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‘Just Give Me Some Space’ — Eleventh Circuit Clarifies “Similarly Situated” Standard

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On March 21, 2019, in a 9-3 *en banc* decision, the U.S. Eleventh Circuit Court of Appeals clarified the “similarly situated” standard for comparator evidence in employment discrimination cases. *Lewis v. City of Union City, Georgia*, 15-11362, 2019 WL 1285058, at *2 (11th Cir. Mar. 21, 2019) (en banc). Specifically, the Court ruled that a comparator will only be found to exist where they and the plaintiff are “*similarly situated in all material respects*.” This “all material respects” standard focuses on “substantive likeness,” and should be resolved on a case-by-case individual basis. Critically, the Court observed that this standard should provide employers with the “necessary breathing space to make appropriate business decisions.”

In what many consider to be a win for employers, the Court also ruled that comparator evidence should be analyzed during the *prima facie* stage of the *McDonnell Douglas* burden shifting analysis. Indeed, the Court flatly rejected the plaintiff’s argument that comparator analysis should “be moved into the pretext stage,” stating that “doing so would effectively shift to the defendant the burden of disproving discrimination – which is precisely what the Supreme Court has forbidden.”

The *Lewis* decision may lead to a review by the United States Supreme Court to resolve an apparent Circuit split on the issue of the similarity of comparators, as the Eleventh Circuit expressly rejected the more lenient standard adopted by the Seventh Circuit. Stay tuned to Polsinelli at Work for further updates.

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