

Comments

CLASS OF ONE: ARE EMPLOYMENT DISCRIMINATION PLAINTIFFS AT AN INSURMOUNTABLE DISADVANTAGE IF THEY HAVE NO “SIMILARLY SITUATED” COMPARATORS?

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I. INTRODUCTION

This Comment will investigate a subset of employment discrimination plaintiffs—those I call the “class of one.” This “class of one”¹ includes plaintiffs who hold a unique position at a small office or are the only employees who have a specific set of job characteristics² within a larger office. An illustrative example is an office with six departments and seventy employees, where Janet works in the Marketing Department.³ The Marketing Department is comprised of five employees: one regional vice president, two senior account managers, one staff account manager (Janet), and one administrative assistant.

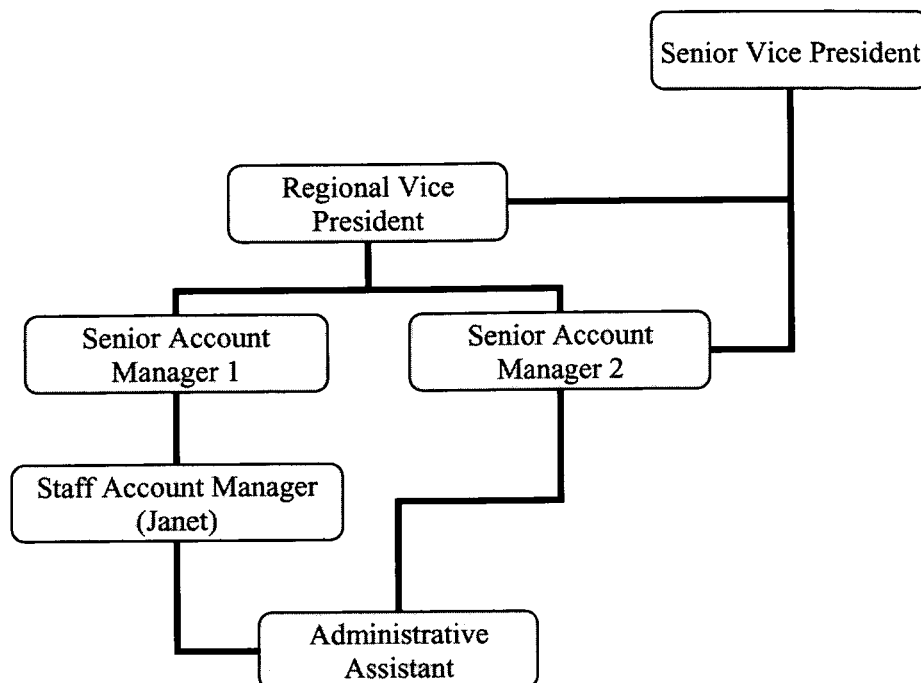
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1. Traditionally, “class of one” refers to the ability of an individual to bring forth an equal protection claim. In *Village of Willowbrook v. Olech*, the Supreme Court held that the “Equal Protection Clause gives rise to a cause of action on behalf of a ‘class of one’ where the plaintiff did not allege membership in a class or group.” 528 U.S. 562, 564 (2000). The Court further held that “the number of individuals in a class is immaterial for equal protection analysis.” *Id.* at 564 n.*.

2. Job characteristics include, for example, job title, job description, salary, and supervisor (the individual to whom the employee reports).

3. This example is solely for illustrative purposes. See Figure: Marketing Department Organizational Chart, *infra*.

FIGURE: MARKETING DEPARTMENT ORGANIZATIONAL CHART



Each position has a different salary and none of the five employees reports to the same supervisor (or set of supervisors).⁴ As a staff account manager, Janet reports to one of the senior account managers. In this example, Janet and others in the Marketing Department are within a “class of one” because no one is “similarly situated.” Each of the five employees has a unique set of job characteristics that no one else in the Marketing Department shares. For example, the two account managers are not “similarly situated” because they do not share the same supervisor. As will be discussed, courts differ in their articulation of the “similarly situated” standard, but some of the factors courts generally look to in assessing whether individuals are similarly situated include whether individuals have the same supervisor, responsibilities, and conduct.⁵

4. One senior account manager reports solely to the regional vice president. The second account manager reports to both the regional vice president and the senior vice president who oversees all departments.

5. See Ernest F. Lidge III, *The Courts' Misuse of the Similarly Situated Concept in Employment Discrimination Law*, 67 MO. L. REV. 831, 863-64 (2002) (“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 different conduct.”).

It is already difficult to prove employment discrimination,⁶ and without one of the most common tools, the use of a similarly situated comparator,⁷ those in the “class of one” have limited methods with which to prove an employment discrimination claim.

This Comment investigates whether the “class of one” is at a severe disadvantage with respect to proving employment discrimination claims. Part II gives an overview of employment discrimination claims available to plaintiffs under Title VII. Part III reviews the predominant analysis used for Title VII discrimination cases involving indirect evidence. Part IV examines how one of those means of indirect evidence, the use of the similarly situated standard in identifying comparators, is interpreted across the circuit courts of appeal. Part V discusses a dramatic story involving two former Hewlett-Packard (HP) executives who were arguably members of the “class of one.” Their stories highlight additional areas of needed reform for the “class of one.” Part VI then proposes changes aimed at ameliorating the position of the “class of one.” Finally, Part VII concludes that while the “class of one” is in a precarious position, given certain changes to the ways courts approach the “similarly situated” standard, all may not be lost for the “class of one.”

II. GENERAL OVERVIEW OF SOME EMPLOYMENT DISCRIMINATION CLAIMS UNDER TITLE VII

Three common types of employment discrimination claims under Title VII⁸ are: disparate treatment, disparate impact and hostile work

6. See *infra* note 14 and accompanying text (discussing the rarity of direct evidence and the subtlety of discrimination).

7. See *generally infra* note 18 and accompanying text (discussing the “similarly situated” standard in Title VII cases).

8. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2000 & Supp. IV 2004) [hereinafter Title VII]. 42 U.S.C. § 2000e-2 states:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; 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.

environment.⁹ Disparate treatment, sometimes called discriminatory treatment or intentional discrimination,

is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII.¹⁰

Disparate impact involves a facially neutral policy that has a discriminatory effect on a protected class.¹¹ A hostile work environment exists when work conditions create an atmosphere of discriminatory animus against members of a protected class.¹²

9. See generally Tristin K. Green, *Work Culture and Discrimination*, 93 CAL. L. REV. 623, 654-655 (2005) ("Title VII of the Civil Rights Act makes it unlawful for an employer to discriminate in employment on the basis of race, color, religion, sex, or national origin. Enforcement efforts under the statute have centered primarily on three theories of discrimination: disparate treatment theory, which holds employers liable for intentionally discriminatory, identifiable employment actions taken by particular wrongdoers and for systemic practices or policies of intentional exclusion; disparate impact theory, which holds employers liable for the use of employment practices that have an adverse effect on members of particular groups and are not justified by business necessity; and hostile work environment theory, which protects employees against harassing conduct that rises to the level of a hostile environment."); Lisa Marshall, *The Character of Discrimination Law: The Incompatibility of Rule 404 and Employment Discrimination Suits*, 114 YALE L.J. 1063, 1069 (2005) (discussing the use of propensity evidence in employment discrimination cases).

10. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). Cf. Marshall, *supra* note 9, at 1069 n.21 ("The systemic disparate treatment model . . . differs from the individual disparate treatment model, given its focus on a 'pattern or practice' of intentional discrimination rather than on discrete events.").

11. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971) ("Under the [Civil Rights] Act [of 1964], practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."). See also Marshall, *supra* note 9, at 1069 n.21 ("[T]he disparate impact model governs a fundamentally different form of discrimination suit, insofar as it dispenses with the requirement to prove discriminatory intent in forbidding an employer from acting to 'limit, segregate, or classify' employees '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, e.g., his race." (quoting 42 U.S.C. § 2000e-2(a)(2) (2000))).

12. *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971) (recognizing the existence of "working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers . . ."). See also Marshall, *supra* note 9, at 1069 n.21 ("A suit alleging a hostile work environment . . . requires the plaintiff to show harassing behavior to be 'sufficiently severe or pervasive to alter the conditions of . . . employment,' without necessarily showing an employer's intention to make it so." (quoting *Pa. State Police v. Suders*, 542 U.S. 129, 133 (2004))).

A. *Disparate Treatment and the “Class of One”*

This Comment focuses on disparate treatment with respect to the “class of one” employee. An individual can prove discriminatory treatment by direct or indirect evidence.¹³ Direct evidence of discrimination is rare,¹⁴ especially given the heavy burden placed on plaintiffs to submit “direct evidence [showing] that decisionmakers placed *substantial* negative reliance on an illegitimate criterion in reaching their decision.”¹⁵ Therefore, evidence must illustrate the decisionmaker’s *heavy reliance* on illegitimate reasons in reaching his decision. For example, in a Fifth Circuit case, an African American male was rejected for a position as a poker dealer because “these good old white boys don’t want black people touching their cards.”¹⁶ The Court determined that this statement in addition to the use of the n-word on several occasions by a person with

13. See ROBERT BELTON ET AL., *EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE* 69 (7th ed. 2004) (“[A] plaintiff may prove a claim of unlawful employment discrimination, including the ultimate fact of intentional discrimination, by direct or circumstantial evidence.”); THOMAS R. HAGGARD, *UNDERSTANDING EMPLOYMENT DISCRIMINATION* 64-68 (2001) (discussing direct and indirect evidence of discrimination).

14. See *Fernandes v. Costa Bros. Masonry*, 199 F.3d 572, 580 (1st Cir. 1999), *abrogated by* *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) on other grounds, (“[D]iscrimination tends more and more to operate in subtle ways, [therefore] direct evidence is relatively rare[.]”); *Ramseur v. Chase Manhattan Bank*, 865 F.2d 460, 464 (2d Cir. 1989) (“[T]he court must be alert to the fact that ‘[e]mployers are rarely so cooperative as to include a notation in the personnel file’” (quoting *Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633, 638 (5th Cir. 1985))); *Dister v. Cont’l Group, Inc.*, 859 F.2d 1108, 1112 (2d Cir. 1988) (In reality “direct evidence of discrimination is difficult to find precisely because its practitioners deliberately try to hide it.”); see also Susan K. Grebeldinger, *How Can a Plaintiff Prove Intentional Employment Discrimination if She Cannot Explore the Relevant Circumstances: The Need for Broad Workforce and Time Parameters in Discovery*, 74 DENV. U. L. REV. 159, 159 (1996) (Circumstantial evidence “is the most common way by which an employer’s discrimination is proved”); cf. *Slack v. Havens*, 522 F.2d 1091, 1092-93 (9th Cir. 1975) (not followed on other grounds) (ruling that remarks like “Colored people should stay in their places” and “Colored people are hired to clean because they clean better” are direct evidence of discrimination).

15. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O’Connor, J., concurring) (emphasis added). Some federal courts have had difficulty defining “direct” evidence given Justice O’Connor’s concurring opinion in *Price Waterhouse*, which stated that direct evidence must show “that an illegitimate criterion was a substantial factor in the decision[.]” *Id.* at 276. See also *Fernandes*, 199 F.3d at 581-82 (identifying three classes of direct evidence that arose across the circuits as a result of O’Connor’s “trenchant, universally accepted example of what is *not* direct evidence: stray remarks, such as ‘statements by decisionmakers, or statements by decisionmakers unrelated to the decisional process itself.’ Since then, however, jurists have struggled in attempting to define the term affirmatively. This operose task not only has divided the courts of appeals but also has created a patchwork of intra-circuit conflicts.” (quoting *Price Waterhouse*, 490 U.S. at 277) (internal citations omitted and emphasis added)).

16. *Jones v. Robinson Prop. Group*, 427 F.3d 987, 992 (5th Cir. 2005).

decision-making power constituted direct evidence of discrimination.¹⁷ Often, plaintiffs do not have access to this kind of direct evidence and usually have to rely on circumstantial evidence. As a result, employment discrimination cases using indirect evidence are extremely fact-sensitive.

A common, if not the most common, way for a plaintiff to prove discriminatory treatment is to show that a similarly situated individual, outside the protected class, was treated differently.¹⁸ Returning to Janet and her co-workers in the Marketing Department,¹⁹ if Janet believed that she was discriminated against, and she did not have direct evidence, it would be nearly impossible for her to prove her case since there are no other employees similarly situated to her position.

The Second Circuit determined that “cases *occasionally* arise where a plaintiff cannot show disparate treatment . . . because there are no employees similarly situated to the plaintiff.”²⁰ While there are no empirical studies to show how *occasional* these cases are, one could argue that the only reason such cases would be occasional is because “class of one” cases usually do not advance to trial, let alone an appellate court. Discrimination cases based on circumstantial evidence are already difficult to prove.²¹ Therefore, when you add the lack of a similarly situated comparator, it is clear that those in the “class of one” are at an even greater disadvantage than “typical” plaintiffs (those not in the “class of one”).

To gain a better understanding of what is required to prove an individual disparate treatment claim, an understanding of the foundational case law is required.

17. *Id.* at 993 (finding that decisionmakers “used race as a factor in employment decisions . . .”).

18. See HAGGARD, *supra* note 13, at 67 (“An easy and obvious way for a plaintiff to prove that unfavorable treatment was *because of* a protected characteristic is by reference to a similarly situated person, albeit of a different race, color, sex, national origin, or religion.”); see, e.g., Wallin v. Minn. Dep’t of Corr., 153 F.3d 681, 687 (8th Cir. 1998) (A “common way to raise an inference [of discrimination] is to prove disparate treatment by showing that [plaintiff] was treated less favorably than similarly situated employees . . .”) (internal quotations omitted).

19. See *supra* Part I (introducing a prototype of “class of one” for illustrative purposes).

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

21. See, e.g., BELTON ET AL., *supra* note 13, at 69 (“Proving intentional discrimination can be difficult in disparate treatment cases, particularly in those cases in which a plaintiff must rely solely upon circumstantial evidence.”).

III. DEVELOPMENT OF THE *MCDONNELL DOUGLAS* ANALYSIS

A. *McDonnell Douglas v. Green*

In *McDonnell Douglas Corp. v. Green*,²² the Supreme Court first articulated the burden-shifting analysis used in Title VII discrimination cases. *McDonnell Douglas* involved a black civil rights activist, Percy Green, who believed his recent layoff from his mechanic and laboratory technician position was racially motivated. In response to his dismissal, Green commenced a series of protests that involved disruptive and illegal activity against his employer, McDonnell Douglas.²³ As a black man, Green was within the protected class specified in Title VII.²⁴ *McDonnell Douglas* articulated a three stage analysis to balance employment discrimination evidence.²⁵ The analysis begins with the burden on the plaintiff who must prove a prima facie case of discrimination.²⁶

This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection,

22. 411 U.S. 792 (1973). *McDonnell Douglas* is not the only paradigm under which employment discrimination cases are analyzed. Discrimination cases are also analyzed under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Typically, *Price Waterhouse* has been used to analyze direct evidence discrimination cases but the Supreme Court's ruling in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) held that a case may be analyzed under *Price Waterhouse* even in the absence of direct evidence because nothing in the 1991 Amendments to Title VII requires direct evidence. *Desert Palace*, 539 U.S. at 98-99. After the *Desert Palace* ruling, several commentators have predicted the demise of the *McDonnell Douglas* framework; however, it endures. Compare William R. Corbett, *McDonnell Douglas, 1973-2003: May You Rest in Peace?*, 6 U. PA. J. LAB. & EMP. L. 199, 203 (2003) (discussing the confusion in determining which analysis to use in a particular employment discrimination case), and Jeffrey A. Van Detta, "*Le Roi est Mort; Vive le Roi!*": *An Essay on the Quiet Demise of McDonnell Douglas and the Transformation of Every Title VII Case After Desert Palace, Inc. v. Costa into a "Mixed Motives" Case*, 52 DRAKE L. REV. 71, 72 (2003) (describing *McDonnell Douglas* as "dead as a doornail"), with Steven J. Kaminshine, *Disparate Treatment as a Theory of Discrimination: The Need for a Restatement, Not a Revolution*, 2 STAN. J. C.R. & C.L. 1, 7 (2005) (concluding that "*McDonnell Douglas* is not dead, just wounded, that it can and should coexist with its mixed-motive sibling [*Price Waterhouse*], and that with certain adjustments we can and should maintain a distinction between pretext and mixed-motive claims").

23. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 794 (1973) ("[Green] and other members of the Congress on Racial Equality illegally stalled their cars on the main roads leading to petitioner's plant for the purpose of blocking access to it at the time of the morning shift change.")

24. See 42 U.S.C. § 2000e-2 (2000) ("It shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin . . .").

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

26. *Id.*

the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.²⁷

If a *prima facie* case is established, the burden then shifts to the defendant who must produce evidence of legitimate, nondiscriminatory reasons for the employee's rejection.²⁸ Upon satisfaction of the defendant's burden, the burden shifts back to the plaintiff, whereby she is given an opportunity to rebut those legitimate, nondiscriminatory reasons and argue that they are mere pretext.²⁹ Evidence of such pretext may include showing that a similarly situated individual, outside the protected class, was treated more favorably.³⁰

B. *Texas Department of Community Affairs v. Burdine*

The *McDonnell Douglas* analysis was further developed in *Texas Department of Community Affairs v. Burdine*,³¹ which clarified the second stage of the analysis. In *Burdine*, a former female employee brought a discrimination suit against her employer alleging that she was denied a promotion because of her sex.³² As a female, Burdine was protected under Title VII of the Civil Rights Act of 1964.³³ In *Burdine*, the Supreme Court states that the *prima facie* burden "is not onerous. . . . The *prima facie* case serves an important function in the litigation: it eliminates the most

27. *Id.*

28. *Id.* at 802-04.

29. *Id.* at 805 ("[R]espondent must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision.").

30. *See id.* ("Especially relevant to such a showing would be evidence that white employees involved in acts against petitioner of comparable seriousness to the 'stall-in' were nevertheless retained or rehired. Petitioner may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races."). Plaintiff may assert other evidence to show pretext. Such evidence may include:

[F]acts as to the petitioner's treatment of respondent during his prior term of employment; petitioner's reaction, if any, to respondent's legitimate civil rights activities; and petitioner's general policy and practice with respect to minority employment. On the latter point, statistics as to petitioner's employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks.

Id. at 804-05. Each circuit varies on how they determine who is similarly situated. *See infra* Part IV. For example, the Second Circuit uses a vague standard that requires those who are similarly situated to be so in "all material respects" but it does not specify any *particular respects*. *Shumway v. United Parcel Serv., Inc.*, 118 F.3d 60, 64 (2d Cir. 1997).

31. 450 U.S. 248 (1981).

32. *Id.*

33. 42 U.S.C. § 2000e-2 (2000).

common nondiscriminatory reasons for the plaintiff's rejection."³⁴ Further, and more importantly, the defendant's burden to provide a legitimate, nondiscriminatory reason "need not persuade the court that it was actually motivated by the proffered reasons, but it is sufficient if the defendant's evidence raises a genuine issue of fact as to whether [the company] discriminated against the plaintiff."³⁵ Therefore, the defendant's burden is one of production not of persuasion.³⁶ The burden of persuasion rests with the plaintiff who may succeed "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."³⁷ *Burdine* also emphasized that "*McDonnell Douglas* teaches that it is the plaintiff's task to demonstrate that similarly situated employees were not treated equally[,]"³⁸ not the defendant's.

C. *St. Mary's Honor Center v. Hicks*

In *St. Mary's Honor Center v. Hicks*,³⁹ a correctional officer/shift commander alleged that his demotion and ultimate discharge were due to his race, in violation of Title VII. The Supreme Court held, in a five to four opinion, that proving the falsity of an employer's explanation was not enough to sustain a plaintiff's discrimination claim.⁴⁰ Defendant's production burden does not involve a "credibility assessment," and this assessment occurs after production.⁴¹ Therefore, the ultimate burden of persuasion rests with the plaintiff.⁴²

The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination But . . . [it does not] *compel*[] judgment for the plaintiff⁴³

34. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253-54 (1981).

35. *Id.* at 248 (internal citation omitted).

36. *See id.* at 254 ("The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons.").

37. *Id.* at 256.

38. *Id.* at 258 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973)).

39. 509 U.S. 502 (1993).

40. *Id.*

41. *Id.* at 509.

42. *Id.* at 511.

43. *Id.* at 511 (internal citation omitted). The Court goes on to say that "nothing in law would permit us to substitute for the required finding that the employer's action was the

This ruling confronted the

pretext-plus/pretext-only controversy that had divided the lower courts. Under the pretext-only view, a plaintiff who was able to prove that the employer's explanation was a pretext was entitled to judgment as a matter of law. . . . Under the pretext-plus view, a finding of pretext alone was insufficient; the plaintiff needed additional evidence to show that the employer's proffered reason was a pretext *for discrimination*. . . . The Court agreed that Title VII required proof that the employer's false explanation was a pretext *for discrimination*, but that the fact finder could properly draw that inference from the pretext itself.⁴⁴

Needless to say, the lower courts were still confused and the Supreme Court revisited the issue in *Reeves v. Sanderson Plumbing Products, Inc.*⁴⁵

D. *Reeves v. Sanderson Plumbing Products, Inc.*

Reeves held that a prima facie case, when combined with sufficient evidence for a reasonable factfinder to reject an employer's legitimate, nondiscriminatory reasons, *may* be sufficient to sustain a claim of intentional discrimination under the Age Discrimination in Employment Act (ADEA).⁴⁶ Specifically, plaintiff Reeves made a substantial showing that the defendant's explanation for his dismissal, poor record keeping, was false.⁴⁷ The Court cautioned that it was not a given that such a showing by the plaintiff would always be sufficient.⁴⁸

E. *Summary*

An individual alleging a discrimination claim and using indirect evidence must⁴⁹ utilize the *McDonnell Douglas* burden-shifting analysis.

product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable." *Id.* at 514-15. Therefore, "[i]t is not enough . . . to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination." *Id.* at 519.

44. Kaminshine, *supra* note 22, at 13.

45. 530 U.S. 133 (2000).

46. *Id.* at 147 ("[I]t is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation.").

47. *Id.*

48. *Id.* at 148 ("For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.").

49. *Cf. supra* note 22 (discussing the use of the *Price Waterhouse* analysis for indirect evidence discrimination cases).

Under *McDonnell Douglas*, the plaintiff must prove a prima facie case of discrimination.⁵⁰ After establishing a prima facie case, the defendant then produces legitimate, nondiscriminatory reasons for his or her actions.⁵¹ This evidence need not persuade the court that the defendant was motivated by the specified reasons. Upon production, plaintiff must prove that the specified reasons were merely a pretext for the defendant's actions.⁵² While establishment of a prima facie case and evidence of pretext will generally allow the plaintiff's case to reach the factfinder, "there will be instances where . . . no rational factfinder could conclude that discrimination had occurred."⁵³

IV. SIMILARLY SITUATED STANDARD ACROSS THE CIRCUITS

A common method used by plaintiffs to satisfy the prima facie case and to prove pretext in the *McDonnell Douglas* analysis is to show that the defendant treated others who are similarly situated to the plaintiff, but who are not within the protected class, more favorably.⁵⁴ While the "similarly situated" standard originated in *McDonnell Douglas*⁵⁵ and was further refined in *Burdine*,⁵⁶ it is by no means uniformly defined across the circuit courts of appeal and is hardly a "standard" in the strict sense.⁵⁷

50. See *supra* Part III.A.

51. See *supra* Part III.A.

52. See *supra* Part III.B.

53. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 134-35 (2000).

54. See Haggard, *supra* note 13, at 67 (noting that a comparator may be considered at the pretext stage of the *McDonnell Douglas* analysis); see also *Wallin v. Minn. Dep't of Corr.*, 153 F.3d 681, 687 (8th Cir. 1998) (noting that a common way to raise an inference of discrimination is by showing that the plaintiff was treated less favorably than someone similarly situated who was not in the protected class); 45C AM. JUR. 2D *Job Discrimination* § 2507 (2002) ("This may be accomplished by a showing that similarly situated employees or applicants, who are not members of the plaintiff's protected group, were treated more favorably under comparable circumstances, or by a showing that the employer deviated from its established rules or procedures in dealing with the plaintiff." (internal citations omitted)); *Grebeldinger*, *supra* note 14, at 159 (stating that circumstantial evidence is the most common way to prove employer discrimination).

55. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973) ("Especially relevant to such a showing would be evidence that white employees involved in acts . . . of comparable seriousness . . . were nevertheless retained or rehired. . . . In short . . . [Plaintiff] must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision.").

56. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 258-59 (1981).

57. *Petition for Writ of Certiorari at 7-8, Watts v. City of Norman*, 536 U.S. 976 (2002) (No. 011299), 2002 WL 32134671 [hereinafter *Watts Petition*] ("The First, Second, Fifth, Sixth, Seventh, Eighth, Tenth and Eleventh Circuits have articulated different standards for determining whether a given plaintiff is 'similarly situated' to his suggested comparable employee(s).").

The First Circuit utilizes a “prudent person” standard.⁵⁸ “The test is whether a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated.”⁵⁹ Furthermore, a “claim of disparate treatment based on comparable evidence must rest on proof that the proposed analogue is similarly situated in material respects.”⁶⁰

In the Second Circuit, the issue of determining whether a coworker is similarly situated to the plaintiff is generally a question of fact for the jury.⁶¹ The fact finder must determine if the coworker is similarly situated in “all material respects.”⁶²

The Fifth and Eleventh Circuits utilize a “nearly identical” standard.⁶³ In *Okoye v. University of Texas Houston Health Science Center*, the court stated that in order “to establish disparate treatment a plaintiff must show that the employer gave preferential treatment to another employee under nearly identical circumstances; that is, that the misconduct for which the plaintiff was discharged was nearly identical to that engaged in by other employees.”⁶⁴ The Eleventh Circuit has ruled that “[t]he comparator must

58. *Rathbun v. Autozone, Inc.*, 361 F.3d 62, 76 (1st Cir. 2004); *Conward v. Cambridge Sch. Comm.*, 171 F.3d 12, 20 (1st Cir. 1999); *Dartmouth Review v. Dartmouth Coll.*, 889 F.2d 13, 19 (1st Cir. 1989) (not followed on other grounds).

59. *Dartmouth Review*, 889 F.2d at 19.

60. *Perkins v. Brigham & Women’s Hosp.*, 78 F.3d 747, 751 (1st Cir. 1996).

61. *See, e.g., Roa v. Mineta*, 51 F. App’x 896, 899 (2d Cir. 2002) (“[W]hether two individuals are indeed similarly situated is ordinarily a question of fact for a jury”); *Graham v. Long Island R.R.*, 230 F.3d 34, 39 (2d Cir. 2000) (reaffirming that the question of whether two employees are similarly situated should remain with the jury); *Hargett v. Nat’l Westminster Bank, USA*, 78 F.3d 836, 839-40 (2d Cir. 1996) (contending that the jury must decide whether the employees were similarly situated).

62. *Shumway v. United Parcel Serv., Inc.*, 118 F.3d 60, 64 (2d Cir. 1997). The Second Circuit does not have a strict set of factors with which to determine who is similarly situated in “all material respects” but it has generally used factors like shared supervisor, shared disciplinary standards, and similar duties as a means to determine whether individuals are similarly situated. *See, e.g., McDowell v. T-Mobile USA, Inc.*, No. 04-2909, 2007 WL 2816194, at *9 (E.D.N.Y. Sept. 26, 2007) (“There is no specific set of criteria used to determine whether employees’ conduct is comparable Rather, the determination of whether two employees are similarly situated in all material respects is based on (1) whether the plaintiff and [his comparators] were subject to the same workplace standards and (2) whether the conduct for which the employer imposed discipline was of comparable seriousness.”) (internal citation omitted).

63. *See, e.g., Dileo v. Ashcroft*, 201 F. App’x 190 (5th Cir. 2006) (applying the “nearly identical” standard and citing *Okoye v. University of Texas Houston Health Science Center*, 245 F.3d 507, 514 (5th Cir. 2001)); *Maniccia v. Brown*, 171 F.3d 1364, 1368 (11th Cir. 1999) (“[T]he quantity and quality of the comparator’s misconduct [must] be nearly identical to prevent courts from second-guessing employers’ reasonable decisions”).

64. *Okoye*, 245 F.3d at 514 (some internal punctuation omitted and citation references omitted).

be ‘nearly identical’ to the plaintiff to prevent courts from second-guessing a reasonable decision by the employer.”⁶⁵

The Sixth Circuit’s test, as articulated in *Mitchell v. Toledo Hospital*,⁶⁶ requires that comparators be substantially similar in all respects.⁶⁷ The Tenth Circuit employs a similar standard, requiring the plaintiff to show that the “comparables are similarly-situated *in all respects*.”⁶⁸ Although “[c]omparable employees must be similarly situated in all respects relevant to the employer’s decision . . . they need not be identically situated.”⁶⁹

In the Seventh Circuit, the fourth element of a *prima facie* case requires that a “similarly situated employee outside the protected class was treated more favorably by the employer.”⁷⁰ On the other hand, the Eighth Circuit test, as articulated by *Harvey v. Anheuser-Busch, Inc.*, determines that “[e]mployees are similarly situated when they are involved in or accused of the same offense and are disciplined in different ways.”⁷¹

The confusion regarding which standard to apply has prompted various state supreme courts and the District of Columbia Circuit to look to the federal system for “*nonbinding guidance* regarding the standard to apply when determining what constitutes ‘similarly situated’ employees in employment discrimination cases based on *state law*.”⁷² Various parties

65. *Dickinson v. Springhill Hosps., Inc.*, 187 F. App’x 937, 939 (11th Cir. 2006) (citing *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1091 (11th Cir. 2004)) (some internal punctuation omitted).

66. 964 F.2d 577, 583 (6th Cir. 1992).

67. *Id.* (“[T]he ‘comparables’ [must be] . . . similarly situated *in all respects*. . . . [They] must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer’s treatment of them for it.”). *Cf.* *Watts Petition*, *supra* note 57, at 16 (“The Sixth Circuit has backed away from the *Mitchell v. Toledo Hosp.*’s rigid standard of similarly situated *in all respects*, and currently uses the similarly situated *in all relevant respects* standard. As a result, there is an intracircuit split” (internal citation omitted)); David L. Hudson, *Will the Sixth Circuit Stick to One Standard with Respect to ‘Similarly Situated’ Employees?*, 37 TENN. BAR J. 25, 30 (2001) (“The lack of consistency in the Sixth Circuit with respect to comparables is disturbing for employment law practitioners on both sides.”).

68. *See Magruder v. Runyon*, 844 F. Supp. 696, 702 (D. Kan. 1994), *aff’d*, 544 F.3d 787 (10th Cir. 1995) (some internal punctuation omitted) (“[T]o be deemed ‘similarly-situated,’ the individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer’s treatment of them for it.”).

69. *Ortiz v. Norton*, 254 F.3d 889, 894 (10th Cir. 2001) (internal punctuation omitted).

70. *Watts Petition*, *supra* note 57, at 16 (citing *Gordon v. United Airlines*, 246 F.3d 878, 886 (7th Cir. 2001)).

71. 38 F.3d 968, 972 (8th Cir. 1994) (some internal quotation marks omitted).

72. *Watts Petition*, *supra* note 57, at 16 (citing *Furukawa v. Honolulu Zoological Soc’y*, 936 P.2d 643, 648-51 (Haw. 1997) (adopting “all relevant aspects” standard); *Hollins v. Fed. Nat’l Mortgage Ass’n*, 760 A.2d 563, 578 (D.C. Cir. 2000) (applying the “nearly identical” standard); *Matthews v. Ocean Spray Cranberries, Inc.*, 686 N.E.2d 1303, 1310

have also petitioned the Supreme Court to be heard on the question of clarifying the “similarly situated” standard.⁷³ Although the Supreme Court did not grant certiorari in these cases, their existence indicates a growing problem.

The differing standards across the circuits cause a great deal of uncertainty in discrimination cases generally,⁷⁴ and are arguably a death knell in “class of one” cases specifically. To get a better sense of the “class of one” problem, an example will prove helpful.

V. THE HEWLETT-PACKARD EXECUTIVES: A CONNECTION REVEALED?

A particularly interesting example of potential “class of one” individuals is that of former Hewlett-Packard (HP) executives Carleton S. Fiorina (“Carly Fiorina”) and Patricia Dunn.⁷⁵

A. Carly Fiorina

Carly Fiorina served as HP’s President and Chief Executive Officer (CEO) from 1999 through 2005 and as Chairman of the Board from 2000 through 2005.⁷⁶ Fiorina was dismissed in early 2005 by the HP board when they could no longer agree on the future of HP (subsequent to a merger

(Mass. 1997) (describing the use of the “all relevant aspects” standard in the pretext stage); *Kroh v. Cont’l Gen. Tire, Inc.*, 748 N.E.2d 36, 37-39 (Ohio 2001) (rejecting *Mitchell v. Toledo Hospital’s* “in all respects” approach and adopting the “all of the relevant aspects” standard).

73. See, e.g., Petition for a Writ of Certiorari at i, *Fulton County v. Lambert*, 536 U.S. 906 (2002) (No. 011568), 2002 WL 32135248 (asking “[w]hether certiorari should be granted to resolve a conflict among the United States Courts of Appeal as to the standard for proper comparators in a disparate discipline employment discrimination case”); *Watts* Petition, *supra* note 57, at i (asking “[i]s the standard for determining whether an employment discrimination plaintiff is ‘similarly situated’ to his comparable(s) under *Fed. R. Civ. P. 56* the same as the standard for determining whether he is ‘similarly situated’ to his comparable(s) at trial” and whether “the ‘similarly situated’ test is the same in the prima facie case and pretext stages of cases governed by *McDonnell Douglas Corp. v. Green*”).

74. Although this comment focuses on Title VII, the *McDonnell Douglas* burden-shifting analysis is also used in the Age Discrimination in Employment Act (ADEA), Americans with Disabilities Act (ADA), 42 U.S.C. § 1981 (2000), and other employment discrimination cases. See generally *Horvat v. Forbes Reg’l Hosp.*, 184 F. App’x 216 (3d Cir. 2006) (applying the *McDonnell Douglas* framework to an ADEA claim); *Dyrek v. Garvey*, 334 F.3d 590 (7th Cir. 2003) (applying *McDonnell Douglas* to an ADA claim); *McLee v. Chrysler Corp.*, 109 F.3d 130 (2d Cir. 1997) (applying *McDonnell Douglas* to a § 1981 claim).

75. Although there is no overt evidence, the circumstances surrounding these two former HP chairmen illustrate both the difficulty involved in proving discrimination claims and the difficulty of initially identifying the problem.

76. Former Executive Bios: Carleton S. Fiorina, <http://www.hp.com/hpinfo/execteam/bios/fiorina.html> (last visited Oct. 16, 2007).

with another computer company, Compaq).⁷⁷ At the time, the reasons for her dismissal were described as including both her failure “to produce the kind of profits she had promised” and a collision of her management style with the egalitarian “corporate culture where workers were treated not so much as employees but as family”⁷⁸ While HP denied that a culture clash⁷⁹ or gender was to blame for Fiorina’s dismissal,⁸⁰ Fiorina and others looked back on her removal,⁸¹ over a year and a half later, with new eyes. This review was especially interesting given the almost contemporaneous dismissal of HP executive Patricia Dunn.

While antidiscrimination law can be a powerful protection for those who suffer adverse employment actions, “[t]he [current] model of legal protection assumes that those who have suffered harms will recognize their injuries and invoke the protective measures of law.”⁸² Invocation of these rights is far from *proving* a case based on these rights. Hypothetically, if Fiorina suspected discrimination at the time of her dismissal, under the current system, which heavily relies on the “similarly situated” standard, it is unlikely that she would have been able to prove it. However, after a second female HP executive, Patricia Dunn, was dismissed by the same HP board, the press was drawing parallels between the two cases, and perhaps Fiorina was herself.⁸³

77. *Id.*; Fiorina Comments on Public Firing, Oct. 8, 2006, http://www.cbsnews.com/stories/2006/10/05/60minutes/main2069703_page2.shtml.

78. Gary Rivlin & John Markoff, *Tossing Out a Chief Executive*, N.Y. TIMES, Feb. 14, 2005, at C1.

79. Fiorina discusses the dysfunction of the HP Board in her memoir. See generally CARLY FIORINA, TOUGH CHOICES: A MEMOIR 280-95 (2006) (discussing the dysfunction of the HP Board).

80. See Rivlin & Markoff, *supra* note 78, at C1 (noting that an HP interim chief executive denied that a culture clash played a role in Fiorina’s departure); see also *infra* note 100 (quoting Tom Perkins who denied that Fiorina’s gender was a problem).

81. See generally FIORINA, *supra* note 79 (discussing her tenure at HP); Del Jones, “Former HP Chief Fiorina Takes a Look Back,” USA TODAY, Sept. 15, 2006, at 5B, available at http://www.usatoday.com/money/companies/management/2006-10-15-fiorina-advice_x.htm?tab1=t4 (noting that Fiorina believes that her firing had nothing to do with her performance).

82. Kristin Bumiller, *Victims in the Shadow of the Law: A Critique of the Model of Legal Protection*, 12 SIGNS 421, 422 (1987). “Since most antidiscrimination laws rely primarily on victims to identify violations, report them to public authorities, and participate in enforcement proceedings, these laws tacitly assume that such behavior is reasonably unproblematic.” *Id.*

83. See, e.g., Fiorina Comments on Public Firing, Oct. 8, 2006, <http://www.cbsnews.com/stories/2006/10/05/60minutes/main2069703.shtml> (“Last February, Carly was fired—abruptly and very publicly—with striking parallels with what happened to Pattie Dunn.”).

B. *Patricia Dunn*

Patricia Dunn served as HP Chairman from February 2005 until September 2006, when she resigned due to a controversy regarding efforts to investigate board-level leaks during, and prior to, her tenure at HP.⁸⁴ A month after her resignation, Dunn was criminally charged with four felony counts: fraudulent use of wire, radio or television transmissions; taking, copying, and using computer data without authorization; identity theft; and conspiracy.⁸⁵ “Dunn says a majority of the board asked her to initiate a leak inquiry”⁸⁶ when private HP business ended up in the media.⁸⁷ In a *60 Minutes* interview in October 2006,⁸⁸ Dunn described the circumstances surrounding the backlash over the board leaks as an effort by former HP director, and then board member, Thomas Perkins to oust her and destroy her reputation.⁸⁹ When the investigation revealed the source of the leaks as prominent board member, Jay Keyworth, Perkins allegedly wanted Dunn to keep it quiet.⁹⁰ When Dunn refused, Keyworth was asked to resign and Perkins gave his own resignation “in a huff” and stormed out of an HP board meeting.⁹¹ Dunn says that Perkins

turned to me sitting nearby and pointed at me and said, “You betrayed me.” He said that several times. “You betrayed me, Pattie. You said that we would handle this off-line and a good man is being ruined as a result.” . . . So he drove off and ended up going onto his mega yacht in the Mediterranean. And I suspect he thought over the ensuing days that it was just unacceptable that he was off the board, Jay was going to be off the board, and I was still chairman It was a disinformation, a classic disinformation campaign He set the mindset for basically everything that’s believed about this right now.⁹²

84. James B. Stewart, *The Kona Files: How an Obsession with Leaks Brought Scandal to Hewlett-Packard*, *NEW YORKER*, Feb. 19, 2007, at 152.

85. Patricia Dunn: I Am Innocent, Oct. 8, 2006, <http://www.cbsnews.com/stories/2006/10/05/60minutes/main2069430.shtml>.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* (“[T]hey were best friends They were allies on the board. And I think he [Perkins] thought it was a possibility that the board would say the leaker should resign. He just didn’t want that outcome” said Dunn about Perkins’ reaction (internal quotation marks omitted)).

91. *Id.*

92. *Id.*

C. Connection?

While Dunn's criminal case was pending,⁹³ some commentators drew parallels with Carly Fiorina: "both women were forced out of HP and are lashing out at some members of the male-dominated board."⁹⁴ At one point in early 2005, during Fiorina's tenure, members of the HP board approached Fiorina to restructure the company in a way that would strip her of some of her responsibilities.⁹⁵ That plan was ultimately leaked to the *Wall Street Journal*. A leak investigation at that time did not reveal the *Wall Street Journal* source, although Perkins later admitted that he was a second source to that story. In a *60 Minutes* interview, over a year and a half later, Fiorina said that she intended to clear the air and move forward after the *Wall Street Journal* leak, but at the subsequent board meeting, she was fired, and Dunn was elected chairman of the board.⁹⁶ Fiorina described the dismissal as "heartless" and "disrespectful."⁹⁷ As with Dunn, the key board members at the center of Fiorina's final months at HP were Tom Perkins and Jay Keyworth.

In 2005, Fiorina's dismissal was viewed in a more benign⁹⁸ light than it would later be viewed after Dunn's departure, which revealed some common threads between the two episodes. Both Fiorina and Dunn were in a "class of one," holding unique positions where there were no viable comparators while each worked at HP.⁹⁹ As two women who were unwilling to move lock-step with the board on all issues, Fiorina and

93. Charges against Patricia Dunn were ultimately dismissed. Matt Richtel, *Charges Dismissed in Hewlett-Packard Spying Case*, N.Y. TIMES, Mar. 15, 2007, at C1.

94. Fiorina Comments on Public Firing, Oct. 8, 2006, <http://www.cbsnews.com/stories/2006/10/05/60minutes/main2069703.shtml>.

95. *Id.*; see generally FIORINA, *supra* note 79 (discussing Fiorina's tenure at HP).

96. Fiorina Comments on Public Firing, Oct. 8, 2006, <http://www.cbsnews.com/stories/2006/10/05/60minutes/main2069703.shtml>. Fiorina's interview aired the same night as Dunn's interview. *Id.*

97. *Id.* ("Maybe they took great pleasure in seeing me beat up publicly for weeks and weeks and weeks.")

98. Although there were some who considered that Fiorina's gender had something to do with her dismissal, it was ultimately rejected and commentators looked to other reasons for her departure. See, e.g., Claudia H. Deutsch, *Carl Fiorina? He'd Probably Be Out of Work, Too*, N.Y. TIMES, Feb. 13, 2005, at 35 ("If Carleton S. Fiorina were a man, would the outcome of her turbulent tenure as chief executive of Hewlett-Packard have been different?"). Some critics claimed she spent too much time courting celebrities rather than executing the board's strategy. Michael P. Regan, *The Big Winners and Losers of 2005: A Review of the Notable and Notorious Who Made the News*, CHI. SUN TIMES, Dec. 29, 2005, at 66.

99. At least, there were no *immediate* comparators. Courts are likely to allow employment discrimination plaintiffs to use predecessors or successors as comparators. Although, as discussed in Part VI.D., in attempting to use evidence about a successor, a plaintiff might face statute of limitations issues.

Dunn's decision-making likely led to retribution by specific board members. But without some unexpected twists of fate, they would still look like any other set of ousted CEOs. This is not to say that either Fiorina or Dunn's situation is a clear case of discrimination.¹⁰⁰ However, a case may be made given the similar circumstances: the gender of the chairmen, the board members who played key roles during both tenures, and the various leaks.

Even if there was no gender discrimination, this episode highlights some of the major problems that can arise out of the "class of one." If HP had not replaced Fiorina with another female chairperson (highlighting possible issues certain members of the board may have had with women controlling certain aspects of HP), if Dunn had listened to Perkins and did not reveal the leaker's identity, if Fiorina had agreed to the change in her job description, commentators would not have taken another look at Fiorina's HP experience and viewing Dunn's experience in a broader context of plausible discrimination.¹⁰¹ To prevent these and similar problems, I propose various changes to the "similarly situated" standard.

VI. PROPOSED CHANGES

The "class of one" can be broken into two sub-categories: those who hold unique positions within a larger organization and those who are the only employees in a small organization (less than fifteen employees). Potential remedies relating to the former category will be discussed.¹⁰²

100. In his own *60 Minutes* interview in November 2007, Perkins was asked if "part of the problem was that [he] . . . couldn't accept that there were women in control", Perkins disagreed and said that "up until Carly, all those few that [he has] . . . had to fire have been men". Tom Perkins Regrets Quitting HP Board, Nov. 4, 2007, <http://www.cbsnews.com/stories/2007/11/01/60minutes/main3442193.shtml>.

101. "Plausible discrimination" as opposed to the momentary consideration, and then dismissal, of possible discrimination that occurred right after Fiorina's departure from HP. See generally *supra* note 98 (discussing the press response at the time of Fiorina's dismissal from HP).

102. Title VII covers employees who are part of a firm of fifteen or more employees. 42 U.S.C. § 2000e(a) (2000) (defining "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees"). Therefore, those in the latter category, with fewer than fifteen employees, do not have a federal remedy under Title VII. See also Richard Carlson, *The Small Firm Exemption and the Single Employer Doctrine in Employment Discrimination Law*, 80 ST. JOHN'S L. REV. 1197, 1197 (2006) ("As long as [a firm] employs no more than fourteen [employees], it can refuse to hire women, Moslems, or disabled persons, and it will not be in violation of federal discrimination law.").

A. *Broaden the Scope and Standardize the “Similarly Situated” Analysis*

For an individual who works at an organization with several coworkers, but who is not similarly situated to any of them, a uniform and broad “similarly situated” standard is favorable. A broader standard will allow more individuals to be considered comparators. For example, returning to Janet’s Marketing Department discussed earlier, a broader standard would allow for the use of another in the department to be considered “similarly situated” even though individuals may not have exactly identical characteristics (e.g., same job title and same supervisor(s)).¹⁰³ It does not serve society to have varying and fluctuating standards that govern a federally regulated area such as employment discrimination under Title VII. Although a broader approach may create opportunities to manipulate the “similarly situated” standard,¹⁰⁴ the level of injustice avoided arguably counterbalances that potential. This is especially true given the alternative, a strict standard, which would always enable employers to find *something* that could differentiate potential comparators.¹⁰⁵

Employment discrimination cases are particularly fact-driven and fact-intensive.¹⁰⁶ Employment discrimination fact finders pore over mounds of evidence. Providing a broad “similarly situated” standard that is less “brightline”¹⁰⁷ and more case-specific will not add a significant amount of time to the deliberation process because the facts used to decide the overall case will include the same facts as those used to determine whether the

103. Therefore, the account managers discussed in note 4 may be considered “similarly situated” under a broader standard because they share one supervisor and handle similar tasks. Whereas, under a stricter standard, these differences are likely to be considered material.

104. For example, this may occur by allowing plaintiffs or defendants to compare individuals who should not be considered comparable.

105. See Lidge, *supra* note 5, at 859 (“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.” (quoting *Marzano v. Computer Sci. Corp.*, 91 F.3d 497, 511 (3d Cir. 1996)) (internal quotations omitted)).

106. See, e.g., Michael Z. Green, *Finding Lawyers for Employees in Discrimination Disputes as a Critical Prescription for Unions to Embrace Racial Justice*, 7 U. PA. J. LAB. & EMP. L. 55, 68 (2004) (“[E]mployment discrimination cases that reach trial are almost always fact-intensive . . .”); Marla Swartz, *The Replacement Dilemma: An Argument for Eliminating a Non-Class Replacement Requirement in the Prima Facie Stage of Title VII Individual Disparate Treatment Discrimination Claims*, 101 MICH. L. REV. 1338, 1349 (2003) (“[E]mployment discrimination suits are by their nature fact intensive.”).

107. See generally Part IV (discussing the Tenth Circuit’s strict “similarly situated in all respects” standard and the Eleventh Circuit’s “nearly identical” standard).

plaintiff has a viable comparator. Therefore, those employees who may be unique in their job title or duties, but may share a supervisor with a coworker of a higher or lower job status, for example, should be allowed to broaden the scope of who may be considered “similarly situated.”

B. *Remove the Comparator Requirement from the Prima Facie Stage*

Another needed change is to remove the similarly situated requirement from the prima facie stage of the *McDonnell Douglas* analysis. Six circuits generally require the use of a comparator at the prima facie stage (Fourth, Fifth, Seventh, Ninth, Eleventh, and District of Columbia), three circuits reject the requirement (First, Second, and Tenth), while the other three have confusingly applied both methods (Third, Sixth, and Eighth).¹⁰⁸ Therefore, six to nine circuits are denying an entire class of plaintiffs a federal remedy that is rightfully theirs.¹⁰⁹

Beyond the removal of a rightful remedy, there are several other problems with requiring the use of a comparator at the prima facie stage. Professor Edward F. Lidge¹¹⁰ chronicles several of them.¹¹¹ For example, Professor Lidge argues that such a “requirement frustrates the purpose of the prima facie case.”¹¹² The prima facie case was intended to eliminate “the most common nondiscriminatory reasons for the challenged action” and it was never intended to become “rigid, mechanized, or ritualistic.”¹¹³

C. *Broaden Discovery Parameters*

In general, given the dearth of direct evidence,¹¹⁴ some have argued that federal courts should exercise discretion “to allow a plaintiff [using indirect evidence] broad workforce and temporal scope in the discovery process.”¹¹⁵ Plaintiffs, and especially “class of one” plaintiffs, should be

108. See Lidge, *supra* note 5, at 839-49 (providing a brief survey of the circuits that require “a similarly situated showing as an element of the prima facie case”); see also Sheila R. Foster, *Causation in Antidiscrimination Law: Beyond Intent Versus Impact*, 41 Hous. L. Rev. 1469, 1511 n.176 (2005) (citing cases from the Fourth, Fifth, Seventh, Ninth, and Eleventh Circuits that require plaintiffs to demonstrate that a similarly situated individual was treated differently).

109. This assumes that the plaintiff does not have direct evidence of discrimination.

110. Professor Lidge is a Professor of Law at the University of Memphis Cecil C. Humphreys School of Law.

111. Lidge, *supra* note 5, at 863-64.

112. *Id.* at 855.

113. *Id.* (internal citations omitted).

114. See Lidge, *supra* note 5, at 835 (“In most cases alleging individual disparate treatment, the plaintiff does not possess direct evidence.”).

115. Grebeldinger, *supra* note 14, at 160.

allowed the same broad discovery as the Equal Employment Opportunity Commission (EEOC) is allowed when it conducts investigations.

The discovery accorded a private individual in her Circumstantial Individual Disparate Treatment case should be as broad as the discovery accorded the EEOC in its litigation; the individual, in vindicating her rights under an antidiscrimination statute, essentially serves as a private attorney-general for other potentially aggrieved individuals. As the Tenth Circuit stated in the seminal case *Rich v. Martin Marietta Corp.*, [522 F.2d 333] whether the plaintiff is an individual or the EEOC, “[i]t is plain that the scope of discovery . . . is limited only by relevance and burdensomeness.”¹¹⁶

A broader scope may allow a “class of one” plaintiff to use comparators who existed prior to and/or following his or her time of employment with the defendant employer. As in the HP scenario, while Fiorina did not find someone outside her protected class who was treated more favorably than her, she did find someone who was within her class and treated similarly, and knowing about Dunn and Dunn’s experience at HP would be a helpful means for Fiorina to prove a discrimination claim. Additionally, the existence of subsequent or predecessor CEOs who were not female, and therefore not within the protected class, but who were treated more favorably, would also prove helpful.

D. Extend or Toll the Statute of Limitations

As illustrated in the HP scenario, there may be instances where an individual who suspects discrimination may not be sure that her intuition is correct because she has no comparators and because it is sometimes difficult to confirm suspicions of discrimination.¹¹⁷ However, after learning of another individual who was in a similar situation and who was treated similarly/differently, it may provide a potential plaintiff a means to prove her case. Two possible remedies for such a problem are to either extend or toll¹¹⁸ the statute of limitations for the “class of one.”

The HP saga highlights a need to extend the statute of limitations for filing “class of one” cases. Most discrimination laws, like Title VII, enforced by the Equal Employment Opportunity Commission (EEOC),

116. *Id.* at 180 (quoting *Rich v. Martin Marietta Corp.*, 522 F.2d 333, 343 (10th Cir. 1975)).

117. Discrimination has become more subtle in recent years. *See generally supra* note 14 (discussing the subtle nature of discrimination).

118. *See* BLACK’S LAW DICTIONARY 1525 (8th ed. 2004) (“[T]olling statute. A law that interrupts the running of a statute of limitations in certain situations, as when the defendant cannot be served with process in the forum jurisdiction.”).

must be filed with the EEOC before a private action is pursued.¹¹⁹ An individual must file her complaint with the EEOC within 180 days of the alleged discrimination.¹²⁰ This 180 day deadline might be reasonable in some circumstances, but not so in many “class of one” scenarios.¹²¹ As illustrated by the HP events, there are some circumstances that appear more likely to result from discrimination as an extended period of time passes.¹²²

In other instances, there are situations where potential plaintiffs believe something might be wrong in their work environment but, because

119. Equal Employment Opportunity Commission, Filing a Charge of Employment Discrimination, http://www.eeoc.gov/charge/overview_charge_filing.html (last visited Oct. 10, 2007).

There are strict time limits within which charges must be filed:

A charge must be filed with EEOC within 180 days from the date of the alleged violation, in order to protect the charging party’s rights.

This 180-day filing deadline is extended to 300 days if the charge also is covered by a state or local anti-discrimination law. For ADEA charges, only state laws extend the filing limit to 300 days.

These time limits do not apply to claims under the Equal Pay Act, because under that Act persons do not have to first file a charge with EEOC in order to have the right to go to court. However, since many EPA claims also raise Title VII sex discrimination issues, it may be advisable to file charges under both laws within the time limits indicated.

To protect legal rights, it is always best to contact EEOC promptly when discrimination is suspected.

Id.

120. *Id.*

121. For example, it was over eighteen months between Fiorina’s departure from HP in February 2005 and Dunn’s departure in September 2006 (well over 180 days). Associated Press, *Timeline of the HP Scandal*, MSNBC.COM, <http://www.msnbc.msn.com/id/14801729/> (last visited Oct. 14, 2007).

122. In such an instance, application of the discovery rule of accrual may be desirable. See Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68, 86-88 (2005) (stating that an accrual is one mechanism “for exempting claims from limitations periods”).

A court’s determination of when a cause of action accrues impacts whether a plaintiff may successfully bring a claim remote in time. Accrual is the moment when a plaintiff may bring a cause of action. . . . It is at this point that the proverbial clock begins to run. . . . In general, the clock begins to run not on the date an injury has occurred, but on the date that the plaintiff discovers or should have reasonably discovered the injury.

Id. at 86. Therefore, if Fiorina wanted to call for the application of this rule, she would have to argue that her cause of action was triggered by something other than the initial injury. “The Supreme Court is openly wrestling with the propriety of various accrual approaches—based largely on the type of claim that is being asserted and the statute being enforced.” *Id.* at 87 n.114 (citing *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 123-24 (2002) (O’Connor, J., concurring in part and dissenting in part) for the proposition that “[the] discovery rule applies to discrete acts of employment discrimination.”).

they have no way to confirm it, they would rather not “rock the boat” or believe what they have experienced is not discrimination at all, but is only “in their head.”¹²³ Such feelings might change when potential plaintiffs learn about incidents involving a comparator who came along later and who was, for example, treated more favorably because he lacked the trait discriminated against¹²⁴ or who was treated similarly (as with the former HP chairmen). Because a new statute of limitations may be as arbitrary as the current statute of limitations, it might be preferable to provide a more flexible tolling of statutes given the “class of one” status.

“Equitable tolling permits a court to suspend the running of a limitations period for equitable reasons.”¹²⁵ Courts have used the doctrine of equitable tolling when a plaintiff has been unable to discover his injury.¹²⁶ At the same time, the Supreme Court has noted that “[f]ederal courts have typically extended equitable relief only sparingly.”¹²⁷ Despite this wariness, courts should be more willing to use equitable tolling for the “class of one” in order to ameliorate the plaintiff’s position and to ensure that they are not at an insurmountable disadvantage if they have no similarly situated comparators.

VII. CONCLUSION

Those in the “class of one” currently have several obstacles preventing them from proving discrimination cases based on circumstantial evidence. These obstacles are centered on their very status as the “class of one.” As discussed, there are various changes that could diminish these obstacles. First, a particularly broad definition of “similarly situated” should be used, giving the plaintiff greater latitude as to which comparators may be considered.¹²⁸ Second, there should be no requirement to utilize the

123. *Cf.* Bumiller, *supra* note 82, at 425-26 (discussing that when individuals who suspected discrimination were asked why they did not complain, they “accounted for their inaction in terms of the harm their opponent could impose on them . . .”).

124. For example, if a 58-year-old employee was replaced by a 25-year-old and the predecessor learned that his successor was not having similar issues with a “difficult” supervisor, the 58-year-old might begin to think that the supervisor was “difficult” because of the former employee’s age.

125. Malveaux, *supra* note 122, at 89.

126. Adam Bain & Ugo Colella, *Interpreting Federal Statutes of Limitations*, 37 CREIGHTON L. REV. 493, 505 n.41 (2003) (citing *Chakonas v. City of Chicago*, 42 F.3d 1132, 1135 (7th Cir. 1994) for the proposition that “[e]quitable tolling is appropriate when the plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his claim”).

127. *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 96 (1990).

128. This greater latitude for the plaintiff would be balanced by a similarly broad reserve from which the defense could pull comparators. For example, with a broader standard, the

“similarly situated” standard at the prima facie stage. Third, the “class of one” should be given broad discovery scope to facilitate a broader “similarly situated” standard. Finally, given the difficulties unique to the “class of one,” there should be a longer or tolled statute of limitations to provide for the gathering of additional information, such as learning of other comparators, to bolster circumstantial evidence.

It is scenarios like that of Carly Fiorina and Patricia Dunn that help illustrate the need for reform. There are undoubtedly other examples involving individuals who have less high-powered positions, and accordingly, those cases likely involve greater injustice given the lack of attention. If “class of one” litigation continues as it has, the “class of one” will remain at an insurmountable disadvantage in proving a Title VII discrimination claim. It is important to establish an equitable system incorporating the proposals discussed to level the playing field for the “class of one.”

defense can have a wider pool of individuals from which to show that these individuals were not treated more favorably than the plaintiff.