked for other jobs for the plaintiff and that such openings were available, the plaintiff contended that the company advised him that there were no openings available and never mentioned the possibility of transferring to another job.211 As part of the continued reorganization, Goodyear eliminated two other positions—the positions of Paul Evert, age forty, manager of Human Resources, and Karen Cohn, age twenty-eight, a personnel development specialist.212 The company, however, offered to transfer Evert and Cohn to other positions.213

The plaintiff alleged that the defendant engaged in age discrimination in violation of the ADEA when it failed to grant him the opportunity to transfer to other positions within the organization.214 The district court granted the defendant's motion for summary judgment, finding that Ercegovich had failed both to establish a prima facie case and to prove that the defendant's explanation for its actions was pretextual.215 The district court, relying on Mitchell v. Toledo Hospital,216 found that Ercegovich had failed to show that Evert or Cohn were

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206. See Jones v. Denver Post Corp., 203 F.3d 748, 752-53 (10th Cir. 2000) (plaintiff disciplined for using company telephone for personal business; comparator who did same thing was not similarly situated because comparator was a supervisor); Holbrook v. Reno, 196 F.3d 255, 261-62 (D.C. Cir. 1999) (suspended plaintiff, a probationary trainee, not similarly situated to comparator in part because comparator was a fifteen-year veteran with supervisory duties).
207. 154 F.3d 344 (6th Cir. 1998).
208. Id. at 348.
209. Id.
210. Id. at 348-49.
211. Id. at 349.
212. Id.
213. Id.
214. Id. at 349-50.
215. Id. at 349.
216. 964 F.2d 577 (6th Cir. 1992).
similarly situated since neither of them performed the same job functions as Ercegovich.217

The Sixth Circuit, however, believed that the district court had read the Mitchell case too narrowly.218 The court acknowledged that Mitchell had required that the plaintiff show that the comparator was similarly situated in all relevant respects and that the comparator "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."219 The Ercegovich court stated that in cases involving differing disciplinary actions, the Mitchell factors were "relevant considerations" but that, in different circumstances, courts should make an "independent determination as to the relevancy" of the differences between the plaintiff and the comparator.220 The Ercegovich court said that the plaintiff only had to show that he was similar to the comparator in "all of the relevant aspects,"221 and did not need to show "an exact correlation."222 The court also noted that if courts applied the Mitchell similarly situated standard too strictly and required plaintiffs to prove complete identity, then any employee working in a unique position would be removed from the protection of the laws against discrimination unless he was able to present direct evidence of discrimination.223

According to the Sixth Circuit, the district court, in finding that the plaintiff and the comparators were not similarly situated because of their differing job duties, failed to discuss whether the differences in job duties were actually relevant to Ercegovich's claim. The Sixth Circuit stated:

We believe that when an employer makes selective offers of transfer following a reduction in force or a reorganization, differences in the job activities previously performed by transferred and non-transferred employees do not automatically constitute a meaningful distinction that explains the employer's differential treatment of the two employees. Common sense suggests that when an employer harboring age-discriminatory animus eliminates several employees' positions, its decision to transfer its younger workers to new positions while

217. Ercegovich, 154 F.3d at 350-52.
218. Id. at 352.
219. Id. (quoting Mitchell, 964 F.2d at 583).
220. Id.
221. Id. (quoting Pierce v. Commonwealth Life Ins., 40 F.3d 796, 802 (6th Cir. 1994)) (emphasis omitted).
222. Id.
223. Id. at 353.
denying its older workers the same opportunity irrespective of past differences in their particular job functions may reflect proscribed age bias.\textsuperscript{224}

The Sixth Circuit found that Goodyear had eliminated Cohn, Evert, and Ercegovich’s positions pursuant to a general reorganization of the Human Resources Development Department and they were, therefore, sufficiently similarly situated for Ercegovich to establish a prima facie case.\textsuperscript{225}

The \textit{Ercegovich} court’s analysis was correct. In deciding whether employees are similarly situated, a court should only grant summary judgment if the distinctions between job duties are based on relevant differences. If there is a fact question about whether a difference is relevant or not, that question should go to the jury.\textsuperscript{226}

\textsuperscript{224} \textit{Id.}

\textsuperscript{225} \textit{Id.} The defendant contended that it had offered Ercegovich an opportunity to transfer to another position. \textit{Id.} at 353-54. This, according to the court, satisfied the defendant’s burden of articulating a legitimate non-discriminatory reason for its action and placed the burden on the plaintiff to prove that the defendant’s rationale was a pretext for age discrimination. \textit{Id.} Ercegovich denied that the company had offered him the opportunity to transfer to another position and the court believed that he had offered enough evidence to create an issue of fact. \textit{Id.} at 354. The court also held that a number of age-based statements allegedly made by several persons occupying high positions within the plaintiff’s division of Goodyear were relevant. \textit{Id.} at 354-57. The Sixth Circuit, thus, reversed the district court’s grant of summary judgment to the employer on the plaintiff’s refusal to transfer claim. \textit{Id.} at 357.

\textsuperscript{226} See also \textit{Lathem v. Dep’t of Children \& Youth Servs.}, 172 F.3d 786 (11th Cir. 1999). In \textit{Lathem}, the plaintiff Rhonda Lathem had worked as a secretary for the Department of Children and Youth Services ("DCYS"). During her employment, she became personally involved with two juvenile DCYS clients, in spite of the DCYS policy prohibiting such involvement. She allowed them to stay at her home, and provided one of them with meals and the use of her automobile. In addition, she initially denied her involvement with the boys to a DCYS investigator, although she subsequently admitted it. The Department terminated her for her involvement with the boys and her failure to cooperate with the investigation. \textit{Id.} at 789-90.

In a Title VII suit, Lathem alleged that she had been discriminated against on the basis of sex because the Department had not discharged Larry Smith, her immediate supervisor. \textit{Id.} at 790. Lathem alleged that Smith had committed a more serious violation of the same policy and had denied the charges when confronted. \textit{Id.} The Department suspended him with pay during the investigation but later reinstated him and transferred him to another office. He resigned a short time later. \textit{Id.} The Department argued that if he had not resigned they would have taken further action against him, perhaps discharging him. \textit{Id.} Lathem argued that the Department informed her that, after transferring Smith, the investigation was completed. \textit{Id.} at 790.

The jury found for Lathem and the Department appealed. \textit{Id.} at 791. The
The Ercegovich court’s analysis went to the core of the problem when it noted that differences in responsibility do not “automatically” explain differences in treatment. When a plaintiff contends that the employer treated another employee in a laxer fashion and the employer contends that the employee is not similarly situated because of different responsibilities or job titles, the court should only look at differences that are relevant to the differential treatment. Thus, the employer should present some additional evidence that the difference caused the differential treatment. If the employees were subject to the same disciplinary policies or the same employment handbook, then summary judgment would rarely be appropriate based solely on differences in responsibility.

C. Different Conduct

In disciplinary cases, courts often focus on the differing conduct between the plaintiff and the comparator. Some courts require that the plaintiff demonstrate that the comparator “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.” Others require that the plaintiff show that the comparator engaged in the “same” or “similar” conduct or that

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Department claimed that since Smith and the plaintiff had different job titles they were not similarly situated. *Id.* at 793. The Eleventh Circuit, however, stated that, “[t]he relevant inquiry is not whether the employees hold the same job titles, but whether the employer subjected them to different employment policies.” *Id.* (citing Nix v. WLCY Radio/Rahall Comm., 738 F.2d 1181, 1186 (11th Cir. 1984)). Since DCYS had not offered any evidence that the plaintiff and Smith were subject to different work rules or policies, they were similarly situated. *Id.* The Eleventh Circuit found that DCYS had not explained why it terminated the plaintiff while only transferring Smith and affirmed the judgment of the district court. *Id.* at 795.

227. Fullman v. Henderson, 146 F. Supp. 2d 688, 697 n.4 (E.D. Pa. 2001) (quoting Dill v. Ruyon, No. 96-3384, 1997 WL 164275, at *4 (E.D. Pa. Apr. 3, 1997)); see also Clark v. Runyon, 218 F.3d 915, 918 (8th Cir. 2000) (stating that the comparator must be “similarly situated in all relevant aspects” and “must have dealt with the same supervisor, have been subject to the same standards, and engaged in the same conduct without any mitigating or distinguishing circumstances”) (citing Harvey v. Anheuser-Busch, Inc., 38 F.3d 968, 972 (8th Cir. 1994) and Lynn v. Deaconess Med. Ctr.-W. Campus, 160 F.3d 484, 487-88 (8th Cir. 1998)); Rodriguez-Cuervos v. Wal-Mart Stores, Inc., 181 F.3d 15, 21 (1st Cir. 1999) (stating that the plaintiff bears the burden of showing that the comparators were “subject to the same standards” and were “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”) (quoting Mitchell v. Toledo Hosp., 964 F.2d 577, 583 (6th Cir. 1992)).

228. See Norville v. Staten Island Univ. Hosp., 196 F.3d 89, 96 (2d Cir. 1999)
the comparator's conduct was of "comparable seriousness."\textsuperscript{229} In applying these tests, some courts demand that the conduct be "nearly identical";\textsuperscript{230} other courts make a point of saying that the conduct need not be identical.\textsuperscript{231}

\footnotesize

\begin{itemize}
  \item \textsuperscript{229} See Kendrick v. Penske Transp. Servs., Inc., 220 F.3d 1220, 1230 (10th Cir. 2000) (Plaintiff must show "that he was treated differently from other similarly-situated employees who violated work rules of comparable seriousness."); Holbrook v. Reno, 196 F.3d 255, 261 (D.C. Cir. 1999) (Plaintiff must show that the comparator's conduct was "of comparable seriousness."); (quoting Lynn v. Deaconess Med. Ctr.-W. Campus, 160 F.3d 484, 488 (8th Cir. 1998)); Taylor v. Virginia Univ., 193 F.3d 219, 234 (4th Cir. 1999), cert. denied, 528 U.S. 1189 (2000) (Plaintiff must show that "she suffered more severe discipline for her misconduct as compared to those employees outside the protected class" and that the misconduct committed by the comparators was of "comparable" seriousness to her misconduct.); Lynn v. Deaconess Med. Ctr.-W. Campus, 160 F.3d 484, 488 (8th Cir. 1998) (Plaintiff must show comparator's infractions were of "comparable seriousness."); Moore v. Charlotte, 754 F.2d 1100, 1105-07 (4th Cir. 1995) (To establish a prima facie case of race discrimination, plaintiff must show that employer enforced disciplinary measures against him more severely than it had against an employee of another race who had engaged in similar conduct and that the other employee's acts were of "comparable seriousness.") (quoting McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 283 n.11 (1976)).
  \item Holbrook v. Reno, 196 F.3d 255, 261 (D.C. Cir. 1999) (Female plaintiff must show that "all of the relevant aspects of her employment situation were 'nearly identical' to those of the male employee.") (quoting Neuren v. Adduci, Mastriani, Meeks & Schill, 43 F.3d 1507, 1514 (D.C. Cir. 1995) (quoting Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796, 802 (6th Cir. 1994)); Mayberry v. Vought Aircraft Co., 55 F.3d 1086, 1090 (5th Cir. 1995)) (requiring plaintiff to demonstrate that the other employees "were treated differently under circumstances 'nearly identical' to his") (citing Little v. Republic Ref. Co., 924 F.2d 93, 97 (5th Cir. 1991)).
  \item Graham v. Long Island R.R., 230 F.3d 34, 40 (2d Cir. 2000) (Plaintiff must show that comparators "were subject to the same performance evaluation and discipline standards" and "that similarly situated employees who went undisciplined engaged in comparable conduct; however, the comparator's conduct "need not be identical."); Weeks v. Union Camp Corp., No. 98-2814, 2000 WL 727771, at *6 (4th Cir. June 7, 2000) (While plaintiffs must show that the comparator's conduct was comparable
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While courts' application of these tests vary a great deal, some courts apply the similarly situated test very rigorously and prevent cases from going to the jury because of distinctions in conduct that are not really relevant. A discussion of a few cases will illustrate this.

In Holbrook v. Reno,232 the Federal Bureau of Investigation suspended and demoted the plaintiff, Dawnele Holbrook, a new agent trainee at the FBI Academy, because she had not forthrightly answered inquiries about a relationship with her physical trainer. Holbrook contended that she was similarly situated to three co-employees—two other new agent trainees and Palermo, the agent with whom she allegedly had a sexual relationship.233 The first trainee had engaged in immature, clowning behavior and had made some inappropriate statements, but the FBI permitted this trainee to graduate. The FBI reprimanded the second trainee for drinking and driving although it permitted him to graduate. The court found these individuals were not similarly situated because their misdeeds were not “nearly identical” to the plaintiff’s and did not involve disobedience and lack of forthrightness.234 On the other hand, the court acknowledged that Palermo’s offenses were comparable to Holbrook’s because they both were disciplined for engaging in an improper relationship and lying about it. According to the court, however, they were not similarly situated because Holbrook was a trainee on probation and Palermo was a supervisor and a fifteen-year FBI veteran.235 The District of Columbia Circuit, thus, found the comparators were not similarly situated to the plaintiff and affirmed the district court’s judgment for the defendant as a matter of law.236

In this case, the female plaintiff had evidence that the employer treated three men differently, in spite of their involvement in misconduct. One of the three men (her superior) had committed the same offense as the plaintiff. Another had been drinking and driving. While the distinctions in the employees’ conduct relied on by the court may have been the reasons for the differential treatment, a reasonable jury could have inferred that the differing treatment was because of the plaintiff’s sex. These questions should have gone to the jury. Instead, the court used the similarly situated requirement to keep the decision out of the jury’s hands.

In Kendrick v. Penske Transportation Services, Inc.,237 the plaintiff

232. 196 F.3d 255 (D.C. Cir. 1999).
233. Id. at 261.
234. Id.
235. Id. at 261-62.
236. Id. at 264.
237. 220 F.3d 1220 (10th Cir. 2000).
Kendrick, an African-American truck driver, had established a prima facie case of racial discrimination in his discharge. The employer contended that when a supervisor attempted to give the plaintiff a warning letter about speeding in the parking lot, the plaintiff verbally and physically abused the supervisor by cursing at him, bumping him with his chest, and asking, "[d]o you want a piece of me?" The court proceeded to the pretext stage.

The plaintiff pointed out that a white truck driver, Lynn Taylor, had threatened a co-employee with a crowbar, met with a supervisor, and stormed out of the office after the supervisor told him he was suspended. The company suspended Taylor again after he verbally abused another supervisor but allowed him to keep his job, conditioned upon Taylor’s agreement to serve a six-month probationary period and view anger management videos.

In affirming the district court’s grant of summary judgment to the employer, the Tenth Circuit distinguished the plaintiff and Taylor's conduct. The court said that the plaintiff had actually made physical contact while Taylor had not. Although the court acknowledged that assault with a deadly weapon may be just as threatening as pushing another person, the court was "reluctant to require Penske to view Kendrick and Taylor’s actions as equally unacceptable." The court continued, "[a] company must be allowed to exercise its judgment in determining how severely it will discipline an employee for different types of conduct." The court said that its role was "to prevent unlawful hiring practices, not to act as a super personnel department that second guessing employer’s business judgment."

Although the court feared acting as a super personnel department, it ended up acting as a super jury. The evidence presented by the plaintiff—that the

238. Id. at 1230.
239. Id. The court correctly stated that the plaintiff could prove pretext in a variety of ways, including by showing "that he was treated differently from other similarly-situated employees who violated work rules of comparable seriousness." Id.
240. Id. at 1232-33.
241. Id. at 1233. The court distinguished Taylor and the plaintiff Kendrick’s situations in other ways. For example, the two employees did not have the same immediate supervisors. Although the court acknowledged that the Human Resources manager played a role in deciding on the disciplinary action to be taken against both Taylor and Kendrick, the court believed that the fact that they each had different immediate supervisors diminished "the evidentiary value of the comparison between [the company’s] treatment of the two employees." Id. Here again, however, the court was taking over the jury’s role. If the Human Resources manager played an important role in determining the disciplinary action to be taken against both plaintiffs, then the jury should have been given an opportunity to decide whether discriminatory intent entered into the decision.
242. Id.
243. Id. (quoting Simms v. Oklahoma, 165 F.3d 1321, 1330 (10th Cir. 1999)).
employer retained a white employee who threatened another individual with a crowbar but discharged a black employee who merely bumped another individual—created an inference of discrimination. The court was correct that an employer is entitled to make a business judgment that bumping a co-employee is worse conduct than threatening an individual with a crowbar. The court, however, simply took the employer's word that this was its actual motive. This was for the jury to decide, not the court.244

244. The Fourth and Sixth Circuits made similar errors in two cases. In Weeks v. Union Camp Corp., 215 F.3d 1323 (4th Cir. 2000) (unpublished disposition) (Table) (Full opinion available at No. 98-2814, 2000 WL 727771 (4th Cir. June 7, 2000)), the white plaintiffs Webster and Weeks alleged that the employer, when it terminated them, treated them more harshly than Hunter, a black employee. Id. at *5. Hunter had been unhappy that his job team had given him a partially unfavorable peer review and believed that race had played a role. Webster and Weeks, members of Hunter's job team, were in the break room engaging in a discussion about Hunter. Unbeknownst to them, Hunter had left his duffle bag in the room containing a tape recorder that recorded their discussion. Hunter claimed that he had accidentally turned the tape recorder on when he removed his coat from the duffle bag immediately before Webster and Weeks came into the break room. During their discussion, Webster and Weeks made racial and threatening statements about Hunter. Union Camp, relying upon Hunter's statement that the taping was an accident, listened to the tape. Id. at *1.

Before being confronted with the tape, Weeks and Webster denied making the statements. Union Camp terminated Weeks and Webster for racial harassment and dishonesty in their initial responses to the inquiries. Id. at *2. Webster and Weeks filed suit under Title VII alleging reverse discrimination under Title VII. The district court granted summary judgment in favor of Union Camp because there was no evidence showing "that Union Camp knew or had any reason to know, when it used the tape, that Hunter had intentionally recorded the conversation." Id.

The Fourth Circuit found that the plaintiffs had failed to establish a prima facie case of disparate discipline because they had not shown that Hunter's conduct was of comparable seriousness. Id. at *6. Webster and Weeks argued that Hunter was being dishonest about inadvertently making the recording. The court, however, stated that even if it assumed that Hunter had lied about the incident, there was no evidence that the "employer actually knew that Hunter was lying." Id. The Fourth Circuit court concluded that the plaintiffs were not similarly situated to Hunter and, thus, affirmed the district court's grant of summary judgment to the employer on their Title VII claim. Surely, however, there was an issue of fact as to whether the employer had believed Hunter. Given Hunter's story that he suspected his co-workers of racism, that he brought into the break room a tape recorder concealed in a duffel bag and "inadvertently" turned the recorder on, a reasonable jury could conclude that the employer did not really believe Hunter but found it convenient to say that it believed him. The court, however, refused to let the jury decide this question. Or, another way of looking at the case is that the employer simply took Hunter's word for it, while it aggressively investigated Webster and Weeks. That is evidence of disparate treatment that should have gone to the jury.

In Mitchell v. Toledo Hosp., 964 F.2d 577 (6th Cir. 1992), the employer fired the
Other courts have been less deferential to the employer’s version of events and the employer’s contention that differences in conduct caused the differences in treatment. For example, in *Lynn v. Deaconess Medical Center-West Campus*, the Eighth Circuit reversed the district court’s grant of summary judgment to the employer. The appellate court found that the comparator’s sleeping on the job four times was of comparable seriousness to the plaintiff’s misconduct—lying on a couch and watching television during his shift, arriving late to work, failing to comply with time clock policy, a lack of productivity, a lack of compassion toward patients and staff, disrespect toward others, diagnosing a patient without authority, failing to help a patient’s family member in attaching equipment, and failing to prepare important documents. The court said:

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

plaintiff for misuse of company property when the plaintiff hid a box of valuable forms. *Id.* at 579-83. The Sixth Circuit affirmed the district court’s grant of summary judgment to the employer. The appellate court found that the plaintiff had not established a prima facie case because she had not met the similarly situated requirement. *Id.* at 581-85. The dissent pointed out that, according to the plaintiff Mitchell, she and her co-workers had agreed to play a practical joke on Wachsman, their supervisor. In furtherance of that joke, Mitchell told her fellow employees where the forms were and none of them informed Wachsman. Thus, according to the dissent, all the co-workers had been part of the joke but Mitchell had been the only one punished. The dissent acknowledged that Mitchell was the only employee who actually lied to her supervisor and was, therefore, more insubordinate. The dissent pointed out, however, that the employer had not discharged Mitchell for insubordination, but for misuse of company property. According to the dissent, Mitchell was therefore comparable to her fellow employees except for the insubordination involved in lying to her supervisor. She met the fourth element of the prima facie case by alleging that Bobbie Walley, a filing employee, cursed at her team leader. The employer had not terminated Walley. This was, according to the dissent, an act “of a similar type—verbal insubordination—and of ‘comparable seriousness.’” *Id.* at 586 (Jones, J., dissenting) (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973). The dissent noted that in the case at hand, Walley and Mitchell held jobs at roughly the same level. They were both specialized secretarial positions. It was irrelevant that they reported to different supervisors because a five member review board made decisions regarding employee discipline. In addition, they were both judged by the hospital’s employee handbook. Thus, the plaintiff should have been able to make a prima facie case by proving that Walley and Mitchell were similarly situated and Walley had not been punished for similar conduct. *Id.* at 586-87 (Jones, J., dissenting).

245. 160 F.3d 484 (8th Cir. 1998).

246. *Id.* at 485-89.
even criminal offense, could never be relevant to prove discrimination.\textsuperscript{247}

The \textit{Lynn} court was absolutely correct. To be sure, a jury may have believed the employer’s explanation that the plaintiff and comparator’s different conduct explained the differential treatment. On the other hand, a reasonable jury could also have found that the conduct was not \textit{that} different (or that the comparator’s conduct was more serious) and the differential treatment could only be explained by unlawful discrimination.

Similarly, in \textit{Hollis v. Atlanta Company},\textsuperscript{248} discussed above,\textsuperscript{249} the district court granted summary judgment to the employer because the black female plaintiff had failed to present evidence that “\textit{any superior . . . determined that [the white female comparators] wore a comparable hair style and [were] notified of being in violation of the [company’s] policy.”}\textsuperscript{250} In other words, it did not matter that Hollins alleged that the white comparators wore the same hair style. According to the district court, what mattered was that she had not alleged that a supervisor \textit{had determined} that they wore the same hair style.

If the district court’s opinion had been accepted,\textsuperscript{251} it would have left a large loophole in the employment discrimination laws. A sexist supervisor could determine that a female violated a given work rule, while determining that a male who engaged in the same conduct did not violate the rule. If the company terminated the female employee, her sex discrimination claim nonetheless would be barred, under the theory that the male employee was not similarly situated because a supervisor had not \textit{determined} that he had violated the rule.

The question of whether differences in the plaintiff and comparator’s conduct prevents them from being similarly situated is a difficult one. To be sure, significant differences in conduct would justify a finding that the plaintiff and comparator are not similarly situated. Similarly, suppose an employer’s written policy provided that the plaintiff’s conduct would be punished by termination and the comparator’s conduct by suspension. Uncontested evidence that the employer consistently followed the written policy would justify a finding that the two employees were not similarly situated. If, however, after all inferences are drawn in favor of the plaintiff, a material question of fact remains, courts should not grant summary judgment to the employer. If the plaintiff and

\textsuperscript{247} Id. at 488.
\textsuperscript{248} 188 F.3d 652 (6th Cir. 1999).
\textsuperscript{249} See supra notes 155-61 and accompanying text.
\textsuperscript{250} \textit{Hollins}, 188 F.3d at 660 (emphasis added by the appellate court).
\textsuperscript{251} The Sixth Circuit reversed the district court’s grant of summary judgment to the employer. The appellate court found that the plaintiff had presented evidence that white women wore the same hair style but received different treatment from the same supervisors. \textit{Id.} at 660-61.
comparator’s conduct is roughly comparable in seriousness, then the differences between the two employees should not justify summary judgment for the employer, unless the employer presents additional, uncontested evidence that these differences caused the differential treatment.

Two specific areas involving differences in conduct are subject to misunderstanding. The first concerns the fact that an employer’s good faith mistake does not justify a finding of discrimination. For example, suppose an employer accuses Employee A (a female) and Employees B and C (males) of stealing. After a perfunctory investigation, the employer determines that A committed the theft and that B and C were not involved. Assuming the employer genuinely believed that A had committed the theft and that B and C were innocent, then the three employees would not be similarly situated, even if A is able to prove that she was innocent and B and C were guilty. They would not be similarly situated because the employer had, in good faith, made different determinations for the employees. There may be a problem, however, regarding whether the employer “genuinely” believed that the female was guilty and the males were innocent. If the investigation was perfunctory and the evidence available to the employer questionable, a jury could infer that the employer treated the employees differently, not because of the employer’s good-faith belief in the plaintiff’s guilt and the comparators’ innocence, but because of the plaintiff’s gender.252 So long as the employer’s motivation is open to question, courts should allow the case to go to the jury. Courts should not simply take the employer’s word that it believed in good faith that the plaintiff was guilty and the comparators were innocent.

Another principle can also cause misunderstanding. It is a given that employers are entitled to treat some types of misconduct more seriously than other types and courts should not interfere with these judgments. For example, suppose an employer terminates a black employee for stealing a paper clip and only suspends a white employee who punched a supervisor. The employer is entitled to treat stealing the paper clip as a more serious offense. If the black employee files a Title VII suit and the factfinder believes that this was the actual reason for the differential treatment, the court should enter judgment for the employer. Given the facts in this hypothetical, however, the employer’s motivation is open to question and summary judgment is inappropriate. A reasonable jury could conclude that the plaintiff’s race caused the differential treatment. Unless the seriousness of the plaintiff’s conduct is of such magnitude that a reasonable jury could not disbelieve the employer’s explanation, a court should let the case go to the jury. Again, courts should not accept at face value

252. If the employer treated the employees differently during the investigation, that would also be evidence of disparate treatment. Indeed, such differential treatment itself might be actionable discrimination. See Lidge, supra note 1.
the employer’s explanation for the differential treatment.

V. CONCLUSION

While the similarly situated concept has become an important part of employment discrimination law, courts should take care not to misuse the concept. Since plaintiffs can prove discriminatory intent in a variety of ways, as the Supreme Court has made clear, courts should not require a similarly situated showing as an element of the plaintiff’s prima facie case. In addition, a plaintiff may choose to establish a prima facie case or prove pretext by pointing to the differential treatment of a similarly situated employee. Employers may file a motion for summary judgment based on the argument that the plaintiff and the comparator are not similarly situated. Courts should grant such a motion only if, after drawing all inferences in favor of the plaintiff, there are significant, uncontested, relevant differences between the plaintiff and the comparators. To demonstrate the differences’ relevance, employers will often need to present additional evidence that accounts for the differential treatment. If such evidence is contested, then summary judgment is not appropriate. If courts refrain from using the similarly situated concept improperly, much injustice will be avoided.