

# Eleventh Circuit Clarifies Its ‘Similarly Situated’ Standard for Workplace Discrimination Claims

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The proper standard for comparator evidence in cases alleging intentional discrimination is “similarly situated in all material aspects,” the U.S. Court of Appeals for the Eleventh Circuit has clarified in an *en banc* ruling. [Lewis v. City of Union City, Ga.](#), No. 15-11362, 2019 U.S. App. LEXIS 8450 (11th Cir. Mar. 21, 2019).

The Eleventh Circuit (1) reiterated that a plaintiff who relies on indirect evidence to prove intentional discrimination must show that “similarly situated” employees received preferential treatment as part of her *prima facie* case, and (2) explained that “similarly situated” means “similarly situated in all material aspects.” This definition of “similarly situated” is similar to that used in the Second, Sixth, and Eighth Circuits, and supersedes the various previous standards applied by the Eleventh Circuit.

The Eleventh Circuit has jurisdiction over Alabama, Florida, and Georgia.

### Background

Jacqueline Lewis, an African-American with a documented heart-condition, was a detective with the Union City Police Department. In 2010, the Police Department announced a new policy requiring all officers to carry Tasers and that officers receive a five-second Taser shock. The Police Department also scheduled Lewis for pepper spray training.

Concerned about her heart health, Lewis submitted a note from her doctor that stated it was not safe to use a Taser or pepper spray on or near Lewis. Based on this note, the Police Chief deemed Lewis unable to perform the essential functions of her job and placed her on unpaid administrative leave until she could receive medical clearance.

Lewis exhausted her accrued leave, did not complete the necessary Family and Medical Leave Act paperwork, and was fired for taking unapproved leave. Lewis then sued the City and the Police Chief for race, gender, and disability discrimination.

In response to the City’s motion for summary judgment, Lewis presented indirect evidence of discrimination under the *McDonnell Douglas* burden-shifting method. She identified two white male detectives who failed physical fitness tests, but received more time to correct their failures. Lewis argued that the men were “similarly situated” to her, but were treated more favorably because of their race, gender, or disability status.

The U.S. District Court for the Northern District of Georgia rejected this comparison and held that the proffered comparators did not qualify as “similarly situated” under the “nearly identical” or the “same or similar” definitions previously articulated by the Eleventh Circuit.

On appeal, a three-judge panel of the Eleventh Circuit reversed, in part, and held that the two men were valid comparators. The Eleventh Circuit vacated the panel’s decision and

took the case to clarify the proper comparator standard in cases alleging intentional discrimination.

### Eleventh Circuit Opinion

The Eleventh Circuit first determined where in the *McDonnell Douglas* analysis courts should consider the comparator question. Under *McDonnell Douglas*, the plaintiff must present a *prima facie* case of intentional discrimination. If the defendant responds with a legitimate business explanation for taking the action in question, the burden then shifts to the plaintiff to demonstrate that the defendant's explanation is mere pretext. In this case, the Eleventh Circuit rejected the plaintiff's attempt to move the comparator analysis out of the *prima facie* stage and into the pretext analysis. It held that a "meaningful comparator analysis must remain part of the *prima facie* case."

Next, the Eleventh Circuit considered what the phrase "similarly situated" requires a plaintiff to show. The Court rejected the two standards used previously in the circuit. It found that (1) "nearly identical" was too strict, and (2) "same or similar" was too strict and too lenient, and therefore incoherent. Instead, the Court held that a plaintiff proceeding under *McDonnell Douglas* "must show that she and her comparators are 'similarly situated in all material respects.'"

### Similarly Situated In All Material Respects

Whether individuals are "similarly situated in all material respects" must be determined on a case-by-case basis. The Court provided some guidance, including:

- Comparators do not have to have precisely the same title;
- Minor differences in job function will not disqualify a would-be comparator;
- Comparators engaged in the same basic conduct (or misconduct) as the plaintiff;
- Comparators have been subject to the same employment policy, guideline, or rule as the plaintiff;
- Comparators, ordinarily, have been under the jurisdiction of the same supervisor as plaintiff; and
- Comparators share the plaintiff's employment or disciplinary history.

Applying this standard to the present case, the Court ruled that the two white male officers were not similarly situated "in all material respects" because they were placed on administrative leave pursuant to different personnel policies and for different medical conditions.

Please contact Jackson Lewis with any questions on the impact of the *Lewis* decision.

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