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The Perils of a Comparator: A Modern Pleading Standard for Title VII Disparate Treatment Claims

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I. INTRODUCTION

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on "race, color, religion, sex, or national origin."[1] Since Title VII was enacted, courts have expanded its scope.[2] But broader protections work only if plaintiffs can obtain redress in court. The existing framework for pleading a Title VII claim makes redress difficult.

Courts have not adopted a uniform pleading standard for Title VII claims. Some circuits mandate that plaintiffs identify a comparator, a requirement that poses a significant obstacle to many deserving plaintiffs.[3] A comparator is an individual who is "similarly situated" to the plaintiff in the workplace, but for the plaintiff's protected trait.[4] Courts following this approach compare the plaintiff to the comparator when evaluating the role of the protected trait in any adverse employment action taken against the plaintiff.[5] At the pleading stage, these courts require a plaintiff to allege a prima facie case of employment discrimination under a four-pronged test established by the Supreme Court in *McDonnell Douglas Corporation v. Green* ("*McDonnell Douglas*").[6] And complaints that fail to identify a comparator are routinely dismissed.[7]

This approach runs afoul of Supreme Court precedent stating that the *McDonnell Douglas* test is not a pleading standard.[8] Additionally, forcing complainants to plead a comparator imposes a heightened pleading standard on Title VII claims, which frustrates the statute's purpose. Further, discrimination today is often subtle and imperceptible; as such, it is difficult to prove without the benefit of discovery.[9] While an employee at a large employer may not have access to evidence of a comparator,[10] at

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1. Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-2(a).

2. *See, e.g.*, Bostock v. Clayton County, 140 S. Ct. 1731, 1754 (2020) ("An employer who fires an individual merely for being gay or transgender defies [Title VII]."). For a further discussion of how federal courts have expanded the scope of Title VII's sex discrimination provision, see *Examples of Court Decisions Supporting Coverage of LGBT-Related Discrimination Under Title VII*, EEOC, https://www.eeoc.gov/wysk/examples-court-decisions-supporting-coverage-lgbt-related-discrimination-under-title-vii (last visited Feb. 13, 2023).

3. *See, e.g.*, Tabb v. Bd. of Educ. of Durham Pub. Schs., 29 F.4th 148, 156 (4th Cir.), *cert. denied*, 143 S. Ct. 104 (2022) (mem.); Chhim v. Univ. of Tex. at Austin, 836 F.3d 467, 470–71 (5th Cir. 2016); Hager v. Ark. Dep't of Health, 735 F.3d 1009, 1015 (8th Cir. 2013); Sheets v. City of Winslow, 859 F. App'x 161, 162 (9th Cir. 2021).

4. *Chhim*, 836 F.3d at 470–71.

5. *See, e.g.*, *id.*

6. 411 U.S. 792, 802 (1973).

7. *See, e.g.*, *Tabb*, 29 F.4th at 156; *Chhim*, 836 F.3d at 470–71; *Hager*, 735 F.3d at 1015; *Sheets*, 859 F. App'x at 162.

8. Swierkiewicz v. Sorema N. A., 534 U.S. 506, 510–11 (2002).

9. Stephen Chupaska, *Not All Discrimination Is Obvious*, Columbia Bus. Sch. (Jul. 12, 2019), https://www8.gsb.columbia.edu/articles/ideas-work/not-all-discrimination-obvious.

10. *See* Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 Duke L.J. 1, 45 (2010).

a small employer, there may be no comparator at all.[11] Thus, requiring comparator evidence at the pleading stage strips a plaintiff of the power to be heard afforded them under Title VII.

Other circuits do not require a comparator at the pleading stage[12] and instead follow the framework articulated by the Court in *Swierkiewicz v. Sorema N. A.*[13] Per the *Swierkiewicz* standard, an employment discrimination complaint need only allege "a short and plain statement of the claim showing that the pleader is entitled to relief" under Title VII.[14] Demanding far less of a complainant than the *McDonnell Douglas* test, the *Swierkiewicz* standard potentially allows frivolous claims to proceed.[15]

This Note contends that a new, uniform pleading standard for Title VII claims is necessary to eliminate the existing ambiguity as to whether *McDonnell Douglas* or *Swierkiewicz* governs. Part II of this Note tracks the development of the judicial approaches used to assess Title VII complaints. Then, Part III sets forth the problems the current pleading landscape imposes on plaintiffs bringing Title VII claims. Part IV offers a solution: a uniform pleading standard for Title VII claims that courts should adopt. Part V concludes this Note.

II. THE DEVELOPMENT OF THE TITLE VII PLEADING LANDSCAPE

A. The McDonnell Douglas-Swierkiewicz *Dichotomy*

In 1964, Congress enacted Title VII of the Civil Rights Act.[16] Title VII provides that

> [i]t 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 [their] 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 [their] employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect [their] status as an employee, because of such individual's race, color, religion, sex, or national origin.[17]

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11. *See* Tricia M. Beckles, Comment, *Class of One: Are Employment Discrimination Plaintiffs at an Insurmountable Disadvantage if They Have No "Similarly Situated" Comparators?*, 10 U. Pa. J. Bus. & Emp. L. 459, 459 (2008).

12. *See, e.g.*, Bar v. Kalitta Charters II, LLC, No. 21-1739, 2022 WL 3042844, at *3 (6th Cir. Aug. 2, 2022); Powers v. Sec'y, U.S. Homeland Sec., 846 F. App'x 754, 758 (11th Cir. 2021) (per curiam).

13. 534 U.S. at 508.

14. *Id.* (quoting Fed. R. Civ. P. 8(a)(2)).

15. *See* Rebecca Love Kourlis et al., *Reinvigorating Pleadings*, 87 Denv. U. L. Rev. 245, 263 & n.115 (2010) (noting that lower courts have recognized "heightened pleading" standards as necessary to avoid meritless litigation of claims brought under the Civil Rights Act).

16. Civil Rights Act of 1964 §§ 701–18, 42 U.S.C. §§ 2000e–e-17.

17. *Id.* § 2000e-2(a).

In the 1971 seminal case *Griggs v. Duke Power Company*, the Supreme Court interpreted these provisions to create two distinct claims: disparate treatment and disparate impact.[18]

Disparate treatment claims challenge employment actions that have discriminatory intent or motive and can be proven by direct or circumstantial evidence.[19] To analyze circumstantial evidence cases, the Court in 1973 articulated a burden-shifting framework in *McDonnell Douglas*.[20] Under the framework, a plaintiff must first state a prima facie case of employment discrimination by proving the following four elements:

> (i) that [they] belong[] to a [protected class]; (ii) that [they] applied and w[ere] qualified for a job for which the employer was seeking applicants; (iii) that, despite [their] qualifications, [they] w[ere] rejected; and (iv) that, after [their] rejection, the position remained open and the employer continued to seek applicants from persons of [plaintiff]'s qualifications.[21]

If the plaintiff satisfies their prima facie showing, the burden then shifts to the employer to demonstrate a legitimate, nondiscriminatory reason for its decision not to hire the plaintiff.[22] And should the employer satisfy this step, the burden shifts back to the plaintiff to show that the employer's stated reason is pretextual.[23]

Based on the Court's guidance that the four prima facie elements it articulated might not be applicable to all cases,[24] lower courts have adjusted the *McDonnell Douglas* test to accommodate various factual scenarios.[25] One iteration, announced by the U.S. Court of Appeals for the Fifth Circuit in the 1980 case *Whiting v. Jackson*

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18. 401 U.S. 424, 431 (1971). This Note discusses only disparate treatment claims, because the *McDonnell Douglas* and *Swierkiewicz* pleading standards apply primarily to causes of action arising under disparate treatment.

19. *See* Sandra F. Sperino, *Justice Kennedy's Big New Idea*, 96 B.U. L. Rev. 1789, 1797–99 (2016).

20. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

    The facts of *McDonnell Douglas* are not necessary to an understanding of the legal arguments, but they are offered here for the interested reader. As part of a general staff reduction, manufacturer McDonnell Douglas Corporation fired the respondent, a Black man who had worked for the manufacturer as a mechanic and laboratory technician. *Id.* at 794. The respondent had been a long-time activist in the civil rights movement, and to protest the staff reduction, he and other former employees stalled their cars on the main roads leading to the manufacturer's plant. *Id.* at 794–95. Weeks after this incident, the manufacturer advertised job openings for the respondent's former position; he reapplied for his job and was rejected. *Id.* at 796. The respondent brought an employment discrimination claim under Title VII, alleging that the manufacturer's refusal to rehire him was based on his race and civil rights activism. *Id.* at 796–97.

21. *Id.* at 802.

22. *Id.*

23. *Id.* at 804.

24. *Id.* at 802 n.13 ("The facts necessarily will vary in Title VII cases, and the specification . . . of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations.").

25. For example, courts have adapted the *McDonnell Douglas* elements to apply in employment termination cases. *See, e.g.*, Potter v. Goodwill Indus. of Cleveland, 518 F.2d 864, 865 (6th Cir. 1975) (per curiam);

State University, established the comparator requirement for employment termination complaints by mandating that a plaintiff prove

> (1) [they] belong[] to a group protected by the statute; (2) [they] w[ere] qualified for the job from which [they] w[ere] suspended and not rehired; (3) [they] w[ere] terminated; and (4) *after [their] termination, the employer hired a person not in plaintiff's protected class, or retained those, having comparable or lesser qualifications, not in plaintiff's protected class.*[26]

In 2002, the Supreme Court clarified in *Swierkiewicz* that the *McDonnell Douglas* test requiring plaintiffs to show a prima facie case of discrimination is an "evidentiary standard, not a pleading requirement."[27] To survive a motion to dismiss per *Swierkiewicz*, a plaintiff need only plead "a short and plain statement of the claim showing that the [plaintiff] is entitled to relief" under Title VII.[28] In *Swierkiewicz*, the petitioner's proffered evidence fell short of establishing a prima facie case of employment discrimination,[29] but the Court deemed his complaint sufficient to withstand a motion to dismiss because it provided the petitioner's employer with fair notice and a basis for his claims.[30] Some circuits have interpreted *Swierkiewicz* to set forth a two-part standard under which a plaintiff need only plead (1) an adverse employment action (2) taken due to the plaintiff's protected class.[31]

Further, the Court made clear that the test in *McDonnell Douglas* was never intended as a pleading requirement to survive a motion to dismiss; instead, the framework was adopted to allocate the burden of proof during employment discrimination litigation.[32] Requiring a Title VII plaintiff to assert a prima facie case under *McDonnell Douglas*, the Court emphasized, would impose a particularity standard that would "too narrowly constric[t] the role of the pleadings."[33]

B. The Twiqbal *Wrench*

For the fifty years following its 1957 decision in *Conley v. Gibson*, the Supreme Court interpreted Federal Rule of Civil Procedure 8(a)(2), requiring a complaint to

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Flowers v. Crouch-Walker Corp., 552 F.2d 1277, 1281 & n.3 (7th Cir. 1977); Marks v. Prattco, Inc., 607 F.2d 1153, 1155 (5th Cir. 1979).

26. 616 F.2d 116, 121 (5th Cir. 1980) (emphasis added).

27. Swierkiewicz v. Sorema N. A., 534 U.S. 506, 510 (2002).

28. *Id.* at 508 (quoting Fed. R. Civ. P. 8(a)(2)).

29. *See* Swierkiewicz v. Sorema, N.A., 5 F. App'x 63, 64–65 (2d Cir. 2001) (dismissing the complaint because it failed to set forth a prima facie case of discrimination per *McDonnell Douglas*), *rev'd*, 534 U.S. 506 (2002).

30. *Swierkiewicz*, 534 U.S. at 514.

31. *See, e.g.*, Olivarez v. T-Mobile USA, Inc., 997 F.3d 595, 599–600 (5th Cir.), *cert. denied*, 142 S. Ct. 713 (2021) (mem.).

32. *Swierkiewicz*, 534 U.S. at 510–11.

33. *Id.* at 511 (alteration in original) (quoting McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 283 n.11 (1976)).

plead "a short and plain statement of the claim showing that the pleader is entitled to relief,"[34] as instructing courts to deny a motion to dismiss for failure to state a claim unless a plaintiff could allege "no set of facts" entitling them to relief.[35] But in its 2007 decision *Bell Atlantic Corporation v. Twombly*, the Court declared that a complaint must state a claim for relief that is "plausible on its face" to withstand a motion to dismiss.[36] In this antitrust conspiracy case, the Court found the plaintiffs' complaint lacking because it merely asserted "legal conclusions," not facts sufficient to "nudge[] their claims across the line from conceivable to plausible."[37] One question left unanswered was whether this new, heightened pleading standard applied to all civil cases or to antitrust cases only.[38]

Two years later, in *Ashcroft v. Iqbal*, the Court provided an answer when it extended *Twombly* to all civil cases.[39] Thus, a civil plaintiff must allege facts that plausibly entitle them to relief to survive a motion to dismiss.

The heightened pleading standard established by *Twombly* and *Iqbal* ("*Twiqbal*")[40] has cast doubt on the "continued vitality" of *Swierkiewicz* in Title VII pleadings.[41] Some courts read *Twiqbal* in conjunction with *Swierkiewicz*, by deducing that *Swierkiewicz* is still good law and folding it into the plausibility standard.[42] Other courts purport to follow *Swierkiewicz* but continue to require a comparator under *McDonnell Douglas*.[43] And some courts, adapting *McDonnell Douglas*, require a plaintiff to establish a "reduced" prima facie case of discrimination to survive a motion to dismiss.[44] The confusion surrounding which standard applies in Title VII pleadings coupled with the application by some courts of a more stringent standard than would otherwise be required at the pleading stage render this issue ripe for Supreme Court review.

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34. Fed. R. Civ. P. 8(a)(2).

35. 355 U.S. 41, 45–46 (1957), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

36. 550 U.S. at 570.

37. *Id.* at 564–70.

38. *See* Scott Dodson, *Pleading Standards After* Bell Atlantic Corp. v. Twombly, 93 Va. L. Rev. 135, 142 (2007).

39. 556 U.S. 662, 684 (2009).

40. The Supreme Court's seminal decisions in *Twombly* and *Iqbal* are collectively referred to by the popular moniker "*Twiqbal*." *See, e.g.*, Scott Dodson, *New Pleading, New Discovery*, 109 Mich. L. Rev. 53, 54 (2010).

41. Adam N. Steinman, *The Pleading Problem*, 62 Stan. L. Rev. 1293, 1310 (2010); *see aslo* Fowler v. UPMC Shadyside, 578 F.3d 203, 211 (3d Cir. 2009) (describing the "demise of *Swierkiewicz*").

42. *See, e.g.*, Raj v. La. State Univ., 714 F.3d 322, 331 (5th Cir. 2013); Bar v. Kalitta Charters II, LLC, No. 21-1739, 2022 WL 3042844, at *3 (6th Cir. Aug. 2, 2022); Powers v. Sec'y, U.S. Homeland Sec., 846 F. App'x 754, 757–58 (11th Cir. 2021) (per curiam).

43. *See, e.g.*, Olivarez v. T-Mobile USA, Inc., 997 F.3d 595, 599–600 (5th Cir.), *cert. denied*, 142 S. Ct. 713 (2021) (mem.).

44. *See, e.g.*, Littlejohn v. City of New York, 795 F.3d 297, 311–12 (2d Cir. 2015); Warmington v. Bd. of Regents of Univ. of Minn., 998 F.3d 789, 796 (8th Cir. 2021).

III. PROBLEMS WITH THE TITLE VII PLEADING FRAMEWORK

A. Issues with Requiring a Comparator

First, requiring a plaintiff to satisfy the four-pronged *McDonnell Douglas* test at the pleading stage is antithetical to Supreme Court precedent and Title VII itself. Despite adoption of the test by the lower courts at the motion-to-dismiss phase, the Court has made clear that *McDonnell Douglas* is not a pleading standard.[45] Furthermore, the *McDonnell Douglas* framework does not align with the language of Title VII, because the framework was created to address a distinction between claims based on direct and circumstantial evidence of discrimination—a distinction not present within the statute itself.[46] Circuits that follow *McDonnell Douglas* set an unreasonable requirement for plaintiffs to satisfy at the pleading stage and bar meritorious Title VII claims before discovery even commences.[47]

Additionally, the *McDonnell Douglas* elements force plaintiffs to fit their individual experiences into rigid molds; if they are unable to do so, they are left without redress.[48] This is especially problematic because discrimination cases vary factually, and a prima facie showing will inevitably vary from case to case.[49] While *McDonnell Douglas* left open the possibility for courts to tailor the framework on a case-by-case basis,[50] courts "create[] an unduly limited lens through which to view discrimination" when they draw ad-hoc frameworks from particular facts.[51] Therefore, under *McDonnell Douglas*, a plaintiff can be a victim of employment discrimination but be barred from obtaining relief.

The comparator requirement is a part of the *McDonnell Douglas* test that is particularly troubling. Some courts have construed the fourth element of the prima

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45. Swierkiewicz v. Sorema, N. A., 534 U.S. 506, 510–11 (2002); *see also* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 569–70 (2007) ("*Swierkiewicz* did not change the law of pleading, but simply re-emphasized . . . that the . . . use of a heightened pleading standard for Title VII cases [i]s contrary to the Federal Rules' structure of liberal pleading requirements." (first alteration in original) (quoting Twombly v. Bell Atl. Corp., 313 F. Supp. 2d 174, 181 (S.D.N.Y. 2003))).

46. Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-2(a); *see also* Sandra F. Sperino, *Flying Without a Statutory Basis: Why* McDonnell Douglas *Is Not Justified by Any Statutory Construction Methodology*, 43 Hous. L. Rev. 743, 773 (2006).

47. *See, e.g.*, *Warmington*, 998 F.3d at 798 (dismissing the plaintiff's complaint due to lack of a comparator when she did not "specify the sex of all the 'other coaches' she was treated differently than, leaving th[e] court unable to conclude she was only treated differently than other *male* coaches"); *Olivarez*, 997 F.3d at 600 (finding that the plaintiff's complaint was insufficient because it failed to show that "any non-transgender employee with a similar job and supervisor and who engaged in the same conduct as [the plaintiff] received more favorable treatment").

48. *See* Sandra F. Sperino, *Rethinking Discrimination Law*, 110 Mich. L. Rev. 69, 86 (2011).

49. *See Swierkiewicz*, 534 U.S. at 511–12.

50. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.13 (1973).

51. Sperino, *supra* note 48, at 94.

facie showing[52] to require evidence of a comparator.[53] These courts define a comparator as a "similarly situated employee[] outside the [plaintiff's] protected class who received more favorable treatment."[54]

At no point does Title VII suggest that those discriminated against must measure themselves against a comparator.[55] Moreover, it is possible that a comparator does not exist because an employee is unique in their position or responsibilities, is employed by a small company,[56] or is part of a homogeneous work environment.[57] Today, there is the added problem of behemoth corporations, global in nature. Expecting an employee at a large, multinational company to plausibly allege facts showing a comparator is simply unreasonable.[58]

Even if a comparator does exist, alleging sufficient facts could be complicated "[b]efore discovery has unearthed relevant facts and evidence."[59] Discovery is a potent tool for a plaintiff attempting to establish a comparator, as it can force an employer to turn over pertinent information not readily available to a plaintiff regarding employee makeup, hiring and firing patterns and practices, and interactions between the employer and employees.[60]

52. *McDonnell Douglas Corp.*, 411 U.S. at 802 (requiring a plaintiff to establish that the position for which they applied remained open after they were rejected and that "the employer continued to seek applicants from persons of [plaintiff]'s qualifications").

53. *See, e.g.*, Tabb v. Bd. of Educ. of Durham Pub. Schs., 29 F.4th 148, 156 (4th Cir.), *cert. denied*, 143 S. Ct. 104 (2022) (mem.); Chhim v. Univ. of Tex. at Austin, 836 F.3d 467, 470–71 (5th Cir. 2016); Hager v. Ark. Dep't of Health, 735 F.3d 1009, 1015 (8th Cir. 2013); Sheets v. City of Winslow, 859 F. App'x 161, 162 (9th Cir. 2021).

54. *Tabb*, 29 F.4th at 157. However, there is no consensus on how similar the comparator must be to the plaintiff. *Compare* Coleman v. Donahoe, 667 F.3d 835, 846 (7th Cir. 2012) (applying a flexible standard on a motion for summary judgment that requires the comparator to be similar enough as to not "render the comparison effectively useless" (quoting Humphries v. CBOCS W., Inc., 474 F.3d 387, 405 (7th Cir. 2007))), *with* Flowers v. Troup Cnty. Sch. Dist., 803 F.3d 1327, 1340 (11th Cir. 2015) (requiring that the comparator be "nearly identical" to the plaintiff at the summary-judgment stage (quoting Silvera v. Orange Cnty. Sch. Bd., 244 F.3d 1253, 1259 (11th Cir. 2001))).

55. Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-2(a).

56. *See* Beckles, *supra* note 11, at 459 (describing the "class of one" as "plaintiffs who hold a unique position at a small office or are the only employees who have a specific set of job characteristics within a larger office" (footnote omitted)).

57. Suzanne B. Goldberg, *Discrimination by Comparison*, 120 Yale L.J. 728, 759–61 (2011).

58. *See* Miller, *supra* note 10, at 45 (discussing the "information asymmetry" involved when "challenging the conduct of large institutions"). It is difficult for an employee to access information about an employment action taken against them, let alone information about their colleagues' characteristics, responsibilities, interactions with management, performance reviews, and the like. *See* Jessica Erickson, *Heightened Procedure*, 102 Iowa L. Rev. 61, 67–69 (2016).

59. Swierkiewicz v. Sorema N. A., 534 U.S. 506, 512 (2002).

60. 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, 182 (1996).

In addition, the demographic composition of today's workplace includes more members of protected classes. The evolving workforce has prompted the Supreme Court to expand protections under Title VII.[61]

Today, workplace discrimination is often subtle.[62] As such, plaintiffs seldom have direct evidence of discrimination and must rely on circumstantial evidence, necessitating a clear pleading standard for cases based on such evidence.[63]

The *McDonnell Douglas* test was created half a century ago, and the problems with applying it at the pleading stage in the modern era have grown acute. Neither the test nor the comparator requirement was taken directly from Title VII, and both detract from the statute's purpose. *McDonnell Douglas* leaves Title VII plaintiffs to struggle with an outdated pleading standard rejected by the Supreme Court, and lower courts to parse through ambiguous doctrine. It must be replaced.[64]

B. A Case Study: Olivarez v. T-Mobile USA, Inc.

Since its development, litigants and courts alike "have struggled to understand and apply" *McDonnell Douglas*.[65] For example, the Fifth Circuit purports to analyze employment discrimination pleadings under *Swierkiewicz*,[66] but if circumstantial evidence plays any role in a case, the Fifth Circuit applies the *McDonnell Douglas* elements, and specifically the comparator requirement, to determine whether a plaintiff can survive a motion to dismiss.[67] Decided by the Fifth Circuit, the 2021 employment discrimination case *Olivarez v. T-Mobile USA, Inc.* highlights the

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61. *See, e.g.*, Bostock v. Clayton County, 140 S. Ct. 1731, 1754 (2020).

62. *See* Sperino, *supra* note 48, at 125.

63. *See* Sperino, *supra* note 19, at 1798 ("[I]t is rare that modern courts will characterize a case as a direct evidence case . . . .").

64. While variations on these pleading standards have been suggested in the past, they have focused on the wrong things. For example, one proposed framework requires a plaintiff to plead (1) that they are the victim of the alleged discrimination, (2) their protected trait, (3) the nature of the discrimination they endured, (4) the approximate timeframe during which the discrimination occurred, and (5) that the discrimination was because of the plaintiff's protected trait. Joseph A. Seiner, *The Trouble with* Twombly*: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. Ill. L. Rev. 1011, 1047 (2009). There are several issues with this framework. Requiring a plaintiff to plead the timeframe during which they suffered discrimination teeters on heightened pleading because it requires a plaintiff, who may lack sufficient information, to document the discrimination. And the last element, which mirrors the second prong of the *Swierkiewicz* standard, does not clarify how a plaintiff could satisfy that element, leaving the door open for courts to return to the comparator standard. *See, e.g.*, Olivarez v. T-Mobile USA, Inc., 997 F.3d 595, 599–600 (5th Cir.), *cert. denied*, 142 S. Ct. 713 (2021) (mem.).

65. Sandra F. Sperino, *Beyond* McDonnell Douglas, 34 Berkeley J. Emp. & Lab. L. 257, 260 (2013).

66. *See, e.g.*, Raj v. La. State Univ., 714 F.3d 322, 331 (5th Cir. 2013); Cicalese v. Univ. of Tex. Med. Branch, 924 F.3d 762, 766–67 (5th Cir. 2019).

67. *See, e.g.*, Chhim v. Univ. of Tex. at Austin, 836 F.3d 467, 470–71 (5th Cir. 2016); *Olivarez*, 997 F.3d at 600.

confusion courts face and the problems that requiring a comparator at the pleading stage impose on plaintiffs.[68]

There, Elijah Olivarez, a T-Mobile retail store associate from December 2015 to April 2018, brought a Title VII claim against T-Mobile when he was fired.[69] In his complaint, Olivarez alleged that a supervisor had harassed him because he was transgender and that, when he filed a complaint with the human resources department, T-Mobile retaliated by reducing him to a part-time employee for two months.[70]

The district court dismissed Olivarez's complaint for lack of comparator evidence, and the Fifth Circuit affirmed.[71] The Fifth Circuit reached its conclusion in an equivocal manner, by first acknowledging that it applies *Swierkiewicz* rather than *McDonnell Douglas* when assessing a Title VII claim at the pleading stage; but then it applied *McDonnell Douglas*, including the comparator requirement.[72] Because a plaintiff alleging discrimination based on circumstantial evidence would eventually have to prove the prima facie elements of *McDonnell Douglas*, the court reasoned, analyzing those elements at the pleading stage served as a "helpful" tool to assess whether the complaint passed muster.[73]

Olivarez underscores that requiring comparator evidence at the pleading stage can be fatal to an employee's claim for relief in an employment discrimination case. The notion that Olivarez would have been able to procure knowledge of a comparator from T-Mobile—a company that employs approximately 75,000 employees[74] and has no incentive to share information with a suing plaintiff—is absurd.[75]

The uncertainty surrounding the criteria that apply to Title VII pleadings renders the doctrine unnavigable for courts and ineffective for plaintiffs. In trying to decipher how and when to apply the various standards, courts miss the bigger picture.[76] Therefore, a clear standard is necessary to effectively remedy the harm Title VII is intended to protect against.

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68. 997 F.3d 595.

69. *Id.* at 598.

70. *Id.* Olivarez received unpaid leave from September 2017 through mid-December 2017 and paid medical leave for the latter half of December 2017 to undergo egg preservation and a hysterectomy. *Id.* He requested an extension of leave through February 2018, which was granted, but a further extension of leave requested in March 2018 was denied. *Id.* T-Mobile fired Olivarez in April 2018. *Id.*

71. Olivarez v. T-Mobile USA, Inc., No. H-19-4452, 2020 WL 5269754 (S.D. Tex. Jun. 9, 2020), *aff'd*, 997 F.3d 595 (5th Cir. 2021). Olivarez's petition for writ of certiorari was denied. Olivarez v. T-Mobile USA, Inc., 142 S. Ct. 713 (2021) (mem.).

72. *Olivarez*, 997 F.3d at 599–600.

73. *Id.* at 600.

74. *Number of Employees of T-Mobile U.S. from 2013 to 2021*, Statista: Tech. & Telecomms. (Jan. 18, 2023), https://www.statista.com/statistics/483653/t-mobile-us-employees/ (reporting employment figures for 2021).

75. *See* Goldberg, *supra* note 57, at 738 ("[T]he mismatch between the comparator heuristic and today's work world helps make sense of why so many discrimination plaintiffs lose their cases.").

76. Sperino, *supra* note 65, at 269.

IV. A UNIFORM PLEADING STANDARD

Courts should adopt a new, uniform pleading standard for Title VII disparate treatment claims. To survive a motion to dismiss under Title VII, a plaintiff should be required to plead that (1) they endured an adverse employment action; (2) an individual with supervisory authority over the plaintiff took or caused the adverse employment action; (3) they have a protected trait; and (4) but for the protected trait, the individual with supervisory authority over the plaintiff would not have taken or caused the adverse action. A plaintiff must plead facts within this new standard sufficient to support an inference of plausible employment discrimination.

The standard proposed in this Note inserts two missing pieces into the *Swierkiewicz* framework to strengthen it as a pleading standard. As it exists, the *Swierkiewicz* standard requires a plaintiff to plead that they (1) suffered an adverse employment action (2) because of their protected trait.[77] In addition to these elements, the proposed standard first requires a plaintiff to allege that an individual with supervisory authority over the plaintiff in the workplace discriminated against them. This requirement establishes that the supervisor had the authority to make an employment decision adverse to the plaintiff and provides notice to the employer of the plaintiff's allegations against the supervisor, but does not overburden the plaintiff, who can readily access this information.

The second and most critical modification to the *Swierkiewicz* standard requires a plaintiff to show that, but for the protected trait, the supervisor would not have taken the action they did. Importantly, a plaintiff must not be required to present evidence of a comparator to establish this element. Instead, a plaintiff should be required to assert only the facts available to them to support an inference of discrimination. And the facts alleged by a plaintiff should be evaluated by a court on a case-by-case basis to determine their sufficiency to state a plausible claim.[78] This but-for requirement, a traditional disparate treatment principle,[79] certifies that a plaintiff can establish a causal relationship between their protected class and the adverse action strong enough to invoke Title VII protection. However, the mandate that courts explicitly abandon the comparator requirement ensures that a plaintiff need not overcome a prohibitive hurdle to survive a motion to dismiss.

Finally, this proposed approach requires a plaintiff to meet the plausibility standard established by *Twiqbal*. This last requirement clarifies how *Twiqbal* fits into the proposed pleading framework and serves as a bar against meritless claims by requiring a plaintiff to plead facts that move the needle from possible to plausible employment discrimination.

This new, clarified standard prevents plaintiffs with meritorious claims worthy of discovery from being denied the right to be heard merely because they cannot show comparator evidence. Moreover, the proposed standard presents a plaintiff with

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77. Swierkiewicz v. Sorema N. A., 534 U.S. 506, 514 (2002); *see also Olivarez*, 997 F.3d at 599–600.

78. *See Swierkiewicz*, 534 U.S. at 511–12 (rejecting the rigid *McDonnell Douglas* framework as a pleading requirement because establishing a prima facie case of employment discrimination varies based on context).

79. Katie Eyer, *The But-For Theory of Anti-Discrimination Law*, 107 Va. L. Rev. 1621, 1642 (2021).

the opportunity to use the information they possess in the early stages of litigation to craft a complaint that provides both the court and the employer with the facts sufficient to support an inference of discrimination under Title VII: who discriminated against the plaintiff and how.

Critics of this solution may fear that eliminating the comparator requirement will open the door to frivolous claims.[80] This concern is unwarranted. First, before a plaintiff can even bring a Title VII claim into court, the Equal Employment Opportunity Commission conducts a review to ensure that the plaintiff has reasonable cause for their claim.[81] Second, the plausibility requirement included in the proposed framework guards against frivolous claims by requiring the plaintiff to plead facts that make employment discrimination plausible, not just "conceivable."[82] Third, the Federal Rules of Civil Procedure impose sanctions on attorneys who bring frivolous claims,[83] while the Model Rules of Professional Conduct prohibit meritless lawsuits.[84] Thus, sufficient safeguards exist to prevent an onslaught of baseless claims from reaching courts.[85] As such, this proposed framework strikes a compromise between affording plaintiffs a fair pleading standard and ensuring that claims are valid—ultimately providing a unified way of pleading and evaluating Title VII claims.

V. CONCLUSION

The current doctrine for assessing Title VII claims is confusing for both plaintiffs and courts to navigate. *Swierkiewicz* attempted to resolve this confusion, but *Twombly* and *Iqbal* subsequently frustrated that attempt, rendering the *Swierkiewicz* standard weak. Consequently, many courts continue to require plaintiffs to plead the existence of a comparator at the beginning of litigation, which is often not only onerous but impossible, making Title VII ineffective.

Title VII aims to empower plaintiffs with a cause of action when they are faced with discrimination in the workplace. This purpose must not be saddled with confusing, even insurmountable, requirements. A clear, uniform pleading standard should be implemented, allowing plaintiffs to show they are entitled to relief under Title VII for employment discrimination. And in that pleading framework, comparator evidence should play no part.

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80. *See* Kourlis et al., *supra* note 15, at 264 (noting that "heightened pleading" is "motivated by a desire for gatekeeping").

81. Civil Rights Act of 1964 § 706(b), 42 U.S.C. § 2000e-5(b).

82. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

83. Fed. R. Civ. P. 11.

84. Model Rules of Pro. Conduct r. 3.1 (Am. Bar Ass'n 2020).

85. *See* Sandra F. Sperino & Suja A. Thomas, *Fakers and Floodgates*, 10 Stan. J.C.R. & C.L. 223, 224 (2014) ("Title VII was enacted in the presence of several existing devices that can be employed to stem any false claims and any related floodgates of litigation.").