Comparing Similarly Situated People in Disparate Treatment Cases

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COMPARING SIMILARLY SITUATED PEOPLE IN DISPARATE TREATMENT CASES

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The concept of "similarly situated" is a common sense approach to facts, used by lawyers and nonlawyers alike, outside the courtroom. But when it is brought inside to prove a point in litigation, it all too often sinks into a swamp of unnecessary complexities and legalisms.

We all learned as children that if someone reacts to a situation in a particular way one time, he will probably react the same way the next time. We therefore assume that if someone reacts differently to situations which look similar, he probably perceives a difference. If your boss treats one subordinate more favorably than another, you will assume she has some basis for her preference, even if you cannot figure out what it is. People usually have a reason for what they do.

Because everybody is familiar with the tendency of people to treat similarly situated people similarly, you can use distinctions in reactions to what appear to be similarly situated people as evidence of intentional discrimination. The plaintiff using this technique shows that the defendant treated two people differently, and that the only apparent basis for distinguishing between them is race, or some other prohibited criterion. She then argues that the defendant must have been distinguishing between the two on the basis of that criterion.

In other words, the plaintiff proves her case by a process of elimination: if the only obvious way of distinguishing between two people is by race or some other prohibited criterion, and if the defendant distinguished between them, the defendant probably used that criterion to make the distinction. As the Supreme Court said in a somewhat different context:

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... And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts on with some reason, based his decision on an impermissible consideration such as race. [Citation omitted.]

The trick is to find people who are so similarly situated that the decision to treat them differently is surprising. There is of course nothing to be gained by simply showing that a white employee and a black employee were treated differently; the plaintiff, who bears the burden of proof, must show that the motive for the difference in treatment

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is discriminatory; that it is more likely than not the employer... based his decision on an impermissible consideration such as race. Therefore, if there is no reason to expect the employer to treat the two people being compared in the same way, the fact that they were treated differently will not prove anything.

The test is whether a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated. Much as in the lawyer's art of distinguishing cases, the "relevant aspects" are those factual elements which determine whether reasoned analogy supports, or demands, a like result. Exact correlation is neither likely nor necessary, but the cases must be fair congers. In other words, apples should be compared to apples.

If the plaintiff produces evidence that similarly situated people were treated differently, the defendant can rebut the plaintiff's case by introducing evidence showing that there was a difference between the two, after all. That difference must, of course, provide a plausible basis for the difference in treatment. If the plaintiff shows that a black janitor was fired for tardiness and a white janitor with the same record was not, it is doubtful that the trier of fact will be impressed by proof that the white janitor had six years of education and the black only five. But a showing that the black employee was new to the job and that the white employee was not might well persuade the trier of fact that there is no reason to find the difference in treatment suspicious. The plaintiff is then back where she started, with two people who can be distinguished for purposes of the treatment they received on nondiscriminatory grounds. If she cannot show the new explanation is not credible, she cannot claim that discrimination is a more likely explanation for the distinction the employer made than the reason articulated by the employer.

Comparisons of similarly situated people can be used to prove discrimination whenever the facts will lend themselves to that mode of analysis, but the technique is most often used in discipline cases, as exemplified by the following language from McDonnell v. Santa Fe Trail Transportation Co.:

We find this case indistinguishable from McDonnell Douglas. Fairly read, the complaint asserted that petitioner was discharged for their alleged participation in a misappropriation of cargo... but that a fellow employee, likewise implicated, was not so disciplined, and that the reason for the discrepancy... was that the favored employee is Negro while petitioners are white. While Santa Fe may decide that participation in a theft of cargo may render an employee unqualified for employment, this criterion must be "applied, alike to members of all races," and Title VII is violated if, as petitioners alleged, it was not.

While there are marked similarities between this analytical technique and the technique used in McDonnell Douglas v. Green, the actual focus in each case is different, and it is a mistake—albeit a common one—to use the McDonnell Douglas approach in a case resting on comparisons. Consider, for example, an Eighth Circuit case in which the plaintiff's "primary contention in support of his claim of discriminatory discharge is that he was treated more harshly than similarly situated white employees." The court analyzed the case under the McDonnell Douglas framework.

In order to establish a prima facie case of discriminatory discharge, a plaintiff must show that (1) he was a member of a protected class, (2) he was capable of performing the job, and (3) he was discharged from the job.

Like most circuits, the Eighth Circuit does not consider whites to be members of a protected class. But the Santa Fe plaintiff was white, and the first step in the Eighth Circuit's analysis is obviously unnecessary.

So is the second step; there is nothing in Santa Fe to suggest that a plaintiff has to show he was qualified for a job from which he, alone, was fired. The employer can, of course, show that the other employee was given more favorable treatment because of her superior qualifications, but that has nothing to do with the plaintiff's prima facie case. Thus, of the three elements of proof required by the Eighth Circuit, two are unnecessary. And the centerpiece of the Santa Fe analysis—the difference in treatment—is not even mentioned.

To be sure, many courts have modified McDonnell Douglas in comparison cases by eliminating the requirement that a plaintiff show he was qualified, and they can generally be counted on to abandon the requirement that the plaintiff prove he is in a protected class when the plaintiff is not in one. But the fact remains that the effort to analyze comparison cases in terms of McDonnell Douglas is a mistake, as McDonnell Douglas does not focus on the critical question in a comparison case: whether the plaintiff was treated differently from someone who was so similarly situated as to make that different treatment surprising.

Although both McDonnell Douglas and Santa Fe allow the plaintiff to prove her case by a process of elimination, they require the plaintiff to eliminate different things. A McDonnell Douglas plaintiff tries to prove discrimination by eliminating the nondiscriminatory reasons for the action taken by the defendant. Most McDonnell Douglas cases
therefore ultimately focus on the plausibility of the reason the defendant gives for that action: 14 the defendant claims it had a legitimate reason for what it did, and the plaintiff tries to show it did not. 15 In contrast, comparing “similarly situated” people puts the reason for differences in treatment into issue; the plaintiff claims the difference in treatment shows a discriminatory motive, and the defendant claims it does not. 16

The distinction between the two kinds of proof is of more than just academic interest. Although many courts and the EEOC seem to require advocates and judges to shoehorn their similarly situated arguments and decisions into the McDonnell Douglas framework, the effort can so cloud the issues that the point of the litigation is lost. Defendants who reflexively articulate the nondiscriminatory reasons called for by that case may find they have fortified the wrong position; while they were hunkered down behind their carefully articulated reasons for the actions they took, the plaintiff bypassed the position and attacked the failure to apply those reasons to others. It may be reasonable to fire whites for theft, but it is not lawful to fire only whites for theft. 18

Plaintiffs often make the same mistake. After making an initially promising showing showing that two people were treated differently without apparent reason, they switch gears and go all out to show that the explanation for the personnel decision they are objecting to is so unreasonable as to be pretextual. If, instead of responding the defendant shows that the people being compared are not similarly situated, the plaintiff winds up with proof that the employer made a pretextual, but nondiscriminatory decision, which is all the defendant needs to escape liability. 19 In sum, using McDonnell Douglas is rarely helpful in answering the critical question raised by the comparison of similarly situated individuals: is there a nondiscriminatory explanation for the difference in treatment which is at least as likely to explain what happened as the discriminatory explanation offered by the plaintiff?

Because so many courts and the EEOC require analyzing every case in McDonnell Douglas terms, I suggest putting that step off until you have decided how you want to come out. Analyze it in Santa Fe terms, reach a solid conclusion, and then cram the conclusion back into a McDonnell Douglas framework. The framework has become so elastic that almost any reasonable conclusion can be put into some formulation of it, and the trick is to prevent a formulation picked beforehand from dictating a result that will not stand up to analysis.

In analyzing a Santa Fe type case, check to ensure that: (1) the defendant can be expected to treat similarly situated individuals consistently, and (2) the individuals being compared are truly similarly situated. The first assumption—that a defendant can be expected to react to similarly situated people in the same way—is most commonly attacked on the ground that more than one decision-maker was involved, as when an employee complains that her supervisor treated her more harshly than another supervisor treated someone else. Although a single person can be expected to act in similar ways to the same situation, different people may react to that situation quite differently. When two supervisors impose different penalties for the same offense, the explanation for the difference in treatment is as likely to lie in the different personalities of the supervisors as in any characteristics of the employees. 20

Generally, however, the battle is over the claim that the people being compared are similarly situated. Because disparate treatment cases require a showing of a discriminatory motive, the defendant must know the people being compared were similarly situated. If it mistakenly thought they were different, its decision to treat them differently proves nothing. 21 Usually, however, the defendant does not claim it made a mistake, but that it had a nondiscriminatory basis for distinguishing between the two: the offenses were not equally serious, 22 the employees had different records which had to be taken into consideration, 23 the employees had different statuses within the organization, 24 or there were other factors which can explain the difference in treatment. 25

The technique is a useful one for proving discrimination by comparing similarly situated individuals, but it should be applied with common sense rather than legal rigor.

First, determine whether the employer treated two people differently.

Second, determine whether the failure to treat them similarly is surprising. This does not mean requiring the plaintiff to eliminate every conceivable distinction between the two which might have resulted in differing treatments, but proving a set of facts which would lead a reasonable person to think he knew enough about the situation to expect that the two individuals would receive the same treatment.

Third, determine whether the two individuals can be distinguished on the basis of the criterion that the plaintiff claims the defendant used.

Finally, give the defendant an opportunity to explain the reason for the differences in treatment. Remember, any explanation will rebut the plaintiff's case, if it is more likely, or as likely, as the explanation the plaintiff is trying to prove. The explanation does not have to be legitimate, in the sense that the decision is lawful, or even that it makes sense. But it does have to be inconsistent with the plaintiff's explanation, and has to be just as plausible to the court.
Garrett v. City and County of San Francisco, 818 U.S. 1515, 1519 (6th Cir. 1987) ("Plaintiff can meet [his] burden by showing that other employees ... who engaged in similar acts of wrongdoing of 'comparable seriousness' ... were nevertheless retained."); Barnes v. Yellow Freight Systems, Inc., 772 F.2d 1090, 1101 (5th Cir. 1985) ("When a supervisor of one race treats employees of the same race more favorably than similarly situated employees of another race under circumstances that are essentially identical, a presumption of discriminatory intent is raised."); Tennessee v. Liberty Mutual Insurance Co., 713 F.2d 1142, 1146-50 (6th Cir. 1983) ("In contrast to Liberty Mutual's energetic investigation of women it believed might be attending law school, Liberty Mutual never investigated any of these allegations, suspicions, or rumors about male adjustors attending law school."); Smith v. Monsanto Chemical Co., 770 F.2d 719, 723 (8th Cir. 1985) ("Smith must establish that white employees 'similarly situated in all relevant respects' received more lenient treatment than Smith."); cert. denied, 475 U.S. 1059 (1986), Cummins v. Parker Seal Co., 516 F.2d 544, 559-60 (6th Cir. 1975) ("Ceballos v. J. dissents") ("If a Saturday Sabbath observant can show that an employer discharged him for refusing to work on Saturdays, although similarly situated employees were not required to work on Saturdays, or were exempted from Sunday work, he could maintain that the actual reason for his discharge was religious discrimination, not his refusal to work on Saturdays."); reversed on other grounds, 433 U.S. 803 (1977).


Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 258 ("[I]t is the plaintiff's task to demonstrate that similarly situated employees were not treated equally.");

Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977) ("Proof of discriminatory motive is critical, although it can in some instances be inferred from the mere fact of differences in treatment.");


Smith v. Monsanto Chemical Co., 770 F.2d 719, 723-24 (8th Cir. 1985) ("In the present case, Smith has worked for Monsanto for 3½ years and has not been previously accused of theft. We, therefore, must compare Smith's punishment with that received by white employees of similar status .... Nine employees who had less than five years seniority and no prior violations had been accused of stealing. Of the nine, six were white and three were black. All nine of these employees, similarly situated with respect to Smith, were terminated."); cert. denied, Smith v. Monsanto Chemical Co., 475 U.S. 1050 (U.S. 1986).


427 U.S. at 283-84 (Citation and footnote omitted).


Smith v. Monsanto Chemical Co., 770 F.2d 719, 723 (8th Cir. 1985); cert. denied, 475 U.S. 1050 (1986).

Smith v. Monsanto Chemical Co., 770 F.2d 719, 721 n.2 (8th Cir. 1985); cert. denied, 475 U.S. 1050 (1986).

Bell v. Bolger, 708 F.2d 1312, 1315 n.3 (8th Cir. 1983); REOR 7030.

Compare e.g., McAlester v. United Air Lines, Inc., 851 F.2d 1249, 1280 (10th Cir. 1988) ("A [McDonald Douglas] prima facie case of discriminatory termination is made by showing (i) that McAlester belongs to a racial minority; (ii) that he was discharged for violating a work rule of United; and (iii) that similarly situated non-minority employees who violated the same rule were treated differently than he was."); with Notari v. Denver Water Department, 871 F.2d 595, 590 (10th Cir. 1989) ("The claims of two similarly situated victims of intentional discrimination should not be subjected to ... 'similar dispositions' just because the plaintiff is white.");


The Court of Appeals intimated .... that petitioner's stated reason for refusing to rehire respondent was a "subjective" rather than objective criterion which "tarnished little weight in rebutting charges of discrimination .... [W]e think the court ... seriously underestimated the rebuttal weight to which petitioner's reasons were entitled.... Nothing in Title VII compels an employer to absolve and rehire one who has engaged in such deliberate, unlawful activity against it."

See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981) ("The fact that a court may think the employee misjudged the qualifications of the applicants .... may be probative of whether the employer's reasons for pretexts are discriminatory.");

Turner v. Texas Instruments, Inc., 855 F.2d 1251, 1258 (5th Cir. 1988) ("We conclude that [the employer] presented and proved legitimate, non-discriminatory reasons for the disparity in treatment ....");

Machin v. Sears, Roebuck & Co., 864 F.2d 1366, 1366 (7th Cir. 1988) ("While it is up to an individual employer to decide what disciplinary action, cheating deserves, the criterion for making such a decision must be 'applied, alike to members of all races';"); Hill v. Coca Cola Bottling .
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Co., 786 F.2d 650, 653 (2d Cir. 1986) (Citing the Santa Fe Court for the proposition "While crime or other misconduct may be a legitimate basis for discharge, it is hardly one for racial discrimination."); Barnes v. Yellow Freight Systems, Inc., 778 F.2d 1096, 1102 (5th Cir. 1985) ("[T]he fact that Barnes may have no longer been qualified to perform that particular job does not mean that the company was automatically justified, in view of its record of more lenient discipline for similarly situated whites, in discharging him.")

Friedel v. City of Madison, 632 F.2d 965, 973 (7th Cir. 1980) ("Neither sections 1981 and 1983 make [sic] an employer liable for simply erroneous or arbitrary decisions."); Smith v. Monsanto Chemical Co., 770 F.2d 719, 723 n.3 (8th Cir. 1985) ("It is an employer’s business prerogative to develop as many arbitrary, ridiculous and irrational as it sees fit. Our only concern is that the employer must apply its rules in an even-handed, nondiscriminatory manner."); cert. denied, 475 U.S. 1050 (1986); Nix v. WLCY Radio/Rafael Communications, 736 F.2d 1181, 1187 (11th Cir. 1984) ("The employer may fire an employee for a good reason; a bad reason, a reason based on erroneous facts, or no reason at all, so long as its action is not a discriminatory reason."); Jackson v. City of Killeen, 664 F.2d 1161, 1168 (5th Cir. 1981) (Although plaintiff testified that she was treated harshly by her supervisor, ... since there was no evidence that the supervisor treated all employees equally harshly. If scarce need be said that Title VII is not a shield against harsh treatment at the workplace; it protects only instances of harshness disparately distributed.")

Jones v. Frank, 973 F.2d 673, 676 (9th Cir. 1992) (Citing Timms v. Frank, 953 F.2d 281, 287 (7th Cir.)), cert. denied, __ U.S. ___ (1992) for the proposition that "it is difficult to say that the difference was more likely than not the result of intentional discrimination when two different decision makers are involved."); Jones v. Genvens, 874 F.2d 1534, 1541 (11th Cir. 1989) ("Courts have held that disciplinary measures undertaken by different supervisors may not be comparable for purposes of Title VII analysis."); Cooper v. City of North Olmsted, 795 F.2d 1265, 1271 (6th Cir. 1986) ("Although a change in managers is not a defense to claims of race or sex discrimination, it can suggest a basis other than race or sex for the difference in treatment received by two employees."); Tate v. Weyerhaeuser, 723 F.2d 598, 605 (8th Cir. 1984) (noting that "none of the supervisory personnel involved in the discipline of claimants participated in decisions regarding white employees."); cert. denied, 465 U.S. 847 (1984); Mazzeola v. RCA Global Communications, Inc., 642 F. Supp. 1531, 1546-47 (S.D.N.Y. 1986) ([T]he order to be similarly situated, other employees must have reported to the same supervisor as the plaintiff, must have been subject to the same standards governing performance evaluation and discipline, and must have engaged in conduct similar to the plaintiff’s, without such differentiating or mitigating circumstances that would distinguish their conduct or the appropriate discipline for it."); aff’d, 814 F.2d 653 (2d Cir. 1987).

Jones v. Genvens, 874 F.2d 1534, 1540 (11th Cir. 1989) ([T]he employer successfully rebutted any prima facie case of disparate treatment by showing that it honestly believed the employee committed the violation"); Friedel v. City of Madison, 632 F.2d 965, 973 (7th Cir. 1980) ("The question is ... whether the Madison Police Department or Inspector Franklin intended to discriminate against the basis of their race or gender ... when the Department chose to dismiss them, not simply that the policy applied to them."); Okerhame v. Liberty Mutual Insurance Co., 713 F.2d 1142, 1148 (5th Cir. 1983) ([T]he employer is unaware that a nonminority employee is in violation of company policy by smoking marijuana."); Reynolds v. Humko Products, 756 F.2d 459, 472 (9th Cir. 1985) (plaintiff fired for intoxication cannot compare herself to Mr. Gilliam because "there is no indication that management was aware that Mr. Gilliam was intoxicated..."); Tate v. Weyerhaeuser Co., 723 F.2d 598, 605 (8th Cir. 1984) ([T]here was no evidence that the supervisors were aware [the employee being compared] was drunk."); cert. denied, 465 U.S. 847 (1984); Nix v. WLCY Radio/Rafael Communications, 736 F.2d 1181, 1187 (11th Cir. 1984) ("The employee may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or no reason at all, so long as its action is not a discriminatory reason.").

Hayes v. Invesco, 907 F.2d 853, 856 (8th Cir. 1990) (plaintiff's poor performance had more serious consequences than the other employee's poor performance); Dartmouth Review v. Dartmouth College, 869 F.2d 13, 18 (1st Cir. 1989) ([W]ithout more allegations that perceived racial infractions were punished more harshly than other infractions do not tend to show racial discrimination against the persons accused. Weighing the scales heavily against those who are believed to practice race discrimination may some inequitable, and unjustified, but fair or unfair, justified or not, differentially drawn along such an axis do not constitute the type of disparate treatment outlawed by section 1981. Unfairness alone does not invoke the statute."); Yowell v. U.S. Postal Service, 810 F.2d 544, 549 (7th Cir. 1987) [87 FEOR 7003] ("Thus, in form if not in substance, the record reflects that Mr. Yowell and the comparison employees possess similar work records, including the frequency of AWOLs."); [T]he district court ignored the department’s own classification of disciplinary offenses in its assessments of comparable seriousness which, along with other factors, renders meaningless the requirement of dissimilar sanctions for similar offenses that constitutes a prima facie case of ... discrimination."); Moore v. City of Charlotte, 752 F.2d 1100, 1102 (4th Cir. 1984) ([T]he court was not bound, in the instant case, by the district court’s classification of discipline offenses.")

Well v. Nati., RR Passenger Corp., 718 F.2d 906, 909 (9th Cir. 1984) ("The three white employees who were not discharged for conduct similar to that for which Wall was discharged had no prior disciplinary record."); Johnson v. Burnley, 887 F.2d 471, 479 (4th Cir. 1991) (plaintiff has produced no evidence that any of the male employees had attendance problems even approaching the level of seriousness of Johnson’s misconduct.")

Marshall v. Western Grain Co., 838 F.2d 1165, 1170 (11th Cir. 1988) ([B]ecause of their unique status in the work place, bargaining unit employees are not similarly situated with non-bargaining unit employees."); cert. denied, 468 U.S. 852 (1988); Yowell v. U.S. Postal Service, 610 F.2d 844, 849 (7th Cir. 1987) [87 FEOR 7009] ("[T]he record suggests that preference eligible employees are entitled to more deferential treatment than are non-preference eligible employees like Mr. Yowell. ... As to full-time employees, the record is not clear. However, the burden ... to prove similarity was on the plaintiff at this stage of the case."); Tate v. Weyerhaeuser Co., 723 F.2d 598, 605 (8th Cir. 1983) (collective bargaining agreement provisions justify difference in treatment."); cert. denied, 465 U.S. 847 (1984); Cooper v. City of North Olmsted, 795 F.2d 1265, 1270 (6th Cir. 1986) ("Probationary bus drivers ... do not stand on equal footing with permanent drivers and cannot be considered to be similarly situated.")

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Jones v. Frank, 973 F.2d 673, 676 (6th Cir. 1992) (refusing to compare the differing treatment of individuals resulting from settlement agreements); Lopez v. Metropolitan Life Insurance Co., 930 F.2d 157, 161 (2nd Cir. 1991) (Employee did not get training given other employees because he did not ask for it and they did), cert. denied, ___ U.S. ___ (1991); McMullan v. N. Svetanoff, 878 F.2d 185, 189 (7th Cir. 1989) ("Judge Svetanoff stated ... that he terminated McMullan because he wished to hire Emily Trgovich, a woman with whom the judge had successfully worked in the past. That explanation is a legitimate reason for the plaintiff's termination."); McAlpine v. Foertsch, 870 F.2d 409, 416-17 (7th Cir. 1989) (friends of persons making selections not similarly situated to applicants who were not friends); Lanzner v. Safeway Grocery, 843 F.2d 296, 301 (8th Cir. 1988) ("Evidence that [plaintiff] Lanzner misused Wilbur's time card does not prove that Wilbur is the time clock, or that he knew of the misuse of his card."); Shah v. General Electric Co., 816 F.2d 284, 271 (6th Cir. 1987) ("Thus Lehman [who had worked for defendant for twenty years] was not similarly situated to plaintiff who had worked for nineteen months when [defendant] decided to terminate [plaintiff's] employment but not Lehman's."); Reynolds v. Humko Products, 756 F.2d 469, 472 (6th Cir. 1985) (Distinguishing between employees who drink on duty and others); Bryant v. International Schools Services, Inc., 675 F.2d 962, 975 (3rd Cir. 1982) ("Discrimination against married women constitutes discrimination on the basis of sex only if a different standard, i.e., the marital status of the persons, has been applied to men and women."); Fong v. American Airlines, Inc., 626 F.2d 759, 762 (9th Cir. 1980) (distinguishing between employees who took food from the employing airline that could be reused and those who took food that could not be reused); Potter v. Goodwill Industries of Cleveland, 518 F.2d 886, 885 (6th Cir. 1975) (employees distinguished on the basis of their willingness to perform available tasks.)