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11th Circuit Clarifies "Similarly Situated" Standard for Discrimination Claims

By Emily C. Burke April 2019

On March 21, 2019, a 9-3 en banc majority announced that a plaintiff proceeding under the *McDonnell Douglas* framework must demonstrate as a part of her *prima facie* case that she and her comparators are "similarly situated in all material respects." *Lewis v. City of Union City, Georgia*, 918 F.3d 1213 (11th Cir. 2019).

In this case, an African-American female detective claimed the Union City Police Department terminated her employment due to her race and gender in violation of Title VII and 42 U.S.C. § 1981, and discriminated against her on the basis of her disability in violation of the Americans with Disabilities Act ("ADA"). In support of her race and gender discrimination claims, she identified two white male Union City police officers claiming the two were treated more favorably than she was treated, despite all three failing physical fitness requirements. Whereas the plaintiff was terminated, her comparators were allegedly afforded more opportunities to correct their failures and obtain alternative employment with the City.

The district court granted summary judgment in favor of the City on plaintiff's race and gender claims, holding the proffered comparators were not "nearly identical" under the "similarly situated" standard previously articulated by the Eleventh Circuit. On appeal, a three-judge panel of the Eleventh Circuit reversed in part and held the comparators were valid. The Eleventh Circuit vacated the panel's decision and took the case en banc to finally clarify just how "similarly situated" must a plaintiff and her comparators be.

Previous navigations of the now-familiar *McDonnell Douglas* burden-shifting framework have produced conflicting Eleventh Circuit precedent volleying between different interpretations of "similarly situated." Previously, the Eleventh Circuit has required that proper comparators must be "nearly identical," the "same or similar," or an impossible combination of the two. The *Lewis* decision teases out the parameters of the standard and provides employers and courts with more defined guideposts.

As an initial matter, the Eleventh Circuit held that the meaningful comparator analysis must be conducted at the *prima facie* stage of the *McDonnell Douglas* framework and not moved to the pretext stage as requested by the plaintiff. The Court reasoned moving the comparator analysis from the *prima facie* stage to the pretext stage would force a defendant to disprove the discrimination and would improperly allow a plaintiff to proceed with her discrimination claim without first establishing any valid presumption that her employer has treated "like" employees "differently."

Next, the Eleventh Circuit shifted its focus to the question begging for clarification: just how "similarly situated" must a plaintiff and her comparators be? Mindful of the mess of standards previously

applied and the quintessential notions of discrimination, the Court held that a plaintiff must show that she and her comparators are "similarly situated in all material respects." The new standard strikes an appropriate balance between employee protection and employer discretion by recognizing the impossibility in a perfect apples-to-apples comparison, but requiring an objective substantive likeness between a plaintiff and her comparators.

The Court provided guidance and teased out its new standard explaining that it affords employers the ability to treat employees situated in different "material respects" differently – e.g. employees engaging in different conduct, employees subject to different policies and procedures, employees under the jurisdiction of different supervisors, and employees with different work histories.

The Court's employer-friendly decision provides guidance on which differences are significant enough to warrant different treatment among employees. If employees share material similarities and only differ in trivial ways, the Eleventh Circuit may be inclined to treat them as comparators for the purpose of a Title VII discrimination action. However, employers should be aware that "material" characteristics will forever be moving targets subject to a case-by-case analysis. Nonetheless, the *Lewis* decision provides user-friendly guideposts for employers within the Eleventh Circuit.

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