OOC Brown Bag Lunch Series
Disparate Treatment
March 15, 2017

I. Introduction

Section 201 of the Congressional Accountability Act of 1995 ("CAA"), 2 U.S.C. § 1311, extends the protection of several employment discrimination statutes to legislative branch employees. Employing offices are prohibited from discriminating against employees or applicants based on their membership in protected classes: race, color, sex, religion, national origin, age (over 40), or disability. One of the most common legal theories raised by plaintiffs in cases arising under this section of the statute is ***disparate treatment*** – i.e., that the employing office engaged in intentional discrimination by taking an adverse employment action against them because of their membership in one or more protected classes.

II. Disparate Treatment Claims

The first two elements of a prima facie case of disparate treatment discrimination are similar in OOC administrative proceedings and in federal court. The remainder of the prima facie case may change, however, based on the type of adverse action alleged. If a plaintiff alleges discriminatory non-selection for a position, they usually must show that after being rejected for a position for which they were qualified, the employer continued to seek applicants with the plaintiff's qualifications or hired someone outside of their protected class. In cases involving other kinds of adverse employment actions, different sorts of evidence will be required.

Once the plaintiff has successfully made out a prima facie case, the well-established *McDonnell Douglas* burden-shifting framework comes into play to determine whether the case can be resolved on summary judgment. If the case advances to a trial or administrative hearing, the fact finder must decide the ultimate question of whether or not the adverse employment action was the result of unlawful discrimination.

1) Prima facie case

a) *Rouiller v. U.S. Capitol Police*, No. 15-CP-23 (CV, AG, RP), 2017 WL 106137 (OOC Board Jan. 9, 2017) – To establish a prima facie case of disparate treatment discrimination, the complainant must show that: (1) he is a member of a protected class; (2) he suffered an adverse employment action; and (3) the action gives rise to an inference of discrimination.

b) *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) – In a non-selection case, a plaintiff must show that: (1) he is a member of a protected class; (2) he applied and was

qualified for a job for which the employer was seeking applicants; (3) despite his qualifications, he was rejected; and (4) after his rejection, the position remained open and the employer continued to seek applicants with the plaintiff's qualifications.

c) *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978) – The specific types of proof required to establish a prima facie case may vary depending on the factual circumstances. The *McDonnell Douglas* framework "was not intended to be an inflexible rule," and "was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination. A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors."

d) *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506 (2002) – The prima facie case "is an evidentiary standard, not a pleading requirement." To survive a motion to dismiss, a complaint need only contain a short and plain statement of the claim showing that the plaintiff is entitled to relief and give the defendant fair notice of the basis for the plaintiff's claims.

e) *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981) – "The burden of establishing a prima facie case of disparate treatment is not onerous."

2) Burden shifting framework

a) *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) – Landmark case establishing the burden-shifting paradigm: (1) plaintiff must prove by a preponderance of the evidence a prima facie case of discrimination; (2) burden shifts to defendant "to articulate some legitimate, nondiscriminatory reason" for its action; (3) plaintiff then has an 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.

b) *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981) – "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." At the summary judgment stage, as long as the defendant's evidence regarding the reasons for its action raises a genuine issue of material fact, the burden shifts back to the plaintiff. "The defendant need not persuade the court that it was actually motivated by the proffered reasons"; rather, it is the plaintiff's burden to prove that the reason offered by the defendant was not the true reason.

c) *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993) – Once the defendant satisfies its burden of production by offering evidence of a lawful motive for its action, the *McDonnell Douglas* framework drops out of the picture, and the trier of fact must decide "the ultimate question" of whether the employer discriminated against the plaintiff because of the plaintiff's membership in a protected class.

d) *Brady v. Office of Sergeant at Arms*, 520 F.3d 490 (D.C. Cir. 2008) – "In a Title VII disparate-treatment suit where an employee has suffered an adverse employment action

and an employer has asserted a legitimate, non-discriminatory reason for the decision, the district court need not – *and should not* – decide whether the plaintiff actually made out a prima facie case under *McDonnell Douglas*. Rather, in considering an employer's motion for summary judgment or judgment as a matter of law in those circumstances, the district court must resolve one central question: Has the employee produced sufficient evidence for a reasonable jury to find that the employer's asserted non-discriminatory reason was not the actual reason and that the employer intentionally discriminated against the employee on the basis of race, color, religion, sex, or national origin?" This principle applies to both summary judgment and trial proceedings.

e) *Anyaso v. U.S. Capitol Police*, 39 F. Supp. 3d 34 (D.D.C. 2014) – Once an employer proffers a non-discriminatory reason for taking the adverse action, the court need not and should not decide whether the plaintiff made a prima facie case of discrimination under the *McDonnell Douglas* framework; the court need only determine whether the plaintiff has put forward enough evidence to defeat the proffer and support a finding of discrimination.

g) *Evans v. Office of the Architect of the Capitol*, Nos. 13-AC-56 (CV, AG, RP), 13-AC-71 (CV, RP), 2017 WL — (OOC Board Mar. 13, 2017) – Administrative proceedings under the CAA apply the *McDonnell Douglas* burden-shifting framework. Where a case is past the stage of the proceedings where the parties have presented their evidence on the discrimination issue, the rebuttable presumption created by the establishment of a prima facie case drops out, and the trier of fact must decide, based on the full record, whether the employee has met his ultimate burden of persuasion that the employer discriminated. This is true both at the summary judgment stage and after a hearing has been conducted.

III. Protected Classes

Discrimination is prohibited on the basis of membership in several protected classes, as defined by the various statutes applied to the legislative branch by section 201 of the CAA, 2 U.S.C. § 1311:

a) Title VII of the Civil Rights Act of 1964 – race, color, sex, religion, and national origin [42 U.S.C. § 2000e-2]
b) Age Discrimination in Employment Act – age (40 or older) [29 U.S.C. § 633a]
c) Rehabilitation Act/Americans With Disabilities Act – disability [29 U.S.C. § 791 / 42 U.S.C. §§ 12112-12114]

IV. Adverse Employment Action

In order to qualify as an adverse employment action for purposes of disparate treatment discrimination, the effect of the action must constitute a significant change in employment status. Not all reprimands, discipline, or other negative consequences rise to the level of adverse employment actions.

a) *Architect of the Capitol v. Iyoha*, Nos. 12-AC-30 (CV, DA, RP), 13-AC-03 (CV, RP), 2014 WL 3887569 (OOC Board July 30, 2014) – An adverse employment action is a significant change in employment status, such as firing, failing to promote, a considerable change in benefits, or reassignment with significantly different responsibilities.
b) *Ross v. U.S. Capitol Police*, 195 F. Supp. 3d 180 (D.D.C. 2016) – Constructive discharge can constitute adverse employment action for the purposes of a Title VII status-based discrimination claim brought under the Congressional Accountability Act.
c) *Herbert v. Architect of the Capitol*, 766 F. Supp. 2d 59 (D.D.C. 2011) – Adverse employment action in the discrimination context is limited to those consequences that have an objectively tangible impact on the terms, conditions, or privileges of employment or future employment opportunities. In this case, the plaintiff listed the following as adverse actions: a delayed promotion, an internal investigation, and the issuance of a letter of reprimand. These actions did not have a tangible impact and were therefore not materially adverse where the timing of his promotion had been set by the parties settlement agreement; the report from the internal investigation had never proceeded beyond draft form; and there was no evidence that the reprimand had impacted his pay, grade, or working conditions or that it served as the basis for more severe disciplinary action.
d) *Halcomb v. Office of the Senate Sergeant-at-Arms of the U.S. Senate*, 563 F. Supp. 2d 228 (D.D.C. 2008) – Adverse employment actions do not include actions that only cause "purely subjective injuries" and have no impact on employment status or duties. Excluded conduct includes assigning low profile tasks, subjecting an employee to increased supervision, or applying a sick-leave policy unfavorably against an employee if such conduct does not have a demonstrable objective impact on the employee's salary, benefits or grade. Salary suppression is also not materially adverse if there is no evidence that similarly situated comparators are being paid more.
e) *Gordon v. Office of the Architect of the Capitol*, 928 F. Supp. 2d 196 (D.D.C. 2013) – In determining when a CAA discrimination claim begins to accrue, the notification rule, expounded upon in *Delaware State College v. Ricks*, 449 U.S. 250 (1980), applies: the statute of limitations to request counseling with the OOC begins to run on the date the employment decision is made and formally communicated to the employee. The plaintiff here alleged that she was discriminated against based on her race when she was not selected for a promotion. She requested counseling with the OOC on a date that was within 180 days from when she was formally notified that she was not selected for the position, but more than 180 days from when she overheard a comment from an interview panelist that the other candidate had been selected. The court rejected the employer's motion to dismiss argument that the claim began to run on the date that the plaintiff overheard that the other candidate had been selected because this communication lacked sufficient formality.

V. Inference of Discrimination/Causal Relationship

As the Supreme Court pointed out in *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 716 (1983), "There will seldom be 'eyewitness' testimony as to the employer's mental processes." Therefore, the inference of discrimination typically is supported by indirect evidence.[1]

1) Non-selection cases

a) *Rollins v. Office of the Clerk of the House of Representatives*, No. 03-HS-105 (CV, AG), 2004 WL 5658962 (OOC Board Dec. 23, 2004) – Complainant alleging non-selection based on race, age, and sex discrimination failed to establish a prima facie case. She did not demonstrate that a similarly situated person of a different race or someone significantly younger was chosen for the position, so her race and age claims failed. She also did not demonstrate that she was qualified for the position, so although a male candidate was chosen, that selection did not give rise to an inference of unlawful sex discrimination.

b) *Hyson v. Architect of the Capitol*, 802 F. Supp. 2d 84 (D.D.C. 2011) – In a discriminatory non-selection case, evidence that an employee is equally or insignificantly more qualified than the selected employee is generally not enough to raise an inference of discrimination. However, insignificant differences in qualifications coupled with discriminatory remarks made directly toward the plaintiff may create such an inference. Here, the plaintiff alleged that she was subjected to gender-based discrimination when she was not selected for a promotion. She countered the employer's contention that the selected candidate was more qualified by citing her comparatively higher application score, her longer tenure with the employer, and the fact that she had post-secondary education while the selected candidate did not. She also cited the selecting official's remarks to her than she was "too delicate." The court noted that it was not in a position to "discern a meaningful difference" in the relative value of the plaintiff's qualifications over the selected candidate, and noted that the qualification differences did not give rise to an inference of discrimination alone. When those differences were viewed in connection with the remark, however, a reasonable juror could find that the plaintiff's non-promotion was based to some extent on her gender.

2) Other discrimination cases

a) *Architect of the Capitol v. Iyoha*, Nos. 12-AC-30 (CV, DA, RP), 13-AC-03 (CV, RP), 2014 WL 3887569 (OOC Board July 30, 2014) – Nigerian-born complainant alleged that he had been transferred to a less desirable position because of national origin

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[1] Indeed, where direct evidence of discrimination exists – such as where an employment policy is discriminatory on its face because it explicitly provides for differential treatment based on age, gender, etc. – the *McDonnell Douglas* burden-shifting framework is inapplicable. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985). *See also Coats v. DeVos*, — F. Supp. 3d —, 2017 WL 521500 (D.D.C. Feb. 8, 2017) (*McDonnell Douglas* framework not necessary for race discrimination claim, because plaintiff provided direct evidence of racial bias in the form of a remark made by the plaintiff's supervisor that the plaintiff was being removed "because of [his] race and salary.").

discrimination. He produced evidence that coworkers had heard his supervisor repeatedly make disparaging comments about employees with foreign accents, and that employees who spoke with foreign accents were replaced by others who spoke English as their first language.

b) *Simms v. Office of Congressman Raul Grijalva*, No. 13-HS-68 (CV), 2015 WL 1105746 (OOC Board Mar. 3, 2015) – African-American complainant alleged that she was fired because of her race. In support of her prima facie case, she produced evidence that the office had no other African-American employees prior to her arrival, and she gave examples of ways in which she was treated differently from her coworkers of other races during her employment.

c) *George v. Leavitt*, 407 F. 3d 405 (D.C. Cir. 2005) – One way to satisfy the third prong of a prima facie case – i.e., that the action gives rise to an inference of unlawful discrimination – is to show that similarly situated individuals outside of the protected class were treated differently. Another method is to show that the adverse action was not taken for the two most common legitimate reasons: in a non-selection case, lack of absolute qualifications or lack of a vacancy; in a discharge case, substandard performance or elimination of the employee's position. In this case, the plaintiff satisfied this prong because she created a genuine issue as to whether she was performing at a satisfactory level and her discharge was not precipitated by the elimination of her job.

3) Corroborating evidence generally required

a) *Turner v. U.S. Capitol Police*, 34 F. Supp. 3d 124 (D.D.C. 2014) – A reverse discrimination claim requires evidence of "background circumstances" that could support the suspicion that the defendant is the unusual employer that discriminates against the "majority". Where an employer names generalized, vague, and unspecified information among the evidence relied upon in taking adverse action against a white employee, this may constitute the kind of "background circumstances" that would support a reverse discrimination claim under the CAA.

b) *Schmidt v. U.S. Capitol Police Bd.*, 826 F. Supp. 2d 59 (D.D.C. 2011) – In a disparate promotion case, bare, unsupported allegations that the plaintiff did not receive her requested grade and step promotions while other employees did, without more, are not enough to withstand a motion to dismiss. In this case, the court granted the employer's motion to dismiss this claim because the plaintiff failed to allege any facts to support her claim that the employer engaged in gender and age based discrimination when it failed to promote her as requested.

c) *Fields v. Office of Johnson*, 520 F. Supp. 2d 101 (D.D.C. 2007) – Unsupported allegations that protected-class employees were treated less favorably than non-protected class employees, without more (such as corroborative testimony) are insufficient to create a genuine issue of material fact regarding an inference of discrimination in a disparate treatment claim.

VI. Employing Office's Rationale

The establishment of a prima facie case creates a rebuttable presumption of discrimination. To rebut this presumption, the employing office must articulate a lawful reason for its action and produce enough evidence to allow a trier of fact to conclude that the action was non-discriminatory.

a) *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981) – "We have stated consistently that the employee's prima facie case of discrimination will be rebutted if the employer articulates lawful reasons for the action; that is, to satisfy this intermediate burden, the employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." However, "the defendant's explanation of its legitimate reasons must be clear and reasonably specific."
b) *Johnson v. Office of the Architect of the Capitol*, No. 96-AC-25 (CV), 1998 WL 35281337 (OOC Board May 22, 1998) – Employing office carried its burden of production to rebut complainant's prima facie case by (1) producing evidence to support the decision maker's determination that complainant was not qualified for the position, and (2) producing evidence that the decision maker was not aware of complainant's race or that of other applicants for the position.
c) *Simms v. Office of Congressman Raul Grijalva*, No. 13-HS-68 (CV), 2015 WL 1105746 (OOC Board Mar. 3, 2015) – Employing office failed to rebut the presumption of discrimination because it did not explain why complainant was discharged, and therefore its motion for summary judgment was denied. The employing office relied only on the "same actor" defense, arguing that discrimination could not be inferred because the same individual both hired and fired the complainant, but the Board found that this factor alone was not dispositive on summary judgment, and the employing office was still required to articulate a legitimate non-discriminatory reason for complainant's termination.
d) *DeJesus v. WP Co. LLC*, 841 F.3d 527 (D.C. Cir. 2016) (citing *Russell v. Acme–Evans Co.*, 51 F.3d 64 (7th Cir. 1995)) – If an employer offers several independent lawful reasons for the challenged action, the plaintiff must cast doubt on each reason to overcome summary judgment.

VII. Pretext

There are many ways for a plaintiff to show that an employing office's proffered rationale is pretextual. One of the most common and convincing methods is to show that similarly-situated individuals outside of the plaintiff's protected class (or, in the case of age discrimination, similarly-situated individuals significantly younger than the plaintiff) were treated differently. In the absence of similarly-situated comparators, the plaintiff must produce other evidence to cast doubt on the veracity of the employing office's stated reasons.

1) Comparators

a) *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) – "Especially relevant" to a showing of pretext is evidence that similarly situated individuals outside of the protected class were not treated equally.

b) *Rouiller v. U.S. Capitol Police*, No. 15-CP-23 (CV, AG, RP), 2017 WL 106137 (OOC Board Jan. 9, 2017) – To prove disparate treatment discrimination using a comparator, a plaintiff must show that all relevant aspects of his employment situation were nearly identical to the proffered comparator, including that they dealt with the same supervisor, were subject to the same standards, and had engaged in the same conduct without differentiating or mitigating circumstances that would distinguish them. In this case, the complainant was demoted for dating a subordinate within his chain of command and failing to report the relationship for several months as required under the USCP's rules; the would-be comparators were not high-ranking officials like the complainant, and none of them failed to disclose their relationships as did the complainant.

c) *Halcomb v. Office of the U.S. Senate Sergeant at Arms*, No. 03-SN-29 (CV, RP), 2004 WL 5658967 (OOC Hearing Officer Oct. 14, 2004), *aff'd*, 2005 WL 6236945 (OOC Board Mar. 18, 2005) – The Hearing Officer found, and the Board affirmed, that complainant who claimed she was disciplined differently from coworkers outside of her protected class failed to prove that she was "similarly situated" to those coworkers. Complainant must show that the other employee's situation was "nearly identical" to her own, and that she and the other employee were charged with offenses of comparable seriousness. In this case, complainant and her would-be comparator had different jobs with different responsibilities, they did not engage in the same type of misconduct, and their overall job performance was very different.

d) *Evans v. U.S. Capitol Police Bd.*, Nos. 14-CP-18 (CV, RP), 13-CP-61 (CV, RP), 13-CP-23 (CV, RP), 2015 WL 9257402 (OOC Board Dec. 9, 2015) – Black Sergeant claimed that he had been suspended pending investigation into his alleged misconduct whereas a white Sergeant had not been suspended pending investigation into similar alleged misconduct. The Hearing Officer found, and the Board affirmed, that the two Sergeants were not similarly situated because the alleged victim in the white Sergeant's case downplayed the severity of the Sergeant's conduct.

e) *Wheeler v. Georgetown Univ. Hosp.*, 812 F.3d 1109 (D.C. Cir. 2016) – "In order to be considered similarly situated, it is not necessary that the comparators engaged in the exact same offense; what is required is merely that the offenses are of 'comparable seriousness.'" In this case, an African-American nurse who was terminated for gross misconduct successfully carried her burden to show that at least one white nurse who was "similarly situated to Wheeler in all relevant respects" was not terminated. She produced evidence from which a reasonable jury could conclude that the white comparator nurses worked in the same or a comparable unit as the plaintiff, were subject to the same decision makers as the plaintiff, committed misdeeds of "comparable seriousness" to the plaintiff's, and had a performance history similar to that of the plaintiff, but were not terminated. Summary judgment for the hospital was therefore inappropriate.

f) *Burley v. Nat'l Passenger R.R. Corp.*, 801 F.3d 290 (D.C. Cir. 2015) – In order to rely on comparator evidence the plaintiff must demonstrate that all of the relevant aspects of his or her employment were nearly identical to those of the purportedly comparable employee(s). "Factors that bear on whether someone is an appropriate comparator include the similarity of the plaintiff's and the putative comparator's jobs and job duties, whether they were disciplined by the same supervisor, and, in cases involving discipline, the similarity of their offenses." In this case, one of the would-be comparators was involved in the same accident that gave rise to the plaintiff's discipline, but the two employees had different roles and bore different responsibility for the accident; as to the other would-be comparators, the plaintiff was unable to demonstrate either that they were found to have committed offenses of comparable seriousness, or that they were differently disciplined by the same supervisors who disciplined the plaintiff. *See also Holbrook v. Reno*, 166 F.3d 255 (D.C. Cir. 1999); *Neuren v. Adduci Mastriani, Meeks & Schill,* 43 F.3d 1507 (D.C. Cir. 1995).

g) *Walker v. Johnson*, 798 F.3d 1085 (D.C. Cir. 2015) – One way for a plaintiff to support an inference that the employer's stated reasons were pretextual and the real reasons were prohibited discrimination or retaliation is by citing the employer's better treatment of similarly situated employees outside of the plaintiff's protected group.

h) *George v. Leavitt*, 407 F.3d 405 (D.C. Cir. 2005) – Whether employees are similarly situated ordinary presents a question of fact for the jury. "[A]t the summary judgment stage, a judge may not make credibility determinations, weigh the evidence, or draw inferences from the facts—these are jury functions, not those of a judge ruling on a motion for summary judgment." The plaintiff in this case, a black female, raised a genuine issue of fact as to whether white male coworkers who were not discharged for the same alleged violations that led to her termination were similarly situated to her.

i) *Coats v. DeVos*, — F. Supp. 3d —, 2017 WL 521500 (D.D.C. Feb. 8, 2017) – Although the evaluation of comparator evidence is ordinarily a jury question, to survive summary judgment a plaintiff must identify evidence from which a reasonable jury could find that the relevant aspects of his performance and overall circumstances were "nearly identical" to those of the more favorably treated comparators. Here, the plaintiff offered two comparators, neither of which was a perfect match. Both were at a different GS level from the plaintiff; one had different responsibilities and was subject to different evaluation "critical elements" and different performance standards from the plaintiff, and although the other comparator had more in common with the plaintiff, the plaintiff's performance reviews reflected more serious and persistent deficiencies than the comparator's. The court therefore held that no reasonable jury could find the comparators to be "nearly identical" to plaintiff in all relevant aspects, and granted summary judgment in favor of the employer.

j) *Brady v. Livingood*, 456 F. Supp. 2d 1 (D.D.C. 2006) – Potential comparators in a discriminatory discipline case must have been charged with offenses of comparable seriousness, and all relevant aspects of their employment situation must be "nearly identical" to the plaintiff's. In this case, the plaintiff had been demoted from his

probationary supervisory position after allegations of sexual harassment made against him were substantiated. The universe of similarly-situated employees was limited to other probationary supervisors with similar responsibilities who had been charged with a similar offense.

k) *Johnson v. U.S. Capital Police Bd.*, No. Civ. A. 03-00614 (HHK), 2005 WL 1566392 (D.D.C. July 5, 2005) – For purposes of a prima facie case, plaintiffs do not need to show identical circumstances with the potential comparator in all respects, so long as they are similarly situated in all material respects. However, even if the plaintiff establishes a prima facie case, whether two employees are similarly situated is a fact question for a jury to decide. Here, the employer argued that the potential comparator was not similarly situated because he worked in a different position and reported to a different first-line supervisor. The plaintiffs countered that they worked in the same department as the comparator, they performed similar tasks, and were all non-supervisory employees under the same second-line supervisor. The court found that this was sufficient evidence of being similarly situated for the purposes of the plaintiffs' prima facie case. The court also noted that the employer's contention that the plaintiffs and comparator were not similarly situated in light of differences in work performance, organizational contributions, and chain of command issues was more properly construed as evidence of legitimate, non-discriminatory reasons for the contested adverse action.

l) *Singh v. U.S. House of Representatives*, 300 F. Supp. 2d 48 (D.D.C. 2004) – Where an employer offers a legitimate non-discriminatory reason for terminating the plaintiff, the plaintiff can demonstrate that the proffered reason was pretextual by showing that a similarly situated comparator who is not a member of a protected class was not terminated. A potential comparator is not similarly situated where relevant aspects of their employment situation are not identical to that of the plaintiff.

m) *Rowland v. Walker*, 245 F. Supp. 2d 136 (D.D.C. 2003) – A plaintiff must provide proof that potential comparators received preferential treatment. Here, the plaintiff failed to meet his burden of establishing that he was treated differently from anyone who did not share his race or gender, as he had alleged, where he offered no proof, other than his own belief, that the single individual named as a potential comparator had been given better on-the-job opportunities.

n) *Waters v. U.S. Capitol Police Bd.,* 216 F.R.D. 153 (D.D.C. 2003) – While a plaintiff must ultimately demonstrate that all relevant aspects of her employment situation were "nearly identical" those named as potential comparators to make her prima facie case, she does not have to meet this standard to secure discovery related to potential comparators. The plaintiff here was terminated as a police officer recruit for allegedly cheating on a written examination. The employer contended that discovery was limited to information about other recruits or probationary officers who were terminated for cheating by the same person who terminated the plaintiff. The court rejected the employer's argument, noting that discovery was not limited to information about identical situations, but could also include information reasonably calculated to yield information that would permit the plaintiff to argue that the dissimilar treatment is evidence of discrimination.

o) *Trawick v. Hantman*, 151 F. Supp. 2d 54 (D.D.C. 2001) – If a claimant alleges he was terminated on the basis of his disability, he can show that the employer's stated reasons for his termination were pretextual by submitting evidence that similarly situated non-disabled persons were not disciplined on that basis.

2) Other factors

a) *Architect of the Capitol v. Iyoha*, Nos. 12-AC-30 (CV, DA, RP), 13-AC-03 (CV, RP), 2014 WL 3887569 (OOC Board July 30, 2014) – The employing office's stated reasons for reassigning the complainant, a help desk worker, were inconsistent with the factual record. The stated reason of poor performance was contradicted by the complainant's "outstanding" ratings on his performance evaluations and associated awards, as well as positive feedback received from help desk customers. The stated reason of redundancy of complainant's position was also contradicted by evidence in the record that others were handling the same duties that complainant had handled, and in the same manner. Thus, complainant successfully demonstrated pretext.

b) *George v. Leavitt*, 407 F.3d 405 (D.C. Cir. 2005) – The employer cited "conduct and performance deficiencies" as its reason for terminating the plaintiff, but the record contained sufficient evidence for a jury to find that this stated reason was pretextual: her positive performance review directly contradicted the employer's claim of deficient performance, and despite the employer's contention that the plaintiff's coworkers frequently complained about her, the record showed only one complaint from a coworker about an admittedly minor issue. This was enough to raise a genuine issue as to whether the employer's stated rationale was pretextual.

c) *DeJesus v. WP Co. LLC*, 841 F.3d 527 (D.C. Cir. 2016) – A reasonable jury could find that the employer's explanation for plaintiff's termination was neither honest nor reasonable and that it was therefore pretextual. The plaintiff ordered a study without authorization from his manager; that study was later used as the basis for the plaintiff's termination, even though his manager's initial reaction to the study was to say, "No worries. Good story on the results." Moreover, another action by the plaintiff that was characterized as "insubordination" in support of his termination could reasonably be viewed as a mere miscommunication based on the manager's ambiguous instructions and prior statements. Although "courts should not evaluate the reasonableness of the employer's business decisions… the factfinder is tasked with evaluating the reasonableness of the decisionmaker's *belief* because honesty and reasonableness are linked: a belief may be so unreasonable that a factfinder could suspect it was not honestly held."

d) *Brady v. Office of Sergeant at Arms*, 520 F.3d 490 (D.C. Cir. 2008) – Where a plaintiff alleges that the underlying misconduct for which he was disciplined never occurred, the relevant inquiry is not whether the misconduct actually occurred, but rather whether *the employer honestly and reasonably believed* that the underlying conduct occurred. To demonstrate pretext, the plaintiff must produce evidence sufficient to show that the employer's conclusion was dishonest or unreasonable.

e) *Gage v. Office of the Architect of the Capitol*, No. 00-AC-21 (CV), 2001 WL 36175210 (OOC Board Nov. 14, 2001) – Even though the decision maker incorrectly evaluated the complainant as not minimally qualified, she had an honest good-faith belief that he wasn't qualified, and complainant thus failed to establish pretext. The Board noted that "Evidence indicating that an employer misjudged an employee's performance or qualifications is, of course, relevant to the question whether its stated reason is a pretext masking prohibited discrimination… if the employer made an error too obvious to be unintentional, perhaps it had an unlawful motive for doing so." However, citing federal case law, the Board cautioned that the fact finder's role is not to act as a "super personnel department" that second-guesses the employing office's business judgments.

f) *Mastro v. Potomac Elec. Power Co.*, 447 F.3d 843 (D.C. Cir. 2006) – A plaintiff may demonstrate that the employer's action was pretextual by showing that the investigation leading to the adverse employment action was unfair or inadequate. In this case, the record evidence showed that the investigation conducted into the employee's alleged misconduct, which resulted in his termination, "was not just flawed but inexplicably unfair," and "lacked the careful, systematic assessments of credibility one would expect in an inquiry on which an employee's reputation and livelihood depended."

g) *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000) – Where the supervisor responsible for the plaintiff's firing had made derogatory age-related comments about the plaintiff in the past, the court should have taken those statements into account as evidence of age-related animus, even though the remarks were not made in the direct context of the plaintiff's termination.

h) *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284 (D.C. Cir. 1998) – In a non-selection case, a jury could reasonably find that the plaintiff was significantly more qualified than the selectee, and the decision maker made comments that could arguably be interpreted as evincing bias against plaintiff because of his age and disability. Summary judgment was therefore inappropriate.

i) *McKenna v. Weinberger*, 729 F.2d 783 (D.C. Cir. 1984) – Terminated female plaintiff alleging sex discrimination introduced evidence that a generally sexist work environment existed and was condoned by her employer. However, in a disparate-treatment claim, where the plaintiff alleges that an adverse personnel action was taken and that it was motivated by discriminatory animus, the inquiry must focus on the circumstances surrounding the adverse personnel action. The plaintiff in this case failed to carry her burden to show that she was terminated because she was female rather than because she had an abrasive personality and an inability to work effectively with her colleagues.

j) *Ey v. Office of the Chief Admin. Officer of the U.S. House of Representatives*, 967 F. Supp. 2d 337 (D.D.C. 2013) – An employer's proffered legitimate non-discriminatory reason for engaging in materially adverse action does not have to be objectively justified; the relevant issue is whether the employer believes the reason it offers. Here, the employer asserted that it had terminated the plaintiff for engaging in unethical conduct when he invited private contractors who were submitting bids to the employer to his private housewarming party. The plaintiff alleged that his termination was motivated by

gender-based discrimination, and supported his claim that the employer's proffered reason was pretextual with his own assertion that no ethical problems were created by having the contractors invited to and present at this party. The court noted that even if the employer was wrong in its assessment of the ethical violation, this would not necessarily amount to discrimination, because the employer believed that it did present a violation when it terminated him.

k) *Downing v. Tapella*, 729 F. Supp. 2d 88 (D.D.C. 2010) – Evidence that an employer cited its preference for hands-on experience with potentially but not-yet obsolete technology to make a selection between two equally qualified candidates is not pretext. As evidence of pretext, the plaintiff here cited the inconsistency between the employer's stated preference for the selected candidate's hands-on operational experience with a particular technology and the employer's intent to eventually eliminate the technology. The court rejected this argument on summary judgment, finding that this discrepancy could not establish pretext because the technology was still being used at the time of selection. The employer's preference in this regard was the type of "business decision" beyond the scope of the court's review and was a reasonable preference, given the candidates' otherwise equal qualifications.

l) *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) – A plaintiff may use statistics regarding an employer's employment policies and practices to help determine whether refusal to hire the plaintiff conformed to a general pattern of discrimination against members of plaintiff's protected class.

<u>VIII. Unlawfully Discriminatory Reason</u>

Ultimately, if the employer carries its burden to produce evidence of a lawful reason for the adverse employment action, and the plaintiff produces evidence that the employer's proffered reason is pretextual, the trier of fact must decide the single, central question of whether the employer's real reason for its action was unlawfully discriminatory. The burden of persuasion rests at all times with the plaintiff.

1) Plaintiff's burden

a) *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993) – A showing of pretext is not enough to decide the case on summary judgment in favor of the plaintiff. Even if the plaintiff has successfully demonstrated that the employer's stated reasons were pretextual, the plaintiff still must show that the real reason was because of the plaintiff's protected characteristic, rather than some other reason that is not unlawful.

b) *Rollins v. Office of the Clerk of the House of Representatives*, No. 03-HS-105 (CV, AG), 2004 WL 5658962 (OOC Board Dec. 23, 2004) – "It is not enough to disbelieve the employer's articulated reason. In addition, the fact finder must believe the Complainant's explanation of intentional discrimination. … The ultimate burden of persuading the trier of fact that the Agency discriminated against the Complainant always remains with the Complainant."

c) *Newton v. Architect of the Capitol*, 840 F. Supp. 2d 384 (D.D.C. 2012) – Where an employer asserts a legitimate non-discriminatory reason for an adverse employment action, the employee must produce sufficient evidence for a reasonable jury to find that the employer's asserted reason was not the real reason *and* that the employer intentionally discriminated against the employee based on her membership in a protected class.

2) Evidence of unlawful discrimination

a) *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000) – Although a prima facie case combined with a showing that the employer's proffered reason is pretextual does not *compel* a finding in favor of the plaintiff, in some circumstances a factfinder may reasonably find that the evidence supporting the prima facie case combined with the evidence of pretext is enough to infer an unlawful discriminatory motive. The plaintiff therefore is not necessarily required to produce additional evidence beyond that supporting the prima facie case. A jury is entitled to treat the employer's dishonesty about its reasons as evidence of culpability – i.e., to find that the employer is lying to cover up unlawful discrimination.

b) *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284 (D.C. Cir. 1998) – A plaintiff is not required to produce additional evidence beyond that supporting the prima facie case. A court "must consider all the evidence in its full context," and although a showing of pretext is not always sufficient to defeat summary judgment, "a plaintiff's discrediting of an employer's stated reason for its employment decision is entitled to considerable weight."

c) *Rollins v. Office of the Clerk of the House of Representatives*, No. 03-HS-105 (CV, AG), 2004 WL 5658962 (OOC Board Dec. 23, 2004) – "It is not enough to disbelieve the employer's articulated reason. In addition, the fact finder must believe the Complainant's explanation of intentional discrimination. … However, a prima facie case and sufficient evidence of the Agency's pretext may permit a finding of discrimination, even without additional, independent evidence of discrimination."

d) *Wheeler v. Georgetown Univ. Hosp.*, 812 F.3d 1109 (D.C. Cir. 2016) – In determining the ultimate question of whether the employer's stated reason is pretextual and the real reason was discriminatory, the jury may consider a combination of (1) the evidence offered in support of the plaintiff's prima facie case, (2) any evidence the plaintiff provides to attack the employer's proffered reason for its actions, and (3) any further evidence of discrimination available to the plaintiff or any contrary evidence available to the employer.

e) *Walker v. Johnson*, 798 F.3d 1085 (D.C. Cir. 2015) – "A plaintiff may support an inference that the employer's stated reasons were pretextual, and the real reasons were prohibited discrimination or retaliation, by citing the employer's better treatment of similarly situated employees outside the plaintiff's protected group, its inconsistent or dishonest explanations, its deviation from established procedures or criteria, or the employer's pattern of poor treatment of other employees in the same protected group as

the plaintiff, or other relevant evidence that a jury could reasonably conclude evinces an illicit motive."

3) Cat's Paw

a) *Staub v. Proctor Hosp.*, 562 U.S. 411 (2011) – To prove a causal connection on a "cat's-paw" theory (when the discriminatory animus of a supervisor who set the events in motion, but was not the ultimate decision maker, could be found to be "a motivating factor" in an adverse employment decision), the plaintiff must demonstrate that (1) a supervisor performs an act motivated by discriminatory animus (2) that is *intended* by the supervisor to cause an adverse employment action, and (3) that act is a proximate cause of the ultimate adverse action.

b) *Burley v. Nat'l Passenger Rail Corp.*, 801 F.3d 290 (D.C. Cir. 2015) – In a Title VII race discrimination case applying *Staub*, the plaintiff's cat's paw theory failed because he could not produce evidence that his supervisor was motivated by racial animus.

c) *Morris v. McCarthy,* 825 F.3d 658 (D.C. Cir. 2016) – Even if the decision maker undertook an independent investigation, that does not necessarily break the causal chain, because the ultimate decision maker may still have been influenced by the biased supervisor's recommendation.

d) *Coats v. DeVos*, — F. Supp. 3d —, 2017 WL 521500 (D.D.C. Feb. 8, 2017) – The employer was not entitled to summary judgment because a genuine issue of fact remained as to whether the adverse employment decision was insulated from the supervisor's allegedly biased views. Although the ultimate decision maker showed no evidence of bias, the supervisor who allegedly made a racially discriminatory remark to the plaintiff was significantly involved in the plaintiff's removal proceedings.

4) "Motivating factor" versus "but-for" causation

a) *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) – Congress specifically allows mixed-motive cases under Title VII, as it amended the Civil Rights Act in 1991 to provide that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m). The Supreme Court held that direct evidence of discrimination is not required; to survive summary judgment "a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice.'"

b) *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009) – The plaintiff in an ADEA case must prove that age discrimination was the "but-for" cause of the adverse employment action. The statute prohibits an employer from discriminating against an employee "*because of* such individual's age" (29 U.S.C. § 623(a)(1) (emphasis added)), and the Supreme Court held that this language precludes consideration of mixed motives in ADEA cases.

c) *Parker v. Columbia Pictures Indus.*, 204 F.3d 326 (2d Cir. 2000) – A majority of the Circuit Courts of Appeal have held that a "mixed-motive" causation standard applies to discrimination claims under Title I of the ADA. Under the Rehabilitation Act, however, the standard is "but-for" causation, because the statute prohibits discrimination against an individual "solely by reason of her or his disability" (29 U.S.C. § 794(a)).
d) *Siring v. Oregon State Bd. of Higher Educ. ex rel. E. Oregon Univ.*, 977 F. Supp. 2d 1058 (D. Or. 2013) – In the wake of the Supreme Court's decision in *University of Texas Southwestern Medical Center v. Nassar*, — U.S. —, 133 S.Ct. 2517 (2013), to apply "but-for" causation to Title VII retaliation claims, "it is at least questionable whether *Nassar's* "but for" causation standard should be extended to ADA discrimination claims."