

## Proving Sex-Plus Discrimination through Comparator Evidence

Marc Chase McAllister\*

*This Article considers whether comparator evidence is required to prove sex-plus discrimination, an issue that has splintered courts. Unlike a pure sex discrimination claim, which alleges discrimination against males or females as a whole, a sex-plus claim alleges discrimination against only a particular subgroup of males or females, such as women with children, based on both the plaintiff's sex (e.g., female) and a "plus" factor (e.g., having children). Plaintiffs alleging sex-plus discrimination often attempt to prove their claims with one of two types of comparator proof. The first, referred to in this Article as "opposite sex comparator evidence," compares an employer's treatment of the plaintiff to persons of the opposite sex who share the same plus characteristic, such as evidence that an employer refuses to hire women with children but readily hires men with children. The second is "same sex comparator evidence," which instead shows how the employer treats persons of the same sex as the plaintiff who lack the plus characteristic at issue, such as evidence that an employer refuses to hire women with children but readily hires women without children. Some courts, including the Tenth Circuit Court of Appeals, have declared that sex-plus plaintiffs "can never be successful" without opposite sex comparator evidence, while other courts, including the Second Circuit Court of Appeals, have rejected this approach. After examining this split, this Article makes three claims regarding comparator proof in sex-plus cases. First, this Article argues that a lack of comparator evidence is not fatal to a sex-plus claim, as a plaintiff who lacks comparator proof may still prevail in other ways, including through direct evidence of discrimination. Second, this Article argues that in those instances when a sex-plus plaintiff attempts to prove her claim with comparator evidence, opposite sex comparator evidence is indeed a vital component because without proof that the sexes were treated differently, no inference of "sex"*

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\* Assistant Professor of Business Law, Texas State University. Before joining Texas State in 2017, McAllister taught evidence and various additional law school courses. His articles have been published in the *Boston College Law Review*, *Florida Law Review*, *Washington and Lee Law Review*, *Alabama Law Review*, and numerous additional journals.

*discrimination may arise. Finally, this Article argues that same sex comparator evidence remains relevant in proving a sex-plus claim, and that the strongest sex-plus claims are those that combine the two types of comparator proof.*

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## I. INTRODUCTION

Unlawful employment discrimination occurs when an employer treats an individual less favorably because of his or her protected characteristic, such as her race.<sup>1</sup> Not all unfair treatment by employers is unlawful.<sup>2</sup> Rather, discrimination laws prohibit discriminatory treatment based on certain designated characteristics.<sup>3</sup> Title VII of the Civil Rights Act of 1964, in particular, prohibits discrimination on the basis of “sex.”<sup>4</sup>

Because of the law’s equal employment opportunity objective,<sup>5</sup> the “central question in any employment-discrimination case is whether the employer would have taken the same action had the employee been of a different race[, sex, etc.,] and everything else had remained the same.”<sup>6</sup> For this reason, employment discrimination claims are often proven with evidence that the employer treated an employee in a protected class differently than those outside the employee’s protected class, such as where an employer promotes male but not equally-qualified female employees,<sup>7</sup>

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<sup>1</sup> *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) (describing the “central focus” in an employment discrimination case as “whether the employer is treating ‘some people less favorably than others because of their race, color, religion, sex, or national origin’”) (quoting *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977)); Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 198 (2009).

<sup>2</sup> See ELEVENTH CIR. PATTERN JURY INSTR. - CIV. § 4.5 (2019) (setting forth a standard jury instruction for Title VII discrimination claims stating that “[a]n employer may not discriminate against an employee because of the employee’s [race/religion/sex/national origin], but the employer may [discharge or decline to promote] an employee for any other reason, good or bad, fair or unfair”).

<sup>3</sup> See 42 U.S.C. § 2000e-2(a)(1) (2018) (making it unlawful for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin”); Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 623(a) (2018) (making it unlawful for an employer to discriminate on the basis of age); Americans With Disabilities Act of 1990 (ADA), 42 U.S.C. § 12112 (2018) (making it unlawful for an employer to discriminate on the basis of disability). Other significant federal statutes include the Genetic Information Nondiscrimination Act of 2008 (GINA), 42 U.S.C. § 2000ff-1(a) (2018), which prohibits discrimination on the basis of genetic information; the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2018), which states that Title VII’s prohibition against sex discrimination applies to discrimination on the basis of pregnancy; and the Rehabilitation Act of 1973 (Rehabilitation Act), Pub. L. 93-112, 87 Stat. 394 (codified as amended at 29 U.S.C. § 794 (2012)), which prohibits discrimination against federal government employees based on disabilities.

<sup>4</sup> See 42 U.S.C. § 2000e-2(a)(1).

<sup>5</sup> See *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (declaring that Title VII “requires that persons of like qualifications be given employment opportunities irrespective of their sex,” such that the statute does not permit “one hiring policy for women and another for men”).

<sup>6</sup> *Carson v. Bethlehem Steel Corp.*, 82 F.3d 157, 158 (7th Cir. 1996).

<sup>7</sup> See generally *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

or imposes different requirements on similar employees of different races.<sup>8</sup> Subgroup discrimination claims, by contrast, focus on the employer's treatment of one segment of a protected group, such as married women, rather than the group as a whole, such as all women (married or unmarried).<sup>9</sup>

Sex-plus discrimination is one form of subgroup discrimination.<sup>10</sup> In sex-plus discrimination scenarios, an employer does not discriminate against all members of a protected class.<sup>11</sup> Rather, the employer exercises a more specific sex-based animus targeting only a certain segment of males or females on the basis of the employee's sex and another "plus" factor, as when an employer treats women with children differently than men with children (usually due to the employer's stereotypical belief that such women, but not such men, will be bad employees).<sup>12</sup>

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<sup>8</sup> See, e.g., *Vazquez v. Caesar's Paradise Stream Resort*, No. 3:CV-09-0625, 2013 WL 6244568, at \*4–5 (M.D. Pa. Dec. 3, 2013) (explaining how the plaintiff, an African American employee, brought a successful race discrimination claim where she was fired for wearing her hair in braids while a white employee was not). See also Sullivan, *supra* note 1, at 200 n.42 (stating that "disparate treatment [discrimination] can rarely be established absent a baseline established by the employer's treatment of members of the opposite sex or a different race").

<sup>9</sup> See, e.g., *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971) (finding employer's no-marriage rule for stewardesses to violate Title VII, and declaring that Title VII "is not confined to explicit discriminations based 'solely' on sex," such that the statute encompasses "discrimination [that] adversely affects only a portion of the protected class"); *Jurinko v. Edwin L. Wiegand Co.*, 331 F. Supp. 1184, 1187 (W.D. Pa. 1971) (refusal to hire married women violated Title VII); *Rauw v. Glickman*, No. CV-99-1482-ST, 2001 WL 34039494, at \*8–9 (D. Or. Aug. 6, 2001) (authorizing a sex plus marital status claim under Title VII); *Gee-Thomas v. Cingular Wireless*, 324 F. Supp. 2d 875, 884, 888 (M.D. Tenn. 2004) (recognizing a sex-plus claim on the basis of sex plus marital and family status, but ultimately dismissing the plaintiff's claim because she failed to raise a genuine issue of material fact for trial on the issue of pretext).

<sup>10</sup> See *Coleman v. B–G Maint. Mgmt. of Colo., Inc.*, 108 F.3d 1199, 1203 (10th Cir. 1997) (recognizing that the "gender-plus" discrimination doctrine prohibits discrimination not against women in general, but against subclasses of women).

<sup>11</sup> See *King v. Ferguson Enter., Inc.*, 971 F. Supp. 2d 1200, 1209 (N.D. Ga. 2013) ("To succeed on a gender-plus claim, plaintiffs need not establish that their employer discriminated against the entire class of men or women; instead, they need only establish that their employer treated a subclass of men or women (those with the plus characteristic) differently from those without the plus characteristic."), *aff'd*, 568 F. App'x 686 (11th Cir. 2014).

<sup>12</sup> See *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544–45 (1971) (Marshall, J., concurring). See also *Fisher v. Vassar Coll.*, 70 F.3d 1420, 1433 (2d Cir. 1995) (noting that in *Phillips*, "[t]he Supreme Court . . . adopted the proposition that sex considered in conjunction with a second characteristic—'sex plus'—can delineate a 'protected group' and can therefore serve as the basis for a Title VII suit"), *aff'd en banc*, 114 F.3d 1332 (2d Cir. 1997); *Chadwick v. WellPoint, Inc.*, 561 F.3d 38, 45 (1st Cir. 2009) (discussing sex-plus discrimination and concluding that, under Title VII, "an employer is not free to assume that a woman, because she is a woman, will necessarily be a poor worker because of family responsibilities;" rather, "[t]he essence of Title VII in this context is that women have the

Because sex-plus discrimination is simply one type of “sex” discrimination,<sup>13</sup> courts have recognized that a sex-plus discrimination plaintiff must prove, at a minimum, that the sexes were treated differently.<sup>14</sup> And one common method of proving sex discrimination—whether for a pure sex discrimination claim or a sex-plus claim—is through comparator evidence.<sup>15</sup> When such comparator evidence is used to prove a sex-plus claim, however, courts are split over whether the proper comparator *must* be a person of the *opposite sex* as the plaintiff who shares the same plus characteristic (referred to in this Article as “opposite sex comparator evidence”), or whether a plaintiff may instead prevail with evidence regarding a comparator employee of the *same sex* as the plaintiff who lacks the “plus” characteristic at issue (referred to in this Article as “same sex comparator evidence”).<sup>16</sup>

After examining leading sex-plus cases, this Article presents a series of proposals regarding the proper role of comparator evidence in such cases. First, this Article argues that a lack of comparator evidence is not fatal to a sex-plus claim, as a plaintiff who lacks comparator proof may still prevail in other ways, including through direct evidence of discrimination. Second, this Article argues that for any sex-plus claim *proven through comparator evidence*, opposite sex comparator evidence is indeed an essential component. Such comparator evidence is required, this Article contends, because evidence regarding an employer’s more favorable

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right to prove their mettle in the work arena without the burden of stereotypes regarding whether they can fulfill their responsibilities”); *Smith v. AVSC Int’l, Inc.*, 148 F. Supp. 2d 302, 308 (S.D.N.Y. 2001) (stating that the “sex plus” theory “recognizes that it is impermissible to treat men with an additional characteristic more or less favorably than women with the same additional characteristic”).

<sup>13</sup> See 42 U.S.C. § 2000e-2(a)(1) (2018) (making it unlawful for an employer “to . . . discriminate against any individual . . . because of such individual’s . . . sex”) (emphasis added).

<sup>14</sup> See *DeAngelo v. DentalEZ, Inc.*, 738 F. Supp. 2d 572, 584 (E.D. Pa. 2010) (recognizing that, “[a]t its root, . . . ‘sex-plus’ discrimination is simply a form of gender discrimination,” requiring the plaintiff to present sufficient evidence of sex discrimination); *King*, 971 F. Supp. 2d at 1209 (“Despite its name, the ultimate question in these cases ‘is whether the employer took an adverse employment action at least in part because of an employee’s sex.’”).

<sup>15</sup> See, e.g., *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 345 (7th Cir. 2017) (on a claim of sexual orientation discrimination, employing “the tried-and-true comparative method in which we attempt to isolate the significance of the plaintiff’s sex to the employer’s decision: has she described a situation in which, holding all other things constant and changing only her sex, she would have been treated the same way?”). See generally Suzanne B. Goldberg, *Discrimination by Comparison*, 120 *Yale L.J.* 728, 744-45 (2011) (noting that “comparators have emerged as the predominant methodological device for evaluating discrimination claims”).

<sup>16</sup> See *Philipson v. Univ. of Mich. Bd. of Regents*, No. 06-CV-11977-DT, 2007 WL 907822, at \*6–7 (E.D. Mich. Mar. 22, 2007) (discussing this split among courts).

treatment of an opposite sex comparator is needed to prove that the plaintiff's sex played a factor in the employer's decision, without which there can be no actionable claim of "sex" discrimination.<sup>17</sup> Third, and relatedly, this Article contends that same sex comparator evidence *alone* cannot raise an inference of sex discrimination because such evidence, while useful, does not show how the employer treats members of the opposite sex, without which no inference of sex discrimination may arise.<sup>18</sup> Finally, this Article argues that same sex comparator evidence is nevertheless relevant and plays an important role in proving sex-plus discrimination—namely, to show that the employer does not engage in sex discrimination across-the-board, but rather employs a more specific sex-based animus targeting only a particular subgroup of males or females.<sup>19</sup> For this reason, this Article contends that the strongest sex-plus claims are those where the two types of comparator evidence are used in tandem.<sup>20</sup>

Take, for example, the facts of *Phillips v. Martin Marietta Corporation*, a United States Supreme Court case often cited as establishing the sex-plus discrimination doctrine.<sup>21</sup> In that case, the Court considered an employer's policy of refusing to employ women, but not men, with pre-school aged children.<sup>22</sup> In sex-plus terms, *Phillips* involves an allegation that the employer discriminated against the plaintiff, a female with children, on the basis of both her sex (female) and the plus characteristic of having pre-school aged children. For such a claim, the relevant opposite sex comparator is a male with pre-school aged children. Evidence that an employer treats such an opposite sex comparator more favorably than the plaintiff could be used, as *Phillips* declared, as proof that the employer utilizes "one hiring policy for women and another for men,"<sup>23</sup> hence, that sex discrimination has occurred.<sup>24</sup> Because such opposite sex

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<sup>17</sup> See *Fisher*, 70 F.3d at 1446 (rejecting sex-plus claim for lack of opposite gender comparator evidence, and stating that "[t]o establish that Vassar discriminated on the basis of sex plus marital status, plaintiff must show that married *men* were treated differently from married *women*") (emphasis in original), *aff'd en banc*, 114 F.3d 1332 (2d Cir. 1997).

<sup>18</sup> See *id.* at 1446–47. See also *Coleman v. B-G Maint. Mgmt. of Colo., Inc.*, 108 F.3d 1199, 1202–05 (10th Cir. 1997) (in sex-plus-marital status claim, ruling that a female plaintiff must show that her male co-workers with the same marital status were treated differently, and reversing jury verdict for the plaintiff due to a lack of evidence on that point).

<sup>19</sup> *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971).

<sup>20</sup> See *infra* Part VI.

<sup>21</sup> *Phillips*, 400 U.S. 542 (1971).

<sup>22</sup> *Id.* at 544.

<sup>23</sup> *Id.*

<sup>24</sup> See *id.* (explaining that Title VII "requires that persons of like qualifications be given employment opportunities irrespective of their sex," a principle violated by the employer's use of one hiring policy for men and another for women). See also *Smith v. AVSC Int'l, Inc.*, 148 F. Supp. 2d 302, 308 (S.D.N.Y. 2001) (stating that the "sex plus" theory

comparator evidence directly exposes the employer's differential treatment of the sexes, albeit at the subgroup level, this is the most persuasive type of comparator evidence a plaintiff can invoke in a sex-plus case. This is not to suggest, however, that intra-group comparisons are not also relevant. Recall that in a sex-plus case, the plaintiff does *not* allege that her employer harbors discriminatory animus against women as a whole; rather, she alleges a more specific sex-based animus targeting only a particular segment of females. Such targeted animus can be exposed with evidence that an employer treats *women with children* less favorably than it treats either (a) men with children or (b) women without children, usually due to the employer's stereotypical belief that women with children, but not these comparator subgroups, will be unreliable employees.<sup>25</sup> For this reason, courts have found that a sex-plus plaintiff may establish a prima facie case of discrimination in part based on evidence that she was rejected in favor of a member of the same sex without the relevant plus characteristic.<sup>26</sup>

Before examining the role of comparator evidence in sex-plus cases, Part II of this Article sets forth the general framework for analyzing pure sex discrimination claims under Title VII. Part III then turns to sex-plus discrimination claims, and provides examples where the doctrine has been applied by courts. Part IV summarizes cases requiring sex-plus discrimination claims to be proven with opposite sex comparator evidence. Turning to same sex comparator evidence, Part V reviews cases either rejecting the purported requirement of opposite sex comparator evidence or permitting a sex-plus plaintiff to prove her claim through same sex comparator evidence. Finally, Part VI argues that opposite sex comparator evidence is indeed required to prove sex-plus discrimination through comparator evidence, and that the strongest sex-plus claims are those where both opposite sex and same sex comparator evidence are used in tandem. In addition, Part VI argues that comparator evidence is just one means of proving a sex-plus discrimination claim, and that a plaintiff who lacks opposite sex comparator evidence may still prevail through other evidentiary methods. Part VII concludes.

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"recognizes that it is impermissible to treat men with an additional characteristic more or less favorably than women with the same additional characteristic").

<sup>25</sup> See *Trezza v. Hartford, Inc.*, No. 98 CIV. 2205(MBM), 1998 WL 912101, at \*5–6 (S.D.N.Y. Dec. 30, 1998) (rejecting the defendant's argument that the plaintiff, a female with children, could not prove sex discrimination because another woman, one without children, received the promotion over the plaintiff).

<sup>26</sup> See, e.g., *McGrenaghan v. St. Denis Sch.*, 979 F. Supp. 323, 326–27 (E.D. Pa. 1997) (finding that a teacher could maintain a Title VII sex discrimination claim as a member of a subclass of women with disabled children, and rejecting the defendant's argument that her claim must fail because the person selected for the position over the plaintiff was also a woman, albeit one without a disabled child).

## II. GENERAL FRAMEWORK FOR ANALYZING DISPARATE TREATMENT DISCRIMINATION CLAIMS

Employment discrimination statutes prohibit an employer from discriminating against individuals on the basis of certain protected characteristics, such as race or sex.<sup>27</sup> Determining exactly how a plaintiff should go about proving employment discrimination has proven difficult for courts and scholars, which have adopted or advanced a variety of evidentiary approaches and frameworks.<sup>28</sup> Although this Article does not attempt to resolve these various approaches and frameworks, it does identify the relevant judicial constructs that may be applied to the sex-plus discrimination scenario.

Regardless of the protected characteristic at issue, victims of employment discrimination usually pursue one of four types of claims: disparate treatment,<sup>29</sup> disparate impact,<sup>30</sup> harassment,<sup>31</sup> or retaliation.<sup>32</sup> The first type of claim, disparate treatment, is used to prove intentional acts of discrimination,<sup>33</sup> where the use of comparator evidence is prevalent.<sup>34</sup>

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<sup>27</sup> See *supra* note 2.

<sup>28</sup> See Martin J. Katz, *Reclaiming McDonnell Douglas*, 83 NOTRE DAME L. REV. 109, 159–68 (2007) (describing numerous circuit splits and various debates that have “plagued” employment discrimination law); see also *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 852–54 (9th Cir. 2002) (describing one circuit split regarding the nature of “direct” evidence), *aff’d*, 539 U.S. 90 (2003); *Ortiz v. Werner Enter., Inc.*, 834 F.3d 760 (7th Cir. 2016) (attempting to clarify the proof requirements for Title VII claims).

<sup>29</sup> See, e.g., *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 985–86 (1988).

<sup>30</sup> See, e.g., *Smith v. City of Jackson*, 544 U.S. 228, 240 (2005) (authorizing disparate impact claims under the ADEA); *Griggs v. Duke Power*, 401 U.S. 424, 430–31 (1971) (authorizing disparate impact claims under Title VII).

<sup>31</sup> See, e.g., *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986) (authorizing sexual harassment claims under Title VII); *Rickard v. Swedish Match N. Am., Inc.*, 773 F.3d 181, 184–85 (8th Cir. 2014) (discussing workplace harassment claims based on either sex or age).

<sup>32</sup> See, e.g., 42 U.S.C. § 2000e-3 (2018) (making it unlawful under Title VII “for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter”); 29 U.S.C. § 623(d) (2018) (making it unlawful under the ADEA “for an employer to discriminate against any of his employees or applicants for employment . . . because such individual . . . has opposed any practice made unlawful by [the ADEA], or because such individual . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter”).

<sup>33</sup> *Watson*, 487 U.S. at 986–87; see also *Equal Emp’t Opportunity Comm’n v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1024 (11th Cir. 2016) (explaining that the disparate treatment and disparate impact theories of discrimination “are not interchangeable” and that “courts must be careful to distinguish between the[m]”); *id.* (noting that “[t]o prevail on a disparate treatment claim, a Title VII plaintiff must demonstrate that an employer intentionally discriminated against her on the basis of a protected characteristic,” whereas “a disparate impact claim does not require proof of

Disparate impact claims, by contrast, focus on the discriminatory *effect* of an employer's seemingly neutral practice, procedure, or test, and do not require a plaintiff to prove discriminatory intent.<sup>35</sup> Although all four types of claims are generally available across federal employment discrimination statutes, this Article focuses on disparate treatment claims, which are most commonly used to prove sex-plus discrimination.<sup>36</sup>

Whether a plaintiff will ultimately prevail on a disparate treatment discrimination claim depends somewhat on whether the case involves a "single motive" or "mixed motive" claim.<sup>37</sup> For a mixed motive claim, a plaintiff may prevail if she can demonstrate that the adverse employment action she experienced was motivated by both permissible and forbidden reasons—in other words, by proving that her gender was "a motivating factor" in the employer's decision, rather than "the sole motivating factor."<sup>38</sup> In a mixed motive claim, however, the employer may present the affirmative defense that it "would have taken the same action in the absence of the impermissible motivating factor."<sup>39</sup> While this defense does not completely absolve the employer of liability, it may limit the plaintiff's available remedies by precluding, among other things, money damages.<sup>40</sup>

In a "single motive" claim, by contrast, a plaintiff must prove by a preponderance of evidence that the employer's "true" motive was discriminatory, which, unlike mixed motive claims, allows the plaintiff to

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discriminatory intent" and instead "targets an employment practice that has an actual, though not necessarily deliberate, adverse impact on protected groups").

<sup>34</sup> See Sullivan, *supra* note 1, at 202–09 (discussing the use of comparator evidence in disparate treatment cases).

<sup>35</sup> See *Griggs*, 401 U.S. at 429–30.

<sup>36</sup> See, e.g., *Fuller v. GTE Corp./Contel Cellular, Inc.*, 926 F. Supp. 653, 656 (M.D. Tenn. 1996) (describing the plaintiff's Title VII claim as one alleging "disparate treatment because of [plaintiff's] gender and her status as a mother with young children").

<sup>37</sup> See *Connelly v. Lane Const. Corp.*, 809 F.3d 780, 787 (3d Cir. 2016) ("[I]n a 'mixed-motive' case a plaintiff claims that an employment decision was based on both legitimate and illegitimate reasons. Such cases are in contrast to so-called 'pretext' cases, in which a plaintiff claims that an employer's stated justification for an employment decision is false.>").

<sup>38</sup> *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 284 (4th Cir. 2004). This requirement derives from 42 U.S.C. § 2000e-2(m), which states that "an unlawful employment practice [under Title VII] 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) (2018). See also *Hill*, 354 F.3d at 284.

<sup>39</sup> 42 U.S.C. § 2000e-5(g)(2)(B).

<sup>40</sup> See 42 U.S.C. § 2000e-5(g)(2)(B) (clarifying that a successful affirmative defense limits the available remedies to declaratory relief, injunctive relief, "and attorney's fees and costs"); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 348–49 (2013) (discussing the distinction between the employer's original defense pertaining to liability, and its current defense pertaining to the plaintiff's remedies).

obtain money damages.<sup>41</sup> Unlike a mixed motive claim, then, the critical issue in a single motive claim is whether a legal or illegal motive, but not both, prompted the employer's action.<sup>42</sup>

Regardless of whether a plaintiff pursues a single or mixed motive claim, the plaintiff may prove her employer's discriminatory intent with either direct or circumstantial evidence.<sup>43</sup> Direct evidence of discriminatory intent has been defined as "evidence which, if believed . . . does not require a factfinder to draw any inferences in order to conclude that the challenged employment action was motivated at least in part by prejudice against members of the protected group."<sup>44</sup> Direct evidence would include, for example, "a facially discriminatory employment policy or a corporate decision maker's express statement of a desire to remove employees in the protected group."<sup>45</sup>

When there is no direct evidence of discriminatory intent in a single motive claim, the type of claim most commonly asserted in a sex-plus case,<sup>46</sup> courts have traditionally employed the burden-shifting framework of *McDonnell Douglas v. Green*<sup>47</sup> to determine whether there is sufficient circumstantial evidence to prove discriminatory intent.<sup>48</sup> Because direct

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<sup>41</sup> See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507–08 (1993).

<sup>42</sup> See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 260 (1989) (White, J., concurring) (citations omitted) (explaining that in single-motive cases "the issue is whether either illegal or legal motives, but not both, were the 'true' motives behind the decision," whereas in mixed-motive cases, "there is no one 'true' motive behind the decision," which is "[i]nstead . . . a result of multiple factors, at least one of which is legitimate").

<sup>43</sup> See *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101–02 (2003) (interpreting Title VII to allow plaintiffs to bring mixed-motive discrimination claims based solely on circumstantial evidence).

<sup>44</sup> *Johnson v. Kroger Co.*, 319 F.3d 858, 865 (6th Cir. 2003). See also *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 958 (5th Cir. 1993) (defining direct evidence as "evidence which, if believed, would prove the existence of a fact (i.e., unlawful discrimination) without any inferences or presumptions").

<sup>45</sup> *Nguyen v. City of Cleveland*, 229 F.3d 559, 563 (6th Cir. 2000).

<sup>46</sup> See, e.g., *Fisher v. Vassar Coll.*, 70 F.3d 1420, 1432 (2d Cir. 1995) (noting that the plaintiff's sex-plus-marital status claim is not a mixed-motive case), *aff'd en banc*, 114 F.3d 1332 (2d Cir. 1997).

<sup>47</sup> 411 U.S. 792 (1973).

<sup>48</sup> See *Williams v. Zurz*, 503 F. App'x 367, 374–75 (6th Cir. 2012) ("In cases involving circumstantial evidence, this Circuit has long applied the . . . *McDonnell Douglas* framework."); *King v. Ferguson Enters., Inc.*, 971 F. Supp. 2d 1200, 1210 (N.D. Ga. 2013) (stating that "[i]n the Eleventh Circuit, sex-discrimination claims based on circumstantial evidence are analyzed under the burden-shifting framework established in *McDonnell Douglas* . . ."), *aff'd*, 568 F. App'x 686 (11th Cir. 2014); *Fuller v. GTE Corp./Contel Cellular, Inc.*, 926 F. Supp. 653, 656 (M.D. Tenn. 1996) (stating that "[t]he *McDonnell Douglas* formula is inapplicable to cases in which the Title VII plaintiff presents credible, direct evidence of discriminatory animus"); *Jordan v. Radiology Imaging Assocs.*, 577 F. Supp. 2d 771, 785 (D. Md. 2008) (noting that in the absence of direct evidence of discrimination, the court would apply the *McDonnell Douglas* framework to analyze the

evidence is hard to come by, the *McDonnell Douglas* test is often applied.<sup>49</sup>

The *McDonnell Douglas* test first requires a plaintiff to present evidence of a prima facie case of discrimination.<sup>50</sup> The precise requirements of the prima facie case vary<sup>51</sup> depending on the type of adverse employment action at issue.<sup>52</sup> In the hiring context, for example, the plaintiff must show not only that he belongs to a protected class, but also that he applied and was qualified for an available job; that he was rejected, despite his qualifications; and that, after his rejection, the position remained open and the employer continued to seek applicants from persons of the complainant's qualifications.<sup>53</sup>

If a plaintiff establishes a prima facie case of discrimination, a rebuttable presumption of unlawful discrimination arises.<sup>54</sup> The burden then shifts to the employer to produce evidence of a "legitimate, nondiscriminatory reason" for its adverse employment action, which it must do to avoid liability.<sup>55</sup> If the defendant carries its burden, the presumption of unlawful discrimination is rebutted, and the burden then shifts back to the plaintiff to prove that the defendant's nondiscriminatory explanation is pretextual and that the employer was more likely motivated

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plaintiff's sex-plus claim); *Philipsen v. Univ. of Mich. Bd. of Regents*, No. 06-CV-11977-DT, 2007 WL 907822, at \*6 (E.D. Mich. Mar. 22, 2007) (applying the *McDonnell Douglas* test after finding that a sex-plus plaintiff had failed to produce direct evidence of discrimination). See also *Katz*, *supra* note 28, at 124–25 (explaining that the *McDonnell Douglas* test provides another avenue, beyond direct evidence, for plaintiffs to prove that the adverse employment action at issue occurred "because of" the plaintiff's protected characteristic, namely, by casting doubt on the employer's explanation in an effort to prove the employer's explanation was a cover-up for discrimination).

<sup>49</sup> See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring) (stating that "the entire purpose of the *McDonnell Douglas* prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by"). See also *Katz*, *supra* note 28, at 120 (noting that the "*McDonnell Douglas* [test] remains firmly entrenched in disparate treatment law").

<sup>50</sup> *McDonnell Douglas Corp.*, 411 U.S. at 802.

<sup>51</sup> See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (noting that "the precise requirements of the prima facie case can vary with the context and were 'never intended to be rigid, mechanized, or ritualistic'" (citation omitted)).

<sup>52</sup> See *Crawford v. Carroll*, 529 F.3d 961, 970–71 (11th Cir. 2008) (describing an "adverse employment action" under Title VII as "a serious and material change in the terms, conditions, or privileges of employment"); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 575–76 (6th Cir. 2004) (defining an "adverse employment action" under Title VII as a "materially adverse change in the terms and conditions of [plaintiff's] employment," and finding that a

twenty-four-hour suspension, which was the equivalent of three eight-hour days, could constitute an adverse employment action).

<sup>53</sup> *McDonnell Douglas Corp.*, 411 U.S. at 802.

<sup>54</sup> *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 (1983).

<sup>55</sup> *McDonnell Douglas Corp.*, 411 U.S. at 802.

by discriminatory intent.<sup>56</sup> Thus, although the burden of production shifts back and forth, the burden of persuading the factfinder that the defendant intentionally discriminated against the plaintiff remains “at all times with the plaintiff.”<sup>57</sup>

By ultimately requiring the plaintiff to prove that discriminatory intent is the more likely explanation for the employer’s action, as opposed to one possible motivation,<sup>58</sup> the *McDonnell Douglas* burden-shifting analysis is generally thought to be distinct from the motivating factor framework employed in mixed motive cases,<sup>59</sup> and is typically more difficult for a

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<sup>56</sup> *Id.* at 804; *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 507–08 (1993). *See also* *Fisher v. Vassar Coll.*, 70 F.3d 1420, 1433 (2d Cir. 1995) (recognizing that it is not enough for a plaintiff to show that the defendant’s non-discriminatory explanation is pretextual; rather, the plaintiff must also prove that discrimination was the true motive for the decision), *aff’d en banc*, 114 F.3d 1332 (2d Cir. 1997); *id.* at 1448 (finding the plaintiff proved pretext, but failed to prove that sex discrimination was the employer’s true motive); *id.* at 1437 (stating that “our ruling on pretext does not require as a corollary that we affirm the ultimate finding on discrimination”). *But see* *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 147–48 (2000) (clarifying that the evidence of discrimination put forth in the plaintiff’s prima facie case, combined with the evidence that the employer’s asserted justification is false, “may [be alone sufficient to] permit the trier of fact to conclude that the employer unlawfully discriminated”).

<sup>57</sup> *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

<sup>58</sup> *See Hicks*, 509 U.S. at 506–07.

<sup>59</sup> *See Chadwick v. WellPoint, Inc.*, 561 F.3d 38, 45 (1st Cir. 2009) (explaining that the plaintiff “presses her claim under two separate . . . theories,” the first a “mixed motives” claim under *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), and the second “a traditional discrimination claim under the familiar *McDonnell Douglas* burden shifting scheme”); *Connelly v. Lane Const. Corp.*, 809 F.3d 780, 787 (3d Cir. 2016) (“A Title VII plaintiff may make a claim for discrimination ‘under either the pretext theory set forth in *McDonnell Douglas Corp. v. Green*, . . . or the mixed-motive theory . . . under which a plaintiff may show that an employment decision was made based on both legitimate and illegitimate reasons.”) (citation omitted); *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 284–85 (4th Cir. 2004) (noting that a plaintiff may “establish a claim for intentional sex . . . discrimination through two avenues of proof,” first, under a mixed-motive theory, “by demonstrating through direct or circumstantial evidence that sex . . . discrimination motivated the employer’s adverse employment decision,” and second, “under a ‘pretext’ framework, . . . [by] demonstrate[ing] that the employer’s proffered permissible reason for taking an adverse employment action is actually a pretext for discrimination”); *Criner v. Tex.-N.M. Power Co.*, 470 F. App’x 364, 369 (5th Cir. 2012) (stating that because the plaintiff “did not adequately press a mixed-motive argument before the district court,” the district court correctly applied the *McDonnell Douglas* pretext analysis to her Title VII discrimination claims); *Hashem-Younes v. Danou Enters. Inc.*, 311 F. App’x 777, 779 (6th Cir. 2009) (affirming district court’s application of the *McDonnell Douglas* framework where the plaintiff failed to raise a mixed-motive claim in her complaint or in her response to the defendant’s summary judgment motion); *Bird v. W. Valley City*, 832 F.3d 1188, 1200 n.6 (10th Cir. 2016) (“Plaintiff does not argue . . . that [her employer] had ‘mixed motives’ when firing her, and she thus does not contend that illegal gender discrimination played [only] a ‘motivating part’ in the employment decision. For this reason, we utilize the *McDonnell Douglas* burden-shifting framework alone in analyzing her attempt to prove illegal gender discrimination.”) (internal marks and citations omitted); *Fye v. Okla. Corp. Comm’n*, 516 F.3d 1217, 1225 (10th Cir. 2008) (noting that courts do not employ the

plaintiff to meet.<sup>60</sup> In addition, a court's analysis under *McDonnell Douglas* often boils down to whether the plaintiff has produced sufficient evidence of pretext, an analysis that may hinge on comparator proof.<sup>61</sup> Although the pretext requirement can be stated in various ways, essentially it requires the plaintiff to prove that the employer's proffered legitimate explanation is "unworthy of credence,"<sup>62</sup> and was not the actual reason for its employment action, but instead a fabrication to conceal the employer's true, illegal motive.<sup>63</sup> Such a showing can be made when a plaintiff demonstrates that the employer's explanation should not be believed "because it has no basis in fact," or when the plaintiff simply persuades the court that a prohibited reason more likely motivated the employer.<sup>64</sup> As one court declared, "[t]he more idiosyncratic or questionable the employer's reason, the easier it will be to expose as a pretext, if indeed it is one."<sup>65</sup>

In sum, when a plaintiff relies on circumstantial evidence to prove intentional discrimination for a single motive claim, the type of claim most commonly asserted in a sex-plus case,<sup>66</sup> the plaintiff must typically satisfy the *McDonnell Douglas* burden-shifting test to avoid dismissal of her

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*McDonnell Douglas* framework in mixed-motives claims).

<sup>60</sup> See *Harrison v. Belk, Inc.*, 748 F. App'x 936, 941 n.1 (11th Cir. 2018) (describing the *McDonnell Douglas* test as a "more burdensome standard" as compared to the "mixed-motives" standard).

<sup>61</sup> See *Sullivan*, *supra* note 1, at 206 (noting that courts often look to comparator proof at the pretext stage, where "the absence of a comparator is often fatal to the claim"); *id.* at 208 n.72 (citing cases illustrating that discrimination plaintiffs tend to lose when they fail to generate relevant comparator proof). See, e.g., *Sherman v. Am. Cyanamid Co.*, 188 F.3d 509 (6th Cir. 1999) (rejecting the plaintiff's sex and sex-plus-age discrimination claims based on her inability to prove pretext); *cf. Fisher*, 70 F.3d at 1434–48 (rejecting the plaintiff's sex-plus-marital status claim based on insufficient evidence to prove that plaintiff's tenure denial was ultimately the result of discrimination, even though the plaintiff had proven pretext), *aff'd en banc*, 114 F.3d 1332 (2d Cir. 1997).

<sup>62</sup> *Burdine*, 450 U.S. at 256.

<sup>63</sup> *Chen v. Dow Chem. Co.*, 580 F.3d 394, 400 (6th Cir. 2009). See also *Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1175 (7th Cir. 2002) (defining pretext as "a lie, specifically a phony reason for some action"); *Burdine*, 450 U.S. at 256 (stating that at the pretext stage, the plaintiff "now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision," a burden that "now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination").

<sup>64</sup> *Torgerson v. City of Rochester*, 643 F.3d 1031, 1047 (8th Cir. 2011) ("There are at least two ways a plaintiff may demonstrate a material question of fact regarding pretext. A plaintiff may show that the employer's explanation is 'unworthy of credence . . . because it has no basis in fact.' Alternatively, a plaintiff may show pretext 'by persuading the court that a [prohibited] reason more likely motivated the employer.'").

<sup>65</sup> *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1012 n.6 (1st Cir. 1979).

<sup>66</sup> See, e.g., *Fisher v. Vassar Coll.*, 70 F.3d 1420, 1432 (2d Cir. 1995) (noting that the plaintiff's sex-plus-marital status claim is not a mixed-motive case), *aff'd en banc*, 114 F.3d 1332 (2d Cir. 1997).

claim.<sup>67</sup> A court's analysis under *McDonnell Douglas* often boils down to whether the plaintiff can show that her employer's stated legitimate reason for its employment action was pretextual and that the employer was more likely motivated by discriminatory intent, which will often hinge on comparator evidence.<sup>68</sup> If a plaintiff survives the *McDonnell Douglas* analysis and avoids summary judgment, the employer's true motivation would then become the primary issue at trial.<sup>69</sup> With these general principles in mind, this Article now considers the specific sex-plus discrimination scenario.

### III. SEX-PLUS DISCRIMINATION

Under the sex-plus discrimination doctrine, a plaintiff, often female, may bring a Title VII claim for sex discrimination if she can show that her employer discriminated against her not because of her sex per se, but because of the combination of her sex plus some additional factor, such as having young children.<sup>70</sup> As courts have developed the doctrine, the "plus" factor in a sex-plus case must pertain either to an immutable characteristic or the exercise of a fundamental right.<sup>71</sup> This section examines these two

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<sup>67</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

<sup>68</sup> *Compare* *Philipsen v. Univ. of Mich. Bd. of Regents*, No. 06-CV-11977-DT, 2007 WL 907822, at \*6–9 (E.D. Mich. Mar. 22, 2007) (applying the *McDonnell Douglas* test and granting summary judgment to the defendant on sex-plus claim due to a lack of evidence that the plaintiff was treated differently than males with young children), *with* *Stalter v. Wal-Mart Stores, Inc.*, 195 F.3d 285, 289–90 (7th Cir. 1999) (in a race discrimination claim, finding the plaintiff's evidence of pretext "more than sufficient evidence to impugn the genuineness of Wal-Mart's motives," in part due to evidence that the plaintiff's employer provided more lenient treatment to a similarly situated Caucasian employee who committed a similar act).

<sup>69</sup> *See* *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 855 (9th Cir. 2002) (explaining that the *McDonnell Douglas* "legal proof structure is a tool to assist plaintiffs at the summary judgment stage so that they may reach trial"), *aff'd*, 539 U.S. 90 (2003); *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (noting that the plaintiff bears "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff"). *See also* *Dudley v. Wal-Mart Stores, Inc.*, 166 F.3d 1317, 1322 (11th Cir. 1999) (declaring that "it is unnecessary and inappropriate to instruct the jury on the *McDonnell Douglas* analysis"); *Costa*, 299 F.3d at 855 (same); *Palmer v. Bd. of Regents of Univ. Sys. of Ga.*, 208 F.3d 969, 974 (11th Cir. 2000) (declaring that although phrases such as "prima facie case" or "burden of production" should not be explained to a jury, the plaintiff still "bears the ultimate burden of proving that discriminatory animus was a determinative factor in the adverse employment decision").

<sup>70</sup> *See* *Franchina v. City of Providence*, 881 F.3d 32, 54 (1st Cir. 2018) (recognizing that in sex-plus claims, "the simple question posed . . . is whether the employer took an adverse employment action at least in part because of an employee's sex," and applying the sex-plus theory to plaintiffs who were allegedly discriminated against at least in part because of their gender where the "plus-factor" is sexual orientation) (alteration in original).

<sup>71</sup> *Jefferies v. Harris Cty. Cmty. Action Ass'n*, 615 F.2d 1025, 1033 (5th Cir. 1980). The sex-plus theory of discrimination does not apply when the "plus" factor at issue does not involve an immutable characteristic, such as race or national origin, or a constitutionally

types of sex-plus discrimination claims.

A. *Sex Plus Discrimination Claims Involving a Fundamental Right*

The United States Supreme Court first ratified the notion that Title VII could be violated by an employer's discriminatory treatment of a subclass of women in *Phillips v. Martin Marietta Corporation*.<sup>72</sup> In *Phillips*, the Court declared that sex discrimination may occur through an employer's policy of refusing to employ women, but not men, with pre-school aged children.<sup>73</sup>

Just as importantly, *Phillips* established that when an employer discriminates against a particular subgroup of women, such as women with children, the employer may not defend its actions with evidence that it does not discriminate against women on the whole.<sup>74</sup> The Court thus deemed it irrelevant that at least seventy-five percent of the persons hired for the position at issue were women, albeit those without children, given that discrimination had occurred against a specific subgroup of women—i.e., those with young children.<sup>75</sup> As such, although the *Phillips* defendant had attempted to show that no sex discrimination had occurred with what this Article refers to as “same sex comparator evidence,” this evidence actually had the opposite effect. Rather than disproving the plaintiff's claim, this evidence in fact highlighted the employer's unique stereotypical biases against the particular subgroup of women to which the plaintiff belonged, thereby demonstrating its relevance.

In another case involving a sex-plus discrimination claim with a “plus” characteristic involving a fundamental right, *McGrenaghan v. St. Denis School*, the United States District Court for the Eastern District of Pennsylvania ruled that a teacher could maintain a Title VII sex discrimination claim as a member of a subclass of women with disabled children.<sup>76</sup> There, the court found evidence of discriminatory animus against mothers with disabled children, including direct evidence of discriminatory animus by the school's principal.<sup>77</sup> Similar to *Phillips*, the

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protected fundamental right, such as marriage or child rearing. *See id.* at 1033–34. For example, courts have rejected sex-plus discrimination claims in the context of gender differentiated appearance requirements, such as employer policies imposing different makeup or hair length requirements for men and women. *See* Marc Chase McAllister, *Extending the Sex Plus Discrimination Doctrine to Age Discrimination Claims*, 60 B.C. L. REV. 469, 485–87 (2019) (discussing the limits of sex-plus theory).

<sup>72</sup> 400 U.S. 542, 544 (1971).

<sup>73</sup> *Phillips*, 400 U.S. at 544.

<sup>74</sup> *See id.* at 543–44.

<sup>75</sup> *Id.*

<sup>76</sup> *McGrenaghan v. St. Denis Sch.*, 979 F. Supp. 323, 327 (E.D. Pa. 1997).

<sup>77</sup> *Id.* at 327.

court thus rejected the defendant's argument that it could not be liable for sex discrimination on the basis that the person hired for the position was also a woman, reasoning that the person hired was "not a member of the subclass of women with disabled children" to which the plaintiff belonged.<sup>78</sup>

*Phillips* and *McGrenaghan* are examples of sex-plus discrimination claims brought by female employees treated differently than their male counterparts for having children.<sup>79</sup> Courts have recognized similar subclasses of women based on their exercise of other fundamental rights.<sup>80</sup> Courts have found, for example, that an employer's unfavorable treatment of married women, as compared to married men, violates Title VII.<sup>81</sup>

In the sex-plus-marital status cases, as in *Phillips* and *McGrenaghan*, courts have rejected employer arguments that no sex discrimination had occurred because the employer did not discriminate against women as a whole.<sup>82</sup> In one such case, the United States Court of Appeals for the Seventh Circuit noted that an employer's no-marriage rule, which it applied to female flight attendants but not their male counterparts, violated Title VII even though the rule did not apply to *all* female employees, "for so long as sex is a factor in the application of the rule, such application involves a discrimination based on sex."<sup>83</sup> Thus, the Seventh Circuit declared, Title VII's effect "is not to be diluted because discrimination adversely affects only a portion of the protected class."<sup>84</sup> As another court

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<sup>78</sup> *Id.* Accordingly, the court denied summary judgment to the defendant on the plaintiff's sex discrimination claim. *Id.*

<sup>79</sup> See also *Chadwick v. WellPoint, Inc.*, 561 F.3d 38, 48 (1st Cir. 2009) (denying summary judgment to the defendant-employer on similar sex plus discrimination claim); *Philipsen v. Univ. of Mich. Bd. of Regents*, No. 06-CV-11977-DT, 2007 WL 907822, at \*6-9 (E.D. Mich. Mar. 22, 2007) (recognizing a similar claim, but granting summary judgment to the defendant on the plaintiff's "sex plus" claim due to a lack of evidence that the plaintiff was treated differently than males with young children).

<sup>80</sup> *Jefferies v. Harris Cty. Cmty. Action Ass'n*, 615 F.2d 1025, 1033 (5th Cir. 1980).

<sup>81</sup> See *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971) (finding employer's no-marriage rule for stewardesses to violate Title VII); *Jurinko v. Wiegand Co.*, 331 F. Supp. 1184, 1187 (W.D. Pa. 1971) (finding that employer's refusal to hire married women violated Title VII). See also *Coleman v. B-G Maint. Mgmt. of Colo., Inc.*, 108 F.3d 1199, 1202-05 (10th Cir. 1997) (in sex-plus-marital status claim, ruling that a female plaintiff must show that her male co-workers with the same marital status were treated differently, and reversing jury verdict for the plaintiff due to a lack of evidence on that point); *Gee-Thomas v. Cingular Wireless*, 324 F. Supp. 2d 875, 884, 888 (M.D. Tenn. 2004) (recognizing a sex plus claim on the basis of sex plus marital and family status, but ultimately dismissing the plaintiff's claim because she failed to raise a genuine issue of material fact for trial on the issue of pretext).

<sup>82</sup> See *Jurinko*, 331 F. Supp. at 1187 (rejecting the argument).

<sup>83</sup> See *Sprogis*, 444 F.2d at 1198 (adopting the reasoning of the EEOC, as expressed in 29 CFR § 1604.3(a)).

<sup>84</sup> *Id.*

in a similar case declared, “[i]f [a] company discriminates against married women, but not against married men, the variable[s] become[] [men and] women, and the discrimination, based on solely sexual distinctions, invidious and unlawful.”<sup>85</sup>

### B. Sex-Plus Discrimination Claims Involving Immutable Characteristics

As noted, the sex-plus theory applies when an employer discriminates against a particular subclass of males or females based on the exercise of a fundamental right, such as the right to marry or have children;<sup>86</sup> or an immutable characteristic, such as race.<sup>87</sup> Immutable characteristics are simply those the employee cannot change.<sup>88</sup>

In the past fifty years, courts have recognized various plus-discrimination claims involving a combination of immutable characteristics, including claims of discrimination based on sex-plus-race (e.g., alleging discrimination against black females<sup>89</sup> or against Asian females),<sup>90</sup> race-plus-religion (e.g., alleging discrimination against a white Jewish male),<sup>91</sup> and sex-plus-age (e.g., involving discrimination against older women).<sup>92</sup>

In a leading sex-plus-race case, *Jefferies v. Harris County Community Action Association*,<sup>93</sup> plaintiff Dafro Jefferies, a black female, alleged that her employer discriminated against her due to her race and sex.<sup>94</sup> The district court separated Jefferies’ single sex-plus-race claim into distinct

<sup>85</sup> *Jurinko*, 331 F. Supp. at 1187.

<sup>86</sup> *See supra* Part II.A.

<sup>87</sup> *See* Arnett v. Aspin, 846 F. Supp. 1234, 1239 (E.D. Pa. 1994); Nicole Buonocore Porter, *Sex Plus Age Discrimination: Protecting Older Women Workers*, 81 DENV. U. L. REV. 79, 87 (2003).

<sup>88</sup> David Schraub, *Unsuspecting*, 96 B.U. L. REV. 361, 378 (2016) (citing *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973)).

<sup>89</sup> *See, e.g.*, *Jefferies v. Harris Cty. Cmty. Action Ass’n*, 615 F.2d 1025, 1034 (5th Cir. 1980) (recognizing a subclass of black women or a sex-plus-race claim).

<sup>90</sup> *See, e.g.*, *Lam v. Univ. of Haw.*, 40 F.3d 1551, 1561–62 (9th Cir. 1994) (recognizing a subclass of Asian women or a sex-plus-race claim).

<sup>91</sup> *See, e.g.*, *Feingold v. New York*, 366 F.3d 138, 153 (2d Cir. 2004) (finding sufficient evidence “to support an inference that [Feingold] was terminated on the basis of his religion and/or race”).

<sup>92</sup> *See, e.g.*, *Cartee v. Wilbur Smith Assocs., Inc.*, C/A No. 3:08-4132-JFA-PJG, 2010 WL 1052082, at \*4 (D.S.C. Mar. 22, 2010).

<sup>93</sup> 615 F.2d 1025 (5th Cir. 1980).

<sup>94</sup> *Id.* at 1028. “In her complaint, Jefferies charged that HCCAA discriminated against her in promotion ‘because she is a woman, up in age and because she is Black.’” *Id.* at 1029. Jefferies’ age-based discrimination claim, however, did not materialize at trial, and was not before the court on appeal. *Id.* at 1030.

claims of race discrimination and sex discrimination.<sup>95</sup> This, in turn, allowed the district court to reject Jefferies' race discrimination claim based on evidence that the promotion she sought was instead filled by a black male, in other words, with opposite sex comparator evidence.<sup>96</sup> The district court then rejected Jefferies' sex discrimination claim due to evidence that sixty to seventy percent of the defendant's employees were female, who often held important positions within the organization.<sup>97</sup>

Overturing the district court's decision, the Fifth Circuit Court of Appeals found it improper to separate Jefferies' single sex-plus-race discrimination claim into separate claims of race and sex discrimination.<sup>98</sup> This was error, according to the court, because "discrimination against black females can exist even in the absence of discrimination against black men or white women."<sup>99</sup> Echoing *Phillips*, the court thus concluded that the employer's relatively favorable treatment of black males and white females may not be used to *disprove* the plaintiff's allegations of sex-plus discrimination, as black men and white women fall outside the relevant subclass of black females.<sup>100</sup> This analysis, in turn, suggests that opposite sex comparator evidence (here, focused on the employer's treatment of black males) and same sex comparator evidence (here, focused on the employer's treatment of white females), can be used by a *plaintiff* as evidence of the employer's targeted sex-based animus, rather than the other way around.<sup>101</sup>

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<sup>95</sup> See *id.* at 1032.

<sup>96</sup> *Id.* at 1030 (rejecting Jefferies' claim of pure race discrimination in promotion, given that the person promoted to the position at issue was also black).

<sup>97</sup> *Id.* at 1029.

<sup>98</sup> *Id.* at 1032.

<sup>99</sup> *Jefferies*, 615 F.2d at 1032.

<sup>100</sup> See *id.* at 1034. See also Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1243–44 (1991) ("[T]he experiences of women of color are frequently the product of intersecting patterns of racism and sexism, and . . . tend not to be represented within the discourses of either feminism or antiracism.").

<sup>101</sup> *Jefferies* is one example of a sex-plus claim combining multiple immutable characteristics. A variety of courts have ratified sex-plus claims by subclasses of employees in similar circumstances. See, e.g., *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1416–17 (10th Cir. 1987) (adopting the reasoning of *Jefferies* in recognizing a sex-plus-race hostile work environment claim); *Robertson v. Wells Fargo Bank, N.A.*, No. 3:14-CV-01861 (VLB), 2017 WL 326317, at \*8 (D. Conn. Jan. 23, 2017) (recognizing that "[a] plaintiff may bring a [discrimination] claim under a combination of two protected grounds of Title VII, such as race and gender"); *Walton v. Vilsack*, No. 09-7627, 2011 WL 3489967, at \*10 (E.D. La. Aug. 10, 2011) (rejecting the defendant's argument that a plaintiff cannot present evidence of discrimination against her as an African-American female); *Johnson v. Dillard's Inc.*, No. 3:03-3445-MBS, 2007 WL 2792232, at \*3–5 (D.S.C. Sept. 24, 2007) (in a lengthy discussion of the issue, recognizing a combination claim alleging race-plus-sex discrimination under Title VII); *Nieto v. Kapoor*, 182 F. Supp. 2d 1114, 1140 (D.N.M.

IV. COMPARATOR EVIDENCE IN SEX-PLUS CASES: REQUIREMENT OF A COMPARATOR OUTSIDE PLAINTIFF'S PROTECTED CLASS WHO SHARES THE SAME "PLUS" CHARACTERISTIC

The remainder of this Article focuses on the evidentiary requirements for proving sex-plus discrimination. This section begins with opposite sex comparator evidence, defined as evidence pertaining to a person of the opposite sex as the plaintiff who shares the same plus characteristic. As explained below, numerous courts have held, or impliedly expressed the view, that Title VII sex-plus discrimination claims necessarily fail in the absence of opposite sex comparator evidence. Courts expressing this approach include the United States Courts of Appeal for the Second, Third, and Tenth Circuits,<sup>102</sup> along with various federal district courts.<sup>103</sup>

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2000) (considering evidence of harassment based on both race and their sex); *Chambers v. Omaha Girls Club*, 629 F. Supp. 925, 944 (D. Neb. 1986) (treating the plaintiff's race and gender discrimination claims as involving "the class of black women"), *aff'd sub nom. Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697 (8th Cir. 1987); *Graham v. Bendix Corp.*, 585 F. Supp. 1036, 1047 (N.D. Ind. 1984) ("Under Title VII, the plaintiff as a black woman is protected against discrimination on the double grounds of race and sex, and an employer who singles out black females for less favorable treatment does not defeat plaintiff's case by showing that white females or black males are not so unfavorably treated.").

<sup>102</sup> See *Coleman v. B-G Maint. Mgmt. of Colo., Inc.*, 108 F.3d 1199, 1202–05 (10th Cir. 1997) (ruling that in a sex-plus-marital status claim a female plaintiff must show that her male co-workers with the same marital status were treated differently, and reversing jury verdict for the plaintiff due to a lack of evidence on that point); *Fisher v. Vassar Coll.*, 70 F.3d 1420, 1446–47 (2d Cir. 1995) (rejecting sex-plus-marital status claim brought by female plaintiff in regards to her tenure denial because she "failed to present any evidence to show that married males who were up for tenure received 'better, or even different treatment'" (emphasis in original), *aff'd en banc*, 114 F.3d 1332 (2d Cir. 1997); *Bryant v. Int'l Sch. Servs., Inc.*, 675 F.2d 562, 575 (3d Cir. 1982) (in rejecting a sex-plus-marital status claim, stating that "[t]o prove their *prima facie* case appellants' must produce evidence that similarly situated males were treated differently and that there was no adequate nonsexual explanation for the different treatment").

<sup>103</sup> See *Llana-Aday v. Dist. Bd. of Trustees of Miami-Dade Coll., No. 11-22825-CIV.*, 2012 WL 5833612, at \*4 (S.D. Fla. Nov. 16, 2012) (granting summary judgment to the defendant on female plaintiff's sex-plus claim based on having children because the plaintiff failed to present evidence regarding an opposite sex comparator with the same child-rearing responsibilities); *Cote v. Shinseki*, No. 807-cv-1524-T-TBM., 2009 WL 1537901, at \*14 n.30 (M.D. Fla. June 2, 2009) (rejecting sex-plus claim and declaring that "gender-plus plaintiffs can never be successful if there is no corresponding subclass of members of the opposite gender [because] [s]uch plaintiffs cannot make the requisite showing that they were treated differently from similarly situated members of the opposite gender" (emphasis in original) (quoting *Coleman v. B-G Maint. Mgmt. of Colo., Inc.*, 108 F.3d 1199, 1204 (10th Cir. 1997)); *Jordan v. Radiology Imaging Assocs.*, 577 F. Supp. 2d 771, 785 (D. Md. 2008) (finding the plaintiff failed to make out a *prima facie* case of sex-plus discrimination because she did not produce "evidence that women with children were treated differently from men with children"); *Philipsen v. Univ. of Mich. Bd. of Regents*, No. 06-CV-11977-DT., 2007 WL 907822, at \*8 (E.D. Mich. Mar. 22, 2007) (establishing that a same sex comparator evidence alone cannot prove discrimination on the basis of sex); *Miller v. Grand Holdings, Inc.*, No. Civ.04-2688 ADM/AJB, 2005 WL 1745639, at \*8 (D. Minn. July 26,

In one leading case, *Coleman v. B-G Maintenance Management of Colorado, Inc.*, the Tenth Circuit Court of Appeals declared that “gender-plus plaintiffs can never be successful if there is no corresponding subclass of members of the opposite gender,” and consequently no evidence of how such opposite sex comparators were treated.<sup>104</sup> Without such comparator evidence, the court declared, sex-plus “plaintiffs cannot make the requisite showing that they were treated differently from similarly situated members of the opposite gender,” a key component of any “sex” discrimination claim.<sup>105</sup>

2005) (rejecting sex-plus-marital status claim brought by a female plaintiff because the plaintiff presented no evidence that “similarly situated men with children were treated more favorably.”); Witt v. Cty. Ins. & Fin. Servs., No. 04 C 3938, 2004 WL 2644397, at \*3 (N.D. Ill. Nov. 18, 2004) (dismissing a female plaintiff’s sex-plus-marital status claim because she failed to present evidence of similarly-situated males who were treated differently by her employer); Hess-Watson v. Potter, No. Cic.A. 703CV00389, 2004 WL 34833, at \*2 (W.D. Va. Jan. 4, 2004) (rejecting a female plaintiff’s claim alleging sex-plus discrimination due to having small children because she presented no evidence that males with small children were treated differently than women with small children; “[r]ather, she claims that the [employer favored] women without small children, but in the absence of a male comparator, this simply does not establish a viable ‘sex plus’ discrimination claim”); Longariello v. Sch. Bd. of Monroe Cty., Fla., 987 F. Supp. 1440, 1449 (S.D. Fla. 1997) (granting summary judgment to the defendant on a male plaintiff’s sex-plus-marital status claim, based on the fact that he was single, because he failed to provide any evidence of how his employer treated single women), *aff’d sub nom.* Longariello v. Sch. Bd., 161 F.3d 21 (11th Cir. 1998); Bass v. Chem. Banking Corp., No. 94 Civ. 8833 (SHS), 1996 WL 374151, at \*5 (S.D.N.Y. July 2, 1996) (rejecting a female plaintiff’s sex-plus-parental status or sex-plus-marital status claim based on a failure to promote because the plaintiff produced no evidence that her former employer “treated her differently than married men or men with children with regard to promotion” adding that promotion of a single woman with no children shows at most “discriminat[ion] against married persons or persons with children”). *Cf.* King v. Ferguson Enters., Inc., 971 F. Supp. 2d 1200, 1214 (N.D. Ga. 2013) (stating that “when female plaintiffs alleging gender-plus discrimination point to a comparator to prove their prima facie case, they must show that the comparator is *both* male *and* has the relevant plus characteristic,” but recognizing that such comparator proof is not the only means of establishing a prima facie case) (emphasis in original), *aff’d*, 568 F. App’x 686 (11th Cir. 2014); DeAngelo v. DentalEZ, Inc., 738 F. Supp. 2d 572, 585 (E.D. Pa. 2010) (stating that when a plaintiff alleges sex-plus-age discrimination against older women, the plaintiff “must present evidence that older men, the relevant comparator, were treated more favorably” such that “evidence regarding [the employer’s] alleged preference for hiring younger women is not on point for this claim” which instead pertains to an age discrimination claim); *id.* (noting further that despite a lack of opposite gender comparator evidence, a plaintiff “may still proceed on a sex-plus theory if she has direct record evidence of gender discrimination.”); Nesselrotte v. Allegheny Energy, Inc., No. 06–01390, 2009 WL 703395, at \*11 (W.D. Pa. Mar. 16, 2009) (in a sex-plus-dependent children claim, requiring a female plaintiff to present evidence regarding the corresponding subclass of men, and rejecting the plaintiff’s attempt to raise an inference of sex discrimination with evidence that she was replaced by a woman without children); *id.* (noting that the plaintiff could rely on evidence, apart from a relevant male comparator, “of any other circumstances, such as impermissible stereotyping, that raise an inference of gender discrimination under Title VII”).

<sup>104</sup> 108 F.3d 1199, 1204 (10th Cir. 1997).

<sup>105</sup> *Id.*

*Coleman* involved a female plaintiff, Stephanie Coleman, who was fired after one of the employees she supervised, her common-law husband, repeatedly left work during his shift.<sup>106</sup> Thereafter, Coleman brought Title VII claims against her former employer for discrimination on the basis of sex and sex-plus-marital status.<sup>107</sup> At trial, Coleman argued that the defendant had not terminated male supervisors whose subordinate employees had left work during their shifts.<sup>108</sup> She did not, however, present evidence that any of those male supervisors were married (or otherwise shared the same plus factor).<sup>109</sup> Nevertheless, the jury rejected Coleman's pure sex discrimination claim while ruling in her favor on her sex-plus-marital status claim, which the defendant appealed.<sup>110</sup>

On appeal, the defendant argued that the jury's verdict must be reversed because the district court's jury instructions allowed the jury to rule for Coleman on her sex-plus claim without proof that she was treated differently than males with a similar marital status.<sup>111</sup> The Tenth Circuit Court of Appeals agreed.<sup>112</sup> As the Tenth Circuit declared, "Title VII prohibits employers from treating married women differently than married men, but it does not protect marital status alone."<sup>113</sup> Nevertheless, as to her sex-plus claim, the district court's instructions failed to require proof that similarly situated males were treated differently, and thus allowed the jury to return a verdict for Coleman if marital status alone were the reason for her termination.<sup>114</sup> For this reason, the jury's verdict had to be reversed.<sup>115</sup>

Going one step further, the court then addressed the defendant's argument that it was entitled to judgment as a matter of law on Coleman's sex-plus claim due to a complete lack of evidence to support that claim.<sup>116</sup> Agreeing with the defendant, the court reiterated that the evidence merely showed that the defendant had not terminated male supervisors whose subordinate employees had left work during their shifts, but there was no evidence that any of those male supervisors "had any kind of personal

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<sup>106</sup> *Coleman*, 108 F.3d at 1202.

<sup>107</sup> *Id.* at 1201. The court referred to these two claims as discrimination on the basis of "gender" and "gender plus her marital status." For simplicity, this Article refers to those claims as "sex" and "sex-plus-marital status."

<sup>108</sup> *Id.* at 1202.

<sup>109</sup> *Id.* at 1205.

<sup>110</sup> *Id.* at 1202.

<sup>111</sup> *Id.* at 1202–03. The jury instruction at issue is quoted in footnote 1 of the court's opinion. *See id.* at 1202 n.1.

<sup>112</sup> *Coleman*, 108 F.3d at 1203.

<sup>113</sup> *Id.* at 1204.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 1205.

relationship, marital or otherwise, with their subordinate employees.”<sup>117</sup> At most, then, Coleman’s evidence tended to prove pure sex discrimination, a claim the jury rejected, leaving Coleman with no viable discrimination claim.<sup>118</sup>

*Coleman* effectively requires a sex-plus claim to be supported by opposite sex comparator evidence.<sup>119</sup> Indeed, in one passage—often quoted by subsequent cases—the court declared that “gender-plus plaintiffs can never be successful if there is no corresponding subclass of members of the opposite gender” because, in that event, “[s]uch plaintiffs cannot make the requisite showing that they were treated differently from similarly situated members of the opposite gender.”<sup>120</sup> Just as importantly, the *Coleman* court rejected the plaintiff’s argument that “[sex]-plus plaintiffs can compare themselves to all persons outside the corresponding subclass” to which the plaintiff belongs,<sup>121</sup> thereby suggesting that same sex comparator evidence is insufficient to prove the requisite discriminatory treatment between the sexes.<sup>122</sup> This point was more explicitly stated in a Second Circuit Court of Appeals case, *Fisher v. Vassar College*.<sup>123</sup>

In *Fisher*, plaintiff and biology professor, Cynthia Fisher, filed a sex-plus-marital status discrimination suit against her former employer, Vassar College, after it denied her tenure.<sup>124</sup> The evidence at trial focused on two issues: Fisher’s qualifications for tenure, and evidence of Vassar’s history of tenure decisions involving married women.<sup>125</sup> As to the latter dispute, Fisher presented, among other evidence,<sup>126</sup> statistical evidence purporting to show that no married female professor in the “hard” sciences had been granted tenure in the three decades before Fisher was denied tenure,<sup>127</sup>

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<sup>117</sup> *Id.*

<sup>118</sup> *Coleman*, 108 F.3d at 1205. For these reasons, the court reversed the jury’s award of \$250,000 damages to Coleman. *Id.*

<sup>119</sup> *See id.* at 1203 (stating that for a sex-plus claim, “the plaintiff must . . . prove that the subclass of women was unfavorably treated as compared to the corresponding subclass of men”). *See also id.* at 1204.

<sup>120</sup> *Id.* at 1204. *See also* Longariello v. Sch. Bd. of Monroe Cty. Fla., 987 F. Supp. 1440, 1449 (S.D. Fla. 1997) (quoting *Coleman* for the proposition that “[g]ender-plus plaintiffs can never be successful if there is no corresponding subclass of members of the opposite gender”), *aff’d sub nom.* Longariello v. Sch. Bd., 161 F.3d 21 (11th Cir. 1998).

<sup>121</sup> *See Coleman*, 108 F.3d at 1204 (rejecting this argument).

<sup>122</sup> *See id.*

<sup>123</sup> 70 F.3d 1420, 1446 (2d Cir. 1995), *aff’d en banc*, 114 F.3d 1332 (2d Cir. 1997).

<sup>124</sup> *Id.* at 1426.

<sup>125</sup> *Id.*

<sup>126</sup> *See id.* at 1438 (explaining that Fisher’s evidence consisted not only of statistical evidence, but also anecdotes, perceived admissions by the decisionmakers in Fisher’s case, and expert testimony); *id.* at 1442 (noting that Fisher’s evidence “lean[ed] heavily on statistics”).

<sup>127</sup> *See id.* at 1427 (finding the “hard” sciences to include mathematics, physics,

whereas the majority of single women in the hard sciences had been granted tenure during the same time period.<sup>128</sup> In defense, Vassar pointed to the plaintiff's lack of comparator evidence regarding how married males were treated, and presented its own data regarding its school-wide record of promoting women.<sup>129</sup>

After a bench trial, the district court ruled in Fisher's favor, directed Vassar to pay damages exceeding \$600,000, and issued an order reinstating Fisher to her former position with a fresh opportunity to apply for tenure.<sup>130</sup> The Second Circuit Court of Appeals reversed, finding clear error in the district court's reliance on the plaintiff's same sex statistics.<sup>131</sup> Specifically, the court declared, Fisher "failed to present *any* evidence to show that married males who were up for tenure received better, or even different treatment."<sup>132</sup> This lack of opposite sex comparator evidence proved fatal to Fisher's claim, because "[i]f Vassar was as unlikely to promote married men as it was to promote married women, then the only

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chemistry, geology, biology, and computer science, but not psychology); *see also id.* at 1442–43 (describing the plaintiff's statistical evidence in detail).

<sup>128</sup> The plaintiff's data included "59 female professors who were employed by Vassar at or above the rank of visiting assistant professor for two years or more in the departments of biology, chemistry, mathematics, physics, geology[,] and psychology at some point" between the years 1956 and 1985. *Id.* at 1442. "Of the 59 people, 19 already had tenure in 1956." *Id.* The plaintiff's data separated the remaining forty individuals into categories based on whether they were single or non-single, and further indicated whether each individual was either "Promoted" (i.e., granted tenure) or "Terminated or left" (including professors who were either denied tenure or left Vassar for any reason). *Id.* Of those forty individuals, fifteen were categorized as non-single; only one of those fifteen non-single persons (a psychology professor who the district court excluded from the hard sciences) was granted tenure. *Id.* at 1443; *see also id.* at 1444 (concluding that the district court should have included psychology in the hard sciences). The plaintiff's data further showed that of the twenty-five single individuals, fourteen had been granted tenure. *Id.* *See also* Fisher v. Vassar Coll., 852 F. Supp. 1193, 1218 (S.D.N.Y. 1994) (setting forth the district court's findings on the tenure decisions for married and unmarried women in the hard sciences).

<sup>129</sup> Fisher, 70 F.3d at 1426–27. Fisher also presented evidence that the hard sciences had traditionally been composed of single women, as well as *married and single men*. *Id.* at 1427; Fisher, 852 F. Supp. at 1225–26. Yet, Fisher's statistics regarding tenure awards, which she "lean[ed] heavily on" in her attempt to establish that Vassar discriminated against married women, Fisher, 70 F.3d at 1442, focused on Vassar's relative treatment of married and unmarried women. *Id.* at 1443. Thus, on appeal, the Second Circuit considered whether the district court clearly erred in finding sex-plus discrimination largely on the basis of Fisher's same sex comparator statistics, which did not include evidence regarding the success of married males who were up for tenure. *See id.* at 1443 (quoting district court's findings based on Fisher's statistics); *id.* at 1446. *See also id.* at 1434 (explaining that the court would overturn the district court's findings of fact only if clearly erroneous).

<sup>130</sup> Fisher, 70 F.3d at 1426, 1431.

<sup>131</sup> *Id.* at 1443.

<sup>132</sup> *Id.* at 1447 (quoting Bryant v. Int'l Sch. Servs., Inc., 675 F.2d 562, 575 (3d Cir. 1982)).

thing one could say is that Vassar discriminated against married people,”<sup>133</sup> which is not unlawful under Title VII.<sup>134</sup>

When a sex-plus plaintiff attempts to prove her case through comparator evidence, *Fisher* effectively requires opposite sex comparator evidence to prove the requisite sex discrimination.<sup>135</sup> In the words of the Second Circuit, “[t]o establish that Vassar discriminated on the basis of sex plus marital status, [a] plaintiff [like Fisher] must show that married *men* were treated differently from married *women*.”<sup>136</sup> “Absent this sex-to-sex comparison,” the court declared, “plaintiff’s [same sex comparator] statistics are meaningless.”<sup>137</sup>

Like *Fisher*, various federal district courts have also rejected sex-plus claims unsupported by opposite sex comparator evidence. In one case, *Fox v. Brown Memorial Home, Inc.*,<sup>138</sup> the plaintiff alleged that she was fired from her job due to her marriage to a man who also worked for the employer, such that her firing was based upon her sex-plus-marital status.<sup>139</sup> In reviewing her claim, the United States District Court for the Southern District of Ohio—quoting from a Sixth Circuit Court of Appeals case—declared that in a sex-plus case, “a female plaintiff must . . . prove that the subclass of women was unfavorably treated *as compared to the corresponding subclass of men*,”<sup>140</sup> adding that “[a]bsent such a corresponding subclass of men, a plaintiff cannot establish sex discrimination.”<sup>141</sup> In *Fox*, the plaintiff failed to allege that a subclass of women was treated unfavorably compared to a subclass of men.<sup>142</sup> For this reason, the court dismissed the plaintiff’s sex-plus claim.<sup>143</sup>

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<sup>133</sup> *Id.*

<sup>134</sup> *Id.* See also *King v. Ferguson Enters., Inc.*, 971 F. Supp. 2d 1200, 1215 (N.D. Ga. 2013) (noting that “if a woman [claiming sex-plus discrimination] cannot show that her employer treats the same subclass of men differently, then gender is not a factor; moreover, allowing her claim without such evidence would result in the protection of the characteristic rather than gender”), *aff’d*, 568 F. App’x 686 (11th Cir. 2014).

<sup>135</sup> See *Fisher*, 70 F.3d at 1446–47. But see *id.* at 1447 n.12 (recognizing that when “the complainant establishes by evidence that there are no [similarly situated] males [with the same plus factor at issue] and that it is unlikely that there would be any, then it may be that the complainant would be able to prevail by providing some other evidence of discrimination”).

<sup>136</sup> *Id.* at 1446 (emphasis in original).

<sup>137</sup> *Id.*

<sup>138</sup> No. 2:09-cv-915, 2010 WL 3167849 (S.D. Ohio Aug. 10, 2010).

<sup>139</sup> See *id.* at \*1–2.

<sup>140</sup> *Id.* at \*2 (quoting *Derungs v. Wal-Mart Stores, Inc.*, 374 F.3d 428, 432 (6th Cir. 2004)) (internal marks omitted) (emphasis in original).

<sup>141</sup> *Id.* at \*2 (quoting *Derungs v. Wal-Mart Stores, Inc.*, 374 F.3d 428, 432 (6th Cir. 2004)) (internal marks omitted) (emphasis in original).

<sup>142</sup> *Id.* at \*3.

<sup>143</sup> See *id.* (stating that “[b]ecause the Complaint does not allege the existence of a

In another similar case, *Fuller v. GTE Corp./Contel Cellular, Inc.*,<sup>144</sup> the plaintiff alleged that her former employer violated Title VII by discriminating against her because of her sex combined with her status as a mother of young children.<sup>145</sup> Similar to *Fox*, the *Fuller* court rejected the plaintiff's sex-plus claim because the plaintiff "failed to show"—and did not even allege in her complaint—"that she was treated differently" than men with young children.<sup>146</sup> For sex-plus claims of the type alleged in *Fuller*, the court declared that a plaintiff must present "evidence to show that fathers of young children received better or even different treatment."<sup>147</sup> Here, however, the plaintiff offered no evidence that her employer "would have treated her any differently had she been a *father* and everything else had remained the same."<sup>148</sup> Without the requisite opposite sex comparator evidence, the court rejected the plaintiff's sex-plus claim.<sup>149</sup>

#### V. COMPARATOR EVIDENCE IN SEX-PLUS CASES: COURTS THAT RECOGNIZE THE RELEVANCE OF SAME SEX COMPARATOR EVIDENCE IN PROVING SEX-PLUS DISCRIMINATION

In contrast to the cases described in the previous section, which generally require opposite sex comparator evidence to prove sex-plus discrimination claims while finding little to no evidentiary value in same sex comparator evidence, other cases have relied heavily on same sex comparator evidence, at times validating sex-plus claims even without opposite sex comparator proof.<sup>150</sup> Cases in this line include two opinions from the United States District Court for the Eastern District of

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similarly situated male subclass, [the plaintiff] cannot demonstrate that she was a victim of sex discrimination under Title VII").

<sup>144</sup> 926 F. Supp. 653 (M.D. Tenn. 1996).

<sup>145</sup> *Id.* at 656.

<sup>146</sup> *Id.* at 657.

<sup>147</sup> *Id.* at 658.

<sup>148</sup> *Id.* at 657 (emphasis in original). The court also found it significant that the plaintiff was replaced by another female with children, *id.*, which seems particularly important in light of the court's iteration of the final requirement of the plaintiff's prima facie case—namely, that the plaintiff "was replaced by someone outside of the protected class," *id.* at 656.

<sup>149</sup> *Id.* at 657.

<sup>150</sup> To be clear, rather than rejecting same sex comparator evidence outright, courts in cases like *Fisher* and *Philipsen* often simply declare that in the absence of opposite gender comparator evidence, same sex comparator evidence alone cannot prove discrimination on the basis of sex. See *Philipsen v. Univ. of Mich. Bd. of Regents*, No. 06-CV-11977-DT, 2007 WL 907822, at \*8 (E.D. Mich. Mar. 22, 2007) (establishing that same sex comparator evidence alone cannot prove discrimination on the basis of sex); *Fisher v. Vassar Coll.*, 70 F.3d 1420, 1446 (2d Cir. 1995) (describing the plaintiff's statistics comparing the employer's treatment of married versus unmarried women as "meaningless" absent a statistically sound "sex-to-sex comparison"), *aff'd en banc*, 114 F.3d 1332 (2d Cir. 1997).

Pennsylvania, *Arnett v. Aspin*,<sup>151</sup> and *McGrenaghan v. St. Denis School*;<sup>152</sup> another District Court opinion from New York, *Trezza v. Hartford, Inc.*;<sup>153</sup> and *Back v. Hastings On Hudson Union Free School Dist.*,<sup>154</sup> a Second Circuit Court of Appeals case.

In *Arnett v. Aspin*, Judge Lowell E. Reed, Jr., of the United States District Court for the Eastern District of Pennsylvania, recognized a sex-plus-age discrimination claim under Title VII based upon discrimination against the subgroup of women over the age of forty.<sup>155</sup> There, forty-nine-year old plaintiff, Mary Arnett, alleged that she was discriminated against by her employer because she was a female over the age of forty.<sup>156</sup> To support her claim, Arnett presented evidence that two women younger than thirty were hired over her for the position of equal employment specialist.<sup>157</sup> She also claimed, and the defendants admitted, that all of the defendants' equal employment specialists had been either women under forty or men over forty.<sup>158</sup>

Arguing primarily that Title VII does not authorize sex-plus-age claims, the defendants moved for summary judgment, which Judge Reed denied.<sup>159</sup> Although Judge Reed's opinion focuses on explaining why sex-plus-age claims are valid under Title VII,<sup>160</sup> an issue that remains unsettled,<sup>161</sup> Judge Reed's analysis of the merits of Arnett's claim explicitly invokes both opposite sex and same sex comparator evidence. Regarding opposite sex comparator evidence, Judge Reed found that "the defendants discriminated against [Arnett] on the basis of her sex . . . [by] requir[ing] more of her than they did of the *male applicants* for the position of equal employment specialist. That is, they required that she be *under the age of forty*."<sup>162</sup> Highlighting Arnett's same sex comparator evidence, Judge Reed further declared that Arnett had shown a prima facie case of discrimination because: (1) she was a member of a protected subclass consisting of

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<sup>151</sup> *Arnett v. Aspin*, 846 F. Supp. 1234, 1239 (E.D. Pa. 1994).

<sup>152</sup> *McGrenaghan v. St. Denis Sch.*, 979 F. Supp. 323 (E.D. Pa. 1997).

<sup>153</sup> *Trezza v. Hartford, Inc.*, No. 98 CIV. 2205 (MBM), 1998 WL 912101 (S.D.N.Y. Dec. 30, 1998).

<sup>154</sup> *Back v. Hastings on Hudson Union Free Sch., Dist.*, 365 F.3d 107 (2d Cir. 2004).

<sup>155</sup> *Arnett*, 846 F. Supp. at 1240.

<sup>156</sup> *Id.* at 1236.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 1236–37.

<sup>159</sup> *See id.* at 1237 (explaining that the defendants only sought summary judgment in their favor with respect to the second count of Arnett's complaint, which alleged sex-plus-age discrimination under Title VII).

<sup>160</sup> *See id.* at 1240–41 & n.8.

<sup>161</sup> *See* Marc Chase McAllister, *Extending the Sex Plus Discrimination Doctrine to Age Discrimination Claims*, 60 B.C.L. REV. 469, 487–92 (2019).

<sup>162</sup> *See Arnett*, 846 F. Supp. at 1240 (emphasis added).

women over forty; (2) she was qualified for and applied for the positions in question; (3) she was denied the positions, despite her qualifications; and (4) other employees outside her protected “class”<sup>163</sup> or “discrete subclass”<sup>164</sup> were selected, “in this case two women under 40.”<sup>165</sup>

Notably, *Arnett* is similar to *Fisher*, in that both plaintiffs presented evidence that the position they sought—equal employment specialist in *Arnett*, and a tenured faculty position in the hard sciences in *Fisher*—had been filled only with women lacking the plus factor at issue,<sup>166</sup> and, at least to some extent, opposite sex comparators possessing the same-plus characteristic.<sup>167</sup> Likewise, both plaintiffs presented evidence that not a single sex-plus woman had previously obtained the position at issue during the relevant time frame.<sup>168</sup> The *Fisher* court, however, overturned judgment in the plaintiff’s favor due to a perceived lack of opposite sex comparator evidence, whereas the *Arnett* court denied summary judgment to the defendant based on similar evidence,<sup>169</sup> after which the *Arnett* parties apparently settled the case.<sup>170</sup> Accordingly, although the procedural posture of each case differs, the cases are in tension with respect to the type of comparator evidence sufficient to support a sex-plus claim.

A few years after *Arnett*, the same court recognized a sex-plus claim in *McGrenaghan v. St. Denis School*,<sup>171</sup> despite the total absence of opposite sex comparator evidence. In that case, plaintiff Sarah McGrenaghan sued defendants, the St. Denis School and Archdiocese of Philadelphia, “for allegedly removing her from a full-time teaching position and refusing to rehire her to the position solely on the basis of” having a disabled child.<sup>172</sup> The defendants sought summary judgment on McGrenaghan’s sex discrimination claim, arguing that she had failed to

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<sup>163</sup> See *id.* at 1239 (stating that “[f]or purposes of determining whether there was disparate treatment [in a sex-plus case], the plaintiff’s class is defined as a subclass of women, for example, women with preschool children”).

<sup>164</sup> See *id.* at 1241 (stating that “[f]or purposes of determining whether the defendants’ discriminated against Arnett in violation of Title VII, I find she is a member of a discrete subclass of ‘women over forty’”).

<sup>165</sup> *Id.*

<sup>166</sup> *Fisher v. Vassar Coll.*, 70 F.3d 1420, 1442–43 (2d Cir. 1995), *aff’d en banc*, 114 F.3d 1332 (2d Cir. 1997); *Arnett*, 846 F. Supp. at 1236–37.

<sup>167</sup> *Fisher*, 70 F.3d at 1427; *Arnett*, 846 F. Supp. at 1236–37.

<sup>168</sup> *Fisher*, 70 F.3d at 1427, 1442–43; *Arnett*, 846 F. Supp. at 1236–37.

<sup>169</sup> *Fisher*, 70 F.3d at 1448; *Arnett*, 846 F. Supp. at 1240–41 & n.7.

<sup>170</sup> The assumption that the parties settled the case is based on the author’s review of the case docket, which includes an order dismissing the case with prejudice signed within a few days after trial was scheduled to begin in the case, with no indication in the docket that trial actually commenced. See Order Dismissing Action with Prejudice, *Arnett v. Aspin*, Civ. A. No. 93–2065 (E.D. Pa. Sept. 1, 1995), ECF No. 28.

<sup>171</sup> *McGrenaghan v. St. Denis Sch.*, 979 F. Supp. 323, 323 (E.D. Pa. 1997).

<sup>172</sup> *Id.* at 325.

produce evidence that she was treated less favorably on the basis of her gender because (a) the person ultimately selected over her was also a woman,<sup>173</sup> and (b) she had no proof that the defendants treated males more favorably than females.<sup>174</sup>

In finding “ample evidence to establish a prima facie case of ‘sex-plus’ gender discrimination” against McGrenaghan’s particular subclass of “women who have children with disabilities,”<sup>175</sup> the court pointed to two items of evidence, neither of which involved opposite sex comparator evidence.<sup>176</sup> First, the court pointed to same sex comparator evidence by noting that the person selected over the plaintiff was a less qualified female who was “not the mother of a disabled child and therefore, not a member of the subclass of women with disabled children.”<sup>177</sup> Second, the court pointed to direct evidence of discriminatory animus against working mothers and mothers with disabled children, including discriminatory statements made by the school’s principal.<sup>178</sup> The court thus rejected the defendant’s argument that it could not be liable for sex discrimination on the basis that the person hired for the position was also a woman.<sup>179</sup>

As *McGrenaghan* shows, opposite sex comparator evidence is not always required to raise an inference of sex-plus discrimination, particularly where the plaintiff produces direct evidence of discriminatory animus against her particular subgroup in combination with same sex comparator evidence. Another similar district court decision, *Trezza v. Hartford, Inc.*,<sup>180</sup> further illustrates the relevance of same sex comparator evidence in proving sex-plus claims.

In *Trezza*, the United States District Court for the Southern District of New York considered a sex-plus claim brought by Joann Trezza, a woman with two young children, based on allegations that her employer denied her

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<sup>173</sup> *Id.* at 326.

<sup>174</sup> *Id.*

<sup>175</sup> *See id.* at 327.

<sup>176</sup> *Id.* Immediately before describing the “ample evidence” supporting the plaintiff’s claim of sex-plus discrimination, the court also stated that the “plaintiff alleges . . . that similar employment decisions would not have been made of a woman without a disabled child or a father of a disabled child.” *Id.* Although this statement seemingly points to opposite gender comparator evidence, the statement appears to be nothing more than a description of the plaintiff’s allegations in the case, as it was made without citing any evidence, which would be expected in an opinion denying summary judgment.

<sup>177</sup> *McGrenaghan v. St. Denis Sch.*, 979 F. Supp. 323, 327 (E.D. Pa. 1997).

<sup>178</sup> *Id.* The court did not identify the particular discriminatory statements made by the school’s principal.

<sup>179</sup> *Id.* Accordingly, the court denied summary judgment to the defendant on the plaintiff’s sex discrimination claim. *Id.*

<sup>180</sup> *Trezza v. Hartford, Inc.*, No. 98 CIV. 2205 (MBM), 1998 WL 912101 (S.D.N.Y. Dec. 30, 1998).

promotions in favor of either women without children or men with children.<sup>181</sup> With respect to one promotion, which was awarded to a woman without children, the defendant argued that Trezza's sex-plus claim should be dismissed because another woman received the promotion, such that there could be no sex discrimination.<sup>182</sup> The court promptly rejected this attempt to use same sex comparator evidence *defensively*,<sup>183</sup> noting that the Supreme Court in *Phillips* had foreclosed this argument.<sup>184</sup> Thus, rather than defeating Trezza's sex-plus discrimination claim, the court declared that the employer's rejection of Trezza in favor of another woman without the relevant plus characteristic actually helped establish a *prima facie* case of discrimination,<sup>185</sup> which was further established through allegations that her employer had treated men with children and women with children differently in regards to promotions.<sup>186</sup> Thus, the combination of both same sex and opposite sex comparator evidence proved critical to the plaintiff's sex-plus claim (at least in the context of defending a motion to dismiss).

Finally, in a decision directly rejecting the view that sex-plus claims must be supported by opposite sex comparator evidence (albeit under 42 U.S.C. § 1983, rather than Title VII<sup>187</sup>), the Second Circuit Court of Appeals found that a sex-plus plaintiff could prove her case through stereotyped remarks about the employment abilities of women with children, without presenting any opposite sex comparator evidence.<sup>188</sup>

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<sup>181</sup> See *id.* at \*1–2 (describing three incidents where the plaintiff failed to earn a promotion, which was instead awarded to either women without children or men with children).

<sup>182</sup> *Id.* at \*5.

<sup>183</sup> *Id.* at \*6 (stating that “[w]hen a plaintiff alleges discrimination on the basis of sex in conjunction with some other characteristic, the defendant’s selection of someone of the same sex as plaintiff but without the added characteristic . . . [may not be used to] defeat an otherwise legitimate inference of discrimination—the essence of a plaintiff’s *prima facie* case”).

<sup>184</sup> See *id.* (stating “the point of *Phillips* and its progeny is that a defendant should not be able to escape liability for discrimination on the basis of sex merely by hiring some members of the protected group”).

<sup>185</sup> See *id.* (declaring that “[t]his court is not the first to conclude that a plaintiff in a sex-plus discrimination case can establish a *prima facie* case of discrimination where she was rejected in favor of a member of the same sex without the relevant additional characteristic”).

<sup>186</sup> *Id.* at \*7.

<sup>187</sup> See *Back v. Hastings On Hudson Union Free Sch. Dist.*, 365 F.3d 107, 118–19 (2d Cir. 2004) (finding that “sex plus” discrimination is actionable under 42 U.S.C. § 1983 because “the Equal Protection Clause forbids sex discrimination no matter how it is labeled,” such that “[t]he relevant issue is . . . whether the plaintiff provides evidence of purposefully sex-discriminatory acts”).

<sup>188</sup> See *id.* at 118–22. See also *id.* at 113 (stating the issue in the case as “whether stereotyping about the qualities of mothers is a form of gender discrimination, and whether

In that case, the Second Circuit considered a discrimination claim brought by school psychologist, Elana Back, after she was denied tenure due to an alleged stereotypical view that young mothers could not balance both work and home obligations.<sup>189</sup> In reversing the lower court's grant of summary judgment to the individuals instrumental in denying Back tenure, the Second Circuit relied primarily on statements made by those individuals that stereotyped her "as a woman and mother of young children," which showed that they "treated her differently than they would have treated a man and father of young children."<sup>190</sup> These stereotyped remarks included a statement that a woman "cannot 'be a good mother'" while holding a job that requires long hours and a statement that a mother who was awarded tenure "would not show the same level of commitment [she] had shown [before earning tenure] because [she] had little ones at home."<sup>191</sup> These and similar remarks, according to the court, demonstrated that the decisionmakers had denied Back tenure based on stereotyped generalizations regarding the inability of women with children to combine work and motherhood, rather than because of Back's actual qualifications, evidence that was alone enough to avoid summary judgment.<sup>192</sup>

Just as importantly, the *Back* court rejected the defendants' argument that opposite sex comparator evidence is required to prove a sex-plus discrimination claim. In one passage, for example, the court described the issue in the case as "whether stereotyping about the qualities of mothers is a form of gender discrimination, and whether this can be determined in the absence of evidence about how the employer in question treated fathers[,]""<sup>193</sup> in other words, in the absence of opposite sex comparator evidence. The court "answer[ed] both questions in the affirmative."<sup>194</sup> Later, the court again rejected the defendants' argument that stereotypes about pregnant women or mothers cannot be presumed to be on the basis of sex "without comparative evidence of what was said about fathers."<sup>195</sup> The court declared the defendants to be "wrong in their contention that [a

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this can be determined in the absence of evidence about how the employer in question treated fathers," and "answer[ing] both questions in the affirmative").

<sup>189</sup> See *id.* See also *id.* at 115 (describing the alleged stereotyping behavior). Notably, Back brought her sex discrimination claim under the Equal Protection Clause, which the court found to encompass sex plus claims. See *id.* at 118–19.

<sup>190</sup> See *id.* at 124, 130 (analyzing the evidence of discriminatory motives and comments of the plaintiff's supervisors, Brennan and Wishnie).

<sup>191</sup> *Id.* at 120. See also *id.* at 115 (summarizing a host of seemingly discriminatory statements).

<sup>192</sup> See *id.* at 120. Notably, the court denied summary judgment only to the actual decisionmakers in Back's case. See *id.* at 113.

<sup>193</sup> *Back*, 365 F.3d at 113.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 121.

plaintiff like] Back cannot make out a claim that survives summary judgment unless she demonstrates that the defendants treated similarly situated men differently.”<sup>196</sup> Thus, although Back had “proffered no evidence about the treatment of male administrators with young children,” this was not fatal to her claim, as “there is no requirement that such evidence be adduced.”<sup>197</sup> Rather, what matters is “the [employer’s] reasons for *the individual plaintiff’s* treatment,”<sup>198</sup> evidenced by the employer’s “stereotypical remarks about the incompatibility of motherhood and employment.”<sup>199</sup> Accordingly, the court declared, “stereotyping of women as caregivers can by itself and without more be evidence of an impermissible, sex-based motive.”<sup>200</sup>

## VI. PROPOSALS

As the previous two sections have shown, courts disagree as to whether opposite sex comparator evidence is required to prove a sex-plus discrimination claim.<sup>201</sup> On the one hand, cases like *Coleman* declare that “gender-plus plaintiffs can never be successful if there is no corresponding subclass of members of the opposite gender” because, in that event, such plaintiffs “cannot make the requisite showing that they were treated differently from similarly situated members of the opposite gender,” a necessary component of any sex discrimination claim.<sup>202</sup> On the other hand, cases like *Back* have openly rejected the purported opposite sex comparator requirement, finding instead that the requisite discriminatory intent can be proven in other ways.<sup>203</sup> This section resolves this dispute, and more broadly delineates the proper role for comparator evidence in sex-plus cases.

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<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* (emphasis in original) (quoting *Brown v. Henderson*, 257 F.3d 246, 252 (2d Cir. 2001)).

<sup>199</sup> *Back*, 365 F.3d at 122.

<sup>200</sup> *Id.* at 122. Later still, the court reiterated this point when discussing the requirements of the *McDonnell Douglas* test. *See id.* at 124 (“[A]s with the first stage of *McDonnell Douglas*, Back is not required to provide evidence that similarly situated men were treated differently[.]”).

<sup>201</sup> *See* *Gee-Thomas v. Cingular Wireless*, 324 F. Supp. 2d 875, 884 n.6 (M.D. Tenn. 2004).

<sup>202</sup> *Coleman v. B-G Maint. Mgmt. of Colo., Inc.*, 108 F.3d 1199, 1204 (10th Cir. 1997).

<sup>203</sup> *Back*, 365 F.3d at 121. Likewise, cases like *Fisher* have noted that when no opposite sex comparator exists in a given workforce, a sex-plus plaintiff may instead provide “some other evidence of discrimination” beyond comparator proof. *See Fisher v. Vassar Coll.*, 70 F.3d 1420, 1447 n.12 (2d Cir. 1995), *aff’d en banc*, 114 F.3d 1332 (2d Cir. 1997).

A. *The Proper Role of Comparator Evidence in Sex-Plus  
Discrimination Cases*

This subsection presents a series of proposals regarding the role of opposite sex and same sex comparator evidence in proving sex-plus discrimination. The subsection to follow examines other means of proving sex-plus discrimination beyond comparator proof.

First, this Article contends that opposite sex comparator evidence is indeed essential in cases where a plaintiff attempts to prove sex-plus discrimination solely through comparator evidence. As noted, opposite sex comparator evidence focuses on the employer's treatment of a person of the opposite sex as the plaintiff who shares the same plus characteristic. Opposite sex comparator evidence would include, for example, evidence that an employer refuses to hire women with children (the plaintiff), but routinely hires men with children (the opposite sex comparator). As cases like *Coleman*,<sup>204</sup> *Fisher*,<sup>205</sup> and *Fuller*<sup>206</sup> suggest, such comparator evidence is required—at least in cases where a plaintiff attempts to prove sex-plus discrimination through comparator evidence—because evidence regarding an employer's more favorable treatment of an opposite sex comparator is needed to prove that the plaintiff's sex played a factor in the employer's decision.<sup>207</sup> After all, Title VII does not prohibit discrimination on the basis of an innocuous plus factor, such as marital status, but this would be the only inference that would arise in a case where a married woman relies exclusively on evidence showing only that she was treated less favorably than unmarried women.<sup>208</sup> Moreover, courts have routinely determined, based on the plain text of Title VII, that there can be no actionable claim of sex discrimination, which includes sex-plus allegations, without proof that members of one sex were treated less favorably or subject to different employment standards than members of the opposite sex.<sup>209</sup> As such,

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<sup>204</sup> See *Coleman*, 108 F.3d at 1203–04.

<sup>205</sup> See *Fisher*, 70 F.3d at 1447.

<sup>206</sup> See *Fuller v. GTE Corp./Contel Cellular, Inc.*, 926 F. Supp. 653, 657–58 (M.D. Tenn. 1996).

<sup>207</sup> See *Fisher*, 70 F.3d at 1446 (rejecting sex-plus claim for lack of opposite gender comparator evidence and stating that “[t]o establish that Vassar discriminated on the basis of sex plus marital status, plaintiff must show that married *men* were treated differently from married *women*”) (emphasis in original), *aff'd en banc*, 114 F.3d 1332 (2d Cir. 1997); *Carson v. Bethlehem Steel Corp.*, 82 F.3d 157, 158 (7th Cir. 1996) (“The central question in any employment-discrimination case is whether the employer would have taken the same action had the employee been of a different race (age, sex, religion, national origin, etc.) and everything else had remained the same.”).

<sup>208</sup> See *Fisher*, 70 F.3d at 1447.

<sup>209</sup> See, e.g., *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (declaring that Title VII “requires that persons of like qualifications be given employment opportunities irrespective of their sex,” such that the statute does not permit “one hiring policy for women

opposite sex comparator evidence is a necessary component of any sex-plus discrimination claim proven through comparator evidence.

*Fisher* provides a helpful illustration. In that case, professor Cynthia Fisher sued her former employer, Vassar College, for sex-plus-marital status discrimination for having denied her tenure.<sup>210</sup> At trial, Fisher presented statistical evidence purporting to show that no married female professor in the hard sciences had been granted tenure in the three decades before Fisher was denied tenure, whereas the majority of single women in the hard sciences had been granted tenure during the same time period.<sup>211</sup> Assuming the truth of these allegations, and without any comparator evidence regarding how married males were treated, the only thing Fisher's data would prove is that Vassar College discriminated against professors on the basis of marital status.<sup>212</sup> But discrimination on the basis of marital status is not, in and of itself, prohibited by Title VII.<sup>213</sup> Accordingly, in order to prove sex discrimination through comparator evidence, plaintiffs like Fisher must present evidence showing that similarly-situated males are treated differently.<sup>214</sup> As the *Fisher* court declared, “[a]bsent this sex-to-sex comparison on a statistically sound basis, plaintiff’s [same sex comparator evidence is] meaningless.”<sup>215</sup>

For similar reasons, this Article further contends that same sex comparator evidence *alone* cannot raise an inference of sex discrimination, because same sex comparator evidence, by itself, cannot generate any inference of sex discrimination.<sup>216</sup> This point is made clear in *Philipsen v.*

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and another for men”); *King v. Ferguson Enters., Inc.*, 971 F. Supp. 2d 1200, 1209 (N.D. Ga. 2013) (“Despite its name, the ultimate question in these cases ‘is whether the employer took an adverse employment action at least in part because of an employee’s sex.’”), *aff’d*, 568 F. App’x 686 (11th Cir. 2014); *DeAngelo v. DentalEZ, Inc.*, 738 F. Supp. 2d 572, 584 (E.D. Pa. 2010) (recognizing that, “[a]t its root, . . . ‘sex-plus’ discrimination is simply a form of gender discrimination,” requiring the plaintiff to present sufficient evidence of sex discrimination).

<sup>210</sup> *Fisher*, 70 F.3d at 1426.

<sup>211</sup> *See supra* note 129.

<sup>212</sup> *Fisher*, 70 F.3d at 1447.

<sup>213</sup> *Id.* *See also King*, 971 F. Supp. 2d at 1215 (“[I]f a woman [claiming sex-plus discrimination] cannot show that her employer treats the same subclass of men differently, then gender is not a factor; moreover, allowing her claim without such evidence would result in the protection of the characteristic rather than gender.”); *Chadwick v. WellPoint, Inc.*, 561 F.3d 38, 43 (1st Cir. 2009) (recognizing that Title VII prohibits discrimination based on sex, but “does not prohibit discrimination based on caregiving responsibility”).

<sup>214</sup> *See Fisher*, 70 F.3d at 1446–47.

<sup>215</sup> *Id.* at 1446.

<sup>216</sup> *See id.* at 1446–47. *See also Coleman v. B–G Maint. Mgmt. of Colo., Inc.*, 108 F.3d 1199, 1202–05 (10th Cir. 1997) (in sex-plus-marital status claim, ruling that a female plaintiff must show that her male co-workers with the same marital status were treated differently, and reversing jury verdict for the plaintiff due to a lack of evidence on that point).

*University of Michigan Board of Regents*, which rejected the plaintiff's claim that her job offer was rescinded based on her sex and parental status as a mother with young children.<sup>217</sup> Applying the *McDonnell Douglas* test,<sup>218</sup> the defendant argued that plaintiff could not establish a prima facie case of sex-plus discrimination because she had failed to identify male employees with young children who were treated differently—in other words, she had failed to produce opposite sex comparator evidence.<sup>219</sup> In response, the plaintiff argued that she had satisfied her burden by showing that women in her workplace were treated differently depending on whether they had children—in other words, that same sex comparator evidence would suffice.<sup>220</sup> The court agreed with the defendant,<sup>221</sup> adding that accepting the plaintiff's argument “would turn this gender discrimination case into a parental discrimination case,” which is not unlawful under federal law.<sup>222</sup>

In sum, when a plaintiff attempts to prove sex-plus discrimination through comparator evidence, it is not enough to point to same sex comparator evidence without also providing evidence of how similarly situated persons of the opposite sex were treated.<sup>223</sup> Although same sex comparator evidence has an important role to play in sex-plus claims and can appear persuasive, given its ability to expose discrimination against a particular subgroup of males or females, such evidence is simply not capable, in and of itself, of demonstrating the requisite sex

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<sup>217</sup> *Philipsen v. Univ. of Mich. Bd. of Regents*, No. 06-CV-11977-DT, 2007 WL 907822 (E.D. Mich. Mar. 22, 2007).

<sup>218</sup> The *Philipsen* court first considered whether the plaintiff could prove her case with direct evidence of discrimination. The plaintiff, who disclosed during her interview that she was the mother of two young children, *id.* at \*1, argued that the following statement made by one of her interviewers constituted direct evidence of discrimination: “I’ve got an offer for you. Before I give it to you, I have a question . . . Are you sure you don’t want to stay at home to be with your children.” *Id.* at \*2, \*5. The court found this statement, although “perhaps not . . . appropriate,” was not direct evidence of discrimination, as “it does not necessarily evince a discriminatory intent,” “does not require the conclusion, without any additional inferences, that [d]efendant discriminated against [p]laintiff on the basis of her status was a mother with young children,” and “does not compel a reasonable factfinder to conclude that [p]laintiff’s job offer was rescinded [several days later] for discriminatory reasons.” *Id.* at \*5.

<sup>219</sup> *Id.* at \*6.

<sup>220</sup> *Id.*

<sup>221</sup> See *id.* (noting that both parties cited cases supporting their respective positions, but that “the court is more persuaded by those that require the comparator to be outside of the protected class”).

<sup>222</sup> *Id.* at \*8.

<sup>223</sup> See *Fisher v. Vassar Coll.*, 70 F.3d at 1446 (2d Cir. 1995) (calling the plaintiff’s same sex comparator evidence “meaningless” in the absence of opposite gender comparator evidence), *aff’d en banc*, 114 F.3d 1332 (2d Cir. 1997).

discrimination.<sup>224</sup>

This is not to suggest, however, that same sex comparator evidence is not relevant in proving sex-plus discrimination. Indeed, when paired with opposite sex comparator evidence, same sex comparator evidence reveals that the employer does not engage in sex discrimination across-the-board, but rather employs a more specific sex-based animus targeting only a particular subgroup of male or female employees, thereby establishing the claim as a sex-plus claim rather than a pure sex discrimination claim.<sup>225</sup> For this reason, this Article contends that the strongest sex-plus discrimination claims are those where the two types of comparator evidence are used in tandem.

Take, for example, the facts of *Lam v. University of Hawaii*, a case in which the United States Court of Appeals for the Ninth Circuit recognized a Title VII sex-plus-race claim brought by an Asian woman of Vietnamese descent.<sup>226</sup> In that case, Maivan Clech Lam sued the University of Hawaii's Law School claiming that it discriminated against her on the basis of her race and sex when it twice rejected her application for a faculty position.<sup>227</sup> After Lam lost at trial, the Ninth Circuit Court of Appeals found it erroneous for the district court to have relied on the defendants' *favorable* treatment of two other candidates for the faculty position at issue: one an Asian man (tending to defeat a claim of pure race discrimination), and the other a white woman (tending to defeat a claim of pure sex discrimination).<sup>228</sup> According to the Ninth Circuit, the district court apparently viewed racism and sexism as "distinct elements amenable to almost mathematical treatment, so that evaluating discrimination against an Asian woman became a simple matter of performing two separate tasks: looking for racism 'alone' and looking for sexism 'alone,' with Asian men and white women as the corresponding model victims."<sup>229</sup> This slicing and dicing of Lam's plus discrimination claim, according to the Ninth Circuit, failed to account for the fact that "Asian women are subject to a set of stereotypes and assumptions shared neither by Asian men nor by white women,"<sup>230</sup> such that Asian women may be targeted for discrimination

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<sup>224</sup> See *Chadwick v. WellPoint, Inc.*, 561 F.3d at 43 (1st Cir. 2009) (in a sex-plus case, declaring that "regardless of the label given to the claim, the simple question posed by sex discrimination suits is whether the employer took an adverse employment action at least in part because of an employee's sex").

<sup>225</sup> *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971).

<sup>226</sup> *Lam v. Univ. of Haw.*, 40 F.3d 1551, 1561–62, n.16.

<sup>227</sup> *Id.* at 1554. Lam also alleged national origin discrimination, *id.* at 1554, but the Ninth Circuit focused on her allegations of race and sex discrimination, *id.* at 1559–60.

<sup>228</sup> *Id.* at 1561.

<sup>229</sup> *Id.*

<sup>230</sup> Here, the court noted in a footnote that Asian women are subject to particular

“even in the absence of discrimination against [Asian] men or white women.”<sup>231</sup> Accordingly, the court determined that “when a plaintiff is claiming race *and* sex bias, it is necessary to determine whether the employer discriminates on the basis of that *combination* of factors, not just whether it discriminates against people of the same race or of the same sex.”<sup>232</sup>

In sex-plus terms, Lam claimed that she belonged to a particular subgroup of women, those who are Asian, that were the target of the defendant’s unique discriminatory animus. To prove the alleged bias, a plaintiff like Lam could invoke both opposite sex and same sex comparator evidence. Regarding opposite sex comparator evidence, Lam might present evidence that the defendant refused to hire Asian women, but had no such policy with respect to the relevant opposite sex comparator sharing the same plus factor as Lam: men who are Asian. Regarding same sex comparator evidence, Lam might present additional evidence that the defendant readily hired the same sex comparator lacking the relevant plus factor pertaining to Lam’s race, including the subgroup of women who are Caucasian. After all, it is this combination of evidence that best proves discrimination against the subgroup of women who are Asian, as opposed to women on the whole. Accordingly, while the *Lam* defendant had attempted to use both types of comparator evidence *defensively*, the lesson of *Lam* is that such evidence can instead be used *offensively*, as a means of proving the defendant’s discriminatory intent against the particular subgroup of women at issue: Asian women. And importantly, this analysis is not unique to “plus” factors involving immutable characteristics, as this same analysis can be applied to the sex-plus cases outlined above with “plus” factors involving fundamental rights, including *Phillips*,<sup>233</sup> *McGrenaghan*,<sup>234</sup> and *Trezza*.<sup>235</sup>

To be sure, the evidentiary function of same sex comparator evidence—exposing an instance of discrimination against only a particular subgroup women—might appear to overlap with that of opposite sex comparator evidence, making same sex comparator evidence redundant and unnecessary. Under the facts of *Lam*, for example, if evidence shows that the defendant-employer does not hire Asian women, but hires Asian men, that evidence might *both* prove that sex discrimination had occurred

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stereotypes such as geisha, dragon lady, concubine, and lotus blossom. *Id.* at 1562 n.21.

<sup>231</sup> *Id.* at 1562 (quoting *Jefferies v. Harris Cty. Cmty. Action Ass’n*, 615 F.2d 1025, 1032 (5th Cir. 1980)).

<sup>232</sup> *Id.* at 1562 (emphasis in original).

<sup>233</sup> See *supra* notes 72–75 and accompanying text.

<sup>234</sup> See *supra* notes 76–78 and accompanying text.

<sup>235</sup> See *supra* notes 180–186 and accompanying text.

(because, in the words of *Phillips*, the employer is utilizing “one hiring policy for women and another for men”),<sup>236</sup> and suggest that the discrimination is occurring at the subgroup level (because the comparison being made is between Asian women and Asian men, rather than women and men on the whole). In this respect, same sex comparator evidence, which performs the evidentiary function of exposing discrimination at the subgroup level, might appear duplicative and therefore unnecessary. But this is incorrect. Sticking with the facts of *Lam*, a simple comparison of the hiring policies between Asian women and Asian men does not indicate, either way, whether all other women and all other men are likewise subject to the same hiring policies. Depending on other evidence, it could be that this employer does not hire only Asian women, or that this employer does not hire women at all, or even that this employer does not hire Asian and Hispanic women. More evidence is needed to know exactly what claim a plaintiff like Lam should pursue: pure sex discrimination, or sex-plus discrimination. Same sex comparator evidence provides the missing link, because if it turns out that this employer readily hires women who are not Asian, then the proper claim becomes sex-plus-race discrimination against the subset of women who are Asian. In this sense, same sex comparator evidence is always relevant in proving sex-plus discrimination, and should not be so easily discounted.<sup>237</sup>

Even courts that seemingly mandate opposite sex comparator evidence have admitted the relevance of same sex comparator evidence. Recall that in *Fisher*,<sup>238</sup> for example, the Second Circuit Court of Appeals found clear error in the district court’s reliance on plaintiff Fisher’s same sex comparator evidence,<sup>239</sup> which the court described as “meaningless” in the absence of a proper “sex-to-sex comparison.”<sup>240</sup> Despite this ruling, in other portions of its opinion, the Second Circuit recognized the usefulness of same sex comparator evidence. The court emphasized, for example, that

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<sup>236</sup> See *Phillips v. Martin Marietta Corp.*, 400 U.S. 544 (1971) (declaring that Title VII “requires that persons of like qualifications be given employment opportunities irrespective of their sex,” such that the statute does not permit “one hiring policy for women and another for men”).

<sup>237</sup> See FED. R. EVID. 401 (providing that “[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action”); FED. R. EVID. 402 (stating that “[r]elevant evidence is [generally] admissible . . .”); FED. R. EVID. 403 (stating the familiar rule that “[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence”).

<sup>238</sup> *Fisher v. Vassar Coll.*, 70 F.3d 1420 (2d Cir. 1995), *aff’d en banc*, 114 F.3d 1332 (2d Cir. 1997).

<sup>239</sup> *Id.* at 1443.

<sup>240</sup> *Id.* at 1446.

the plaintiff's statistics, which had focused on her employer's treatment of married versus single women in the "hard" sciences only, should have instead examined the employer's treatment of married and single women in the college as a whole.<sup>241</sup> Indeed, the Second Circuit declared, "[e]vidence of the treatment of married women throughout the college was highly relevant to a proper assessment of plaintiff's [sex-plus] claim."<sup>242</sup> After all, if the employer in *Fisher* had treated all women alike, the plaintiff's best argument would have been pure sex discrimination, rather than sex-plus-marital status, again demonstrating the relevance of same sex comparator proof.

### B. Beyond Comparators: Other Methods of Proving Sex-Plus Discrimination

As noted, sex-plus discrimination claims typically allege disparate treatment discrimination, which requires proof of discriminatory intent.<sup>243</sup> For such claims, direct or circumstantial evidence may be used to prove the requisite intent.<sup>244</sup> Comparator proof is simply one form of circumstantial evidence.<sup>245</sup> Accordingly, the employer's intent can be proven in other

<sup>241</sup> See *id.* at 1445 (finding the district court to have abused its discretion in failing to receive the defendant's expert testimony on such college-wide data, and stating that the college-wide evidence excluded in the case "strongly suggests that... there was no discrimination against married women in the tenure review process").

<sup>242</sup> *Id.* at 1445.

<sup>243</sup> See *supra* notes 33–36 and accompanying text.

<sup>244</sup> See *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983) ("As in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence. The trier of fact should consider all the evidence, giving it whatever weight and credence it deserves."); *Lewis v. City of Union City, Ga.*, 918 F.3d 1213, 1220 (11th Cir. 2019) ("In order to survive summary judgment, a plaintiff alleging intentional discrimination must present sufficient facts to permit a jury to rule in her favor. One way that she can do so is by satisfying the burden-shifting framework set out in *McDonnell Douglas*"); *id.* at 1220 n.6 (noting further that, beyond the burden-shifting test of *McDonnell Douglas*, "[a] plaintiff can also present direct evidence of discriminatory intent, or demonstrate a 'convincing mosaic' of circumstantial evidence that warrants an inference of intentional discrimination") (citations omitted); *Darke v. Lurie Besikof Lapidus & Co.*, 550 F. Supp. 2d 1032, 1040 (D. Minn. 2008) (explaining that there are basically two ways to prove sex discrimination: (1) the direct method, and (2) the indirect method described in *McDonnell Douglas*). Notably, statistical evidence may be used as circumstantial evidence of the employer's intent to discriminate, especially in systemic, pattern-or-practice cases. See *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339–40 (1977) (affirming the use of statistical evidence in proving employment discrimination); *Rioux v. City of Atlanta, Ga.*, 520 F.3d 1269, 1274 (11th Cir. 2008) (noting that "[a] plaintiff may prove a claim of intentional discrimination through direct evidence, circumstantial evidence, or through statistical proof"); *Fisher*, 70 F.3d at 1442 (recognizing that "[s]tatistics may be a part of a plaintiff's effort to establish discrimination under a theory of disparate treatment"). Nevertheless, a detailed analysis of such statistical proof is beyond the scope of this Article.

<sup>245</sup> See *Bass v. Chem. Banking Corp.*, No. 94 Civ. 8833 (SHS), 1996 WL 374151, at \*6 (S.D.N.Y. July 2, 1996); *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1328 (11th Cir.

ways, including through direct evidence of discrimination against a particular subgroup of males or females, or through other forms of circumstantial evidence (as a variety of sex-plus cases have established).<sup>246</sup> Thus, although some courts have stated that opposite sex comparator evidence is *always* required to prove sex-plus discrimination,<sup>247</sup> this is incorrect. Rather, when a sex-plus plaintiff lacks the requisite opposite sex comparator evidence, she may still prevail through other evidentiary methods.<sup>248</sup> As one court recently declared, proof that an employer treated

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2011) (in a race discrimination case, stating that “the plaintiff’s failure to produce a comparator does not necessarily doom the plaintiff’s case,” “[r]ather, the plaintiff will always survive summary judgment” by presenting sufficient circumstantial evidence, which comes in “various forms,” of the employer’s discriminatory intent). *See also, e.g., Rioux*, 520 F.3d at 1277 (finding the plaintiff established a prima facie case of race discrimination through various items of circumstantial evidence, despite having no evidence of a comparator who was treated more favorably).

<sup>246</sup> *See, e.g., DeAngelo v. DentalEZ, Inc.*, 738 F. Supp. 2d 572, 584–86 (E.D. Pa. 2010) (stating that even in the absence of opposite sex comparator evidence, a plaintiff “may still proceed on a sex-plus theory if she has direct record evidence of gender discrimination”); *Rauw v. Glickman*, No. CV-99-1482-ST, 2001 WL 34039494, at \*11 (D. Or. Aug. 6, 2001) (denying summary judgment to the defendant on the plaintiff’s sex-plus-marital status claim, and noting that plaintiff’s direct evidence “establishes a genuine issue of material fact as to whether improper sex plus marital status discrimination was a factor in the elimination of [plaintiff’s] position”); *Nesselrotte v. Allegheny Energy, Inc.*, No. 06-01390, 2009 WL 703395, at \*11 (W.D. Pa. Mar. 16, 2009) (in a sex-plus-dependent children claim, requiring a female plaintiff to present evidence regarding the corresponding subclass of men, but noting that the plaintiff could rely on evidence “of any other circumstances, such as impermissible stereotyping, that raise an inference of gender discrimination under Title VII”) (citing *Back*, 365 F.3d at 122); *McGrenaghan v. St. Denis Sch.*, 979 F. Supp. 323, 327 (E.D. Pa. 1997) (finding ample evidence of a *prima facie* case of sex-plus discrimination claim brought by a female with a disabled child, despite no opposite sex comparator evidence, based on evidence that the person hired over her was a female without a disabled child and due to discriminatory statements targeting working mothers and mothers with disabled children) (discussed *supra* notes 171–179); *Bass*, 1996 WL 374151 at \*6 (finding that a plaintiff may establish a prima facie case of discrimination, and permit a factfinder to infer a discriminatory motive, based not only on opposite sex comparator evidence, but also by “demonstrating that . . . her performance was criticized in gender-specific language,” “the employer made invidious remarks about other members of the protected class,” or that “the sequence of events leading up to the discharge or the timing of the discharge raises an inference of discrimination”) (citations omitted). *Cf. Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 350, 351 (6th Cir. 1998) (recognizing that a plaintiff may prove discrimination, even in the absence of comparator evidence, through direct, circumstantial, or statistical evidence tending to show that the employer singled out the plaintiff for impermissible reasons).

<sup>247</sup> *See supra* Part III. Recall that in *Coleman*, for example, the Tenth Circuit Court of Appeals declared that “gender-plus plaintiffs can never be successful if there is no corresponding subclass of members of the opposite gender,” because without such comparator evidence, sex-plus “plaintiffs cannot make the requisite showing that they were treated differently from similarly situated members of the opposite gender,” a key component of any “sex” discrimination claim. *Coleman v. B–G Maint. Mgmt. of Colo., Inc.*, 108 F.3d 1199, 1204 (10th Cir. 1997).

<sup>248</sup> *Johnston v. U.S. Bank Nat. Ass’n*, No. 08-CV-0296 PJS/RLE, 2009 WL 2900352, at

an opposite sex comparator better than a sex-plus plaintiff “would be *one way* for [a plaintiff] to prove sex-plus discrimination, but it would not be the *only way*.”<sup>249</sup>

According to most courts, circumstantial evidence of discrimination—which includes comparator proof—is only required where direct evidence of discriminatory intent is lacking.<sup>250</sup>

For this reason, courts often address whether direct evidence of discriminatory intent is present before examining comparator proof.<sup>251</sup> Thus, it is no surprise that courts have validated sex-plus claims based on direct evidence of discrimination, even where opposite sex comparator evidence is lacking.<sup>252</sup>

Perhaps the most common form of direct evidence in sex-plus cases is stereotypical remarks about women with children and their perceived capacity to be good employees. In *Back*, for example, the Second Circuit Court of Appeals found that Back could prove her sex-plus claim solely through evidence of stereotypical remarks about the ability of women with children to be good employees,<sup>253</sup> which the court described as direct evidence of discriminatory intent.<sup>254</sup> As the *Back* court declared, “stereotyping of women as caregivers can by itself and without more be evidence of an impermissible, sex-based motive.”<sup>255</sup>

The First Circuit Court of Appeals reached the same result in *Chadwick v. WellPoint, Inc.*<sup>256</sup> In that case, the First Circuit overturned the district court’s grant of summary judgment to the defendant-employer on the plaintiff’s sex-plus claim alleging she did not receive a promotion

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\*9 (D. Minn. Sept. 2, 2009).

<sup>249</sup> *Id.* See also Goldberg, *supra* note 15, at 751 (arguing that comparator evidence is just one way of discerning an act of discrimination).

<sup>250</sup> See *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) (“[T]he *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination[.]”); *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 58 (1st Cir. 1999) (describing the “the purpose” of “the *McDonnell Douglas/Burdine* framework” as “allowing plaintiffs to prove discrimination by circumstantial evidence”). See also *supra* note 49.

<sup>251</sup> See, e.g., *supra* note 218 (discussing *Philipsen v. Univ. of Mich. Bd. of Regents*, No. 06-CV-11977-DT, 2007 WL 907822 (E.D. Mich. Mar. 22, 2007)).

<sup>252</sup> See *supra* note 244 (listing cases).

<sup>253</sup> See *supra* notes 187–200 and accompanying text.

<sup>254</sup> *Back v. Hastings on Hudson Union Free Sch., Dist.*, 365 F.3d 107, 119, 124 (2d Cir. 2004) (describing the alleged stereotypical comments about a woman’s inability to combine work and motherhood as “direct evidence” of discrimination).

<sup>255</sup> *Id.* at 122. Later still, the court reiterated this point when discussing the requirements of the *McDonnell Douglas* test. See *id.* at 124 (“[A]s with the first stage of *McDonnell Douglas*, Back is not required to provide evidence that similarly situated men were treated differently.”).

<sup>256</sup> *Chadwick v. WellPoint, Inc.*, 561 F.3d 38 (1st Cir. 2009).

because she was the mother of young children.<sup>257</sup> Importantly, the court reached this result even though the person who received the promotion over her was *also a mother with young children*.<sup>258</sup> Thus, without any comparator evidence, and even despite the employer's favorable treatment of another female sharing the same plus characteristic as the plaintiff, which arguably undercut the plaintiff's claim,<sup>259</sup> the *Chadwick* plaintiff was still able to survive summary judgment based solely on stereotypical comments suggesting that the plaintiff would not devote herself to her job due to childcare responsibilities.<sup>260</sup>

Numerous other courts have also noted the ability of sex-plus plaintiffs to prove their claims with direct evidence, without the need for opposite sex comparator proof.<sup>261</sup> Accordingly, stereotypical comments such as those at issue in *Back* and *Chadwick* are simply another means, apart from comparator proof, of raising an inference of sex discrimination, a point made clear by the Supreme Court's decision in *Price Waterhouse v. Hopkins*.<sup>262</sup>

In *Price Waterhouse*, the Supreme Court ruled that Title VII's prohibition of sex discrimination encompasses employment decisions based on gender stereotypes.<sup>263</sup> In that case, plaintiff Ann Hopkins, a female senior manager in an accounting firm, was denied partnership because she was considered "too macho." Along these lines, the plaintiff was told she could improve her chances of partnership if she were to "take a course at charm school," "walk more femininely, talk more femininely, dress more

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<sup>257</sup> *Id.* at 40–41.

<sup>258</sup> At the time of the promotion decision, plaintiff Laurie Chadwick was the mother of an eleven-year-old son and six-year-old triplets in kindergarten. *Id.* at 42. The person who received the promotion over Chadwick, Donna Ouelette, was apparently the mother of two children, ages nine and fourteen. *Id.* at 41–42. In rejecting the defendant's argument that hiring Ouelette tended to defeat any sex-plus claim Chadwick might assert based on the fact of her having children, the court noted a possible distinction between Chadwick, who had four children, and Ouelette, who had only two. *See id.* at 42–43 n.4 (noting further that no evidence suggested the defendant-employer actually knew of Ouelette's status as a mother of two children, while it is uncontested that the defendant-employer knew of Chadwick's children, and stating that, regardless, "discrimination against one employee cannot be remedied solely by nondiscrimination against another employee in that same group").

<sup>259</sup> *See Fuller v. GTE Corp./Contel Cellular, Inc.*, 926 F. Supp. 653, 657 (M.D. Tenn. 1996) (rejecting the plaintiff's sex-plus-parental status claim and noting the fact "[t]hat [p]laintiff was replaced by another female—indeed, by another mother—is simply one factor which helps to defeat [p]laintiff's claim").

<sup>260</sup> *See Chadwick*, 561 F.3d at 46–48.

<sup>261</sup> *See supra* note 244.

<sup>262</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (stating that "stereotyped remarks can certainly be *evidence* that gender played a part" in an adverse employment decision) (emphasis in original).

<sup>263</sup> *Id.* at 250–52.

femininely, wear make-up, have her hair styled, and wear jewelry.”<sup>264</sup> The Supreme Court ruled that such comments could support a Title VII claim of sex discrimination, thereby establishing that Title VII prohibits sex discrimination in the form of sex stereotyping.<sup>265</sup> As the *Back* court later declared, “[i]t is the law, then, that ‘stereotyped remarks can certainly be evidence that gender played a part’ in an adverse employment decision.”<sup>266</sup>

As courts and commentators have noted, the stereotyping directed at Ann Hopkins, who was denied partnership for failing to look and act the way a woman *should* look and act, followed the supposition that a woman is unqualified for a position because she does not conform to a gender stereotype.<sup>267</sup> This is distinct from more traditional forms of stereotyping in discrimination cases, more commonly at issue in sex-plus cases, in which an employer *assumes* a person will be a bad employee simply because she has certain qualities (such as being married, or having children), and takes an adverse action against her due to that stereotypical assumption.<sup>268</sup>

This brings us back to *Coleman*, where the Tenth Circuit Court of Appeals declared that “gender-plus plaintiffs can never be successful if there is no corresponding subclass of members of the opposite gender,” because in that event, sex-plus plaintiffs “cannot make the requisite showing that they were treated differently from similarly situated members of the opposite gender.”<sup>269</sup> This is incorrect, and should not be regarded as the law in sex-plus cases.<sup>270</sup>

To explain, it is certainly true that a female plaintiff alleging sex-plus discrimination must establish that she was discriminated against based on her sex, “which is, analytically, equivalent to establishing that a similarly situated man would not have been discriminated against if such a man

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<sup>264</sup> *Id.* at 235 (internal citations omitted).

<sup>265</sup> *Id.* at 250 (“In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”).

<sup>266</sup> *Back v. Hastings on Hudson Union Free Sch., Dist.*, 365 F.3d 107, 119 (2d Cir. 2004) (quoting *Price Waterhouse*, 490 U.S. at 251).

<sup>267</sup> *See id.*; *Evans v. Ga. Reg’l Hosp.*, 850 F.3d 1248, 1262 (11th Cir. 2017) (Rosenbaum, J., concurring in part and dissenting in part) (stating that the accounting firm in *Price Waterhouse* denied Hopkins’s partnership because “she had qualities that defied stereotypes of how women should look and act”). *See also* Zachary R. Herz, *Price’s Progress: Sex Stereotyping and Its Potential for Antidiscrimination Law*, 124 YALE L.J. 396, 406–07 (2014) (describing *Price Waterhouse*).

<sup>268</sup> *See Back*, 365 F.3d at 119. *See also* Herz, *supra* note 267 (describing the type of stereotyping at issue in *Hopkins* as “prescriptive stereotyping,” and the type of stereotyping at issue in a sex-plus case like *Phillips* as “ascriptive stereotyping”).

<sup>269</sup> *Coleman v. B–G Maint. Mgmt. of Colo., Inc.*, 108 F.3d 1199, 1204 (10th Cir. 1997).

<sup>270</sup> *See Johnston v. U.S. Bank Nat. Ass’n*, No. 08-CV-0296 PJS/RLE, 2009 WL 2900352, at \*9 n.11 (D. Minn. Sept. 2, 2009) (explaining the flaws in this statement).

existed.”<sup>271</sup> “[I]t does not follow that [the sex-plus plaintiff] must be able to prove that a particular similarly situated man was in fact treated better than she,”<sup>272</sup> however, as this ignores the lessons of *Price Waterhouse* and sex-plus cases like *Chadwick* and *Back*, which permit a plaintiff to prove sex discrimination in other ways.<sup>273</sup> Accordingly, although a plaintiff might attempt to prove sex-plus discrimination with evidence that an employer has in fact treated similarly situated males and females differently, other types of evidence—even including other forms of circumstantial evidence—can accomplish the same result.<sup>274</sup>

Notably, when one examines the stereotyped comments in sex-plus cases like *Chadwick* and *Back*, embedded within those comments are hints of opposite sex and same sex comparator evidence, thereby generating a similar inference of discriminatory intent and providing the requisite evidence of differential treatment between the sexes. Suppose, for example, that an employer makes the following comment to a female employee who just had a child: “You are the best credit analyst we have ever had, and you were especially great before you started having kids. Although I don’t mind when men with children work, I really don’t think that women with children should be working, so I’ve decided to fire you immediately. Please collect your belongings and go.”<sup>275</sup> Undoubtedly, if these events occurred, a reasonable jury could find that the plaintiff was fired because of her sex.<sup>276</sup> After all, the employer’s comment *alone* is

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<sup>271</sup> *Id.* at \*9.

<sup>272</sup> *Id.*

<sup>273</sup> See *Back*, 365 F.3d at 119 (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989)).

<sup>274</sup> See *King v. Ferguson Enters., Inc.*, 971 F. Supp. 2d 1200, 1217 (N.D. Ga. 2013) (stating that plaintiffs in the Eleventh Circuit “can establish a prima facie case—without identifying a similarly situated comparator—by offering circumstantial evidence that suggests their employer intentionally discriminated against them ‘with a force similar to that implied by treating nearly identical offenders differently’”) (quoting *Bell v. Crowne Mgmt., LLC*, 844 F. Supp. 2d 1222, 1234 (S.D. Ala. 2012)); see also *Fisher v. Vassar Coll.*, 70 F.3d 1420, 1447 n.12 (2d Cir. 1995) (recognizing that when evidence shows “there are no [similarly situated] males [with the same plus factor at issue] and that it is unlikely that there would be any, then it may be that the complainant would be able to prevail by providing some other evidence of discrimination”), *aff’d en banc*, 114 F.3d 1332 (2d Cir. 1997). Even proof of pretext can constitute evidence that an employer was motivated by discriminatory animus, as opposed to whatever alternative motivation the employer presents. See *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 147 (2000) (stating that “[p]roof that the defendant’s explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive,” as this proof allows a trier of fact to “reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose”).

<sup>275</sup> This hypothetical is adapted from a similar scenario provided in *Johnston*, 2009 WL 2900352 at \*7.

<sup>276</sup> *Id.* at \*9.

evidence that the plaintiff was fired *not* because of her abilities, but rather because of her sex in combination with her parental status. As the quoted comment alone suggests, men with children and women without children would not have suffered the same consequences. Thus, it is simply incorrect to state, as the Tenth Circuit has declared, that “gender-plus plaintiffs can never be successful if there is no corresponding subclass of members of the opposite gender.”<sup>277</sup>

Aside from the failure to account for other forms of persuasive evidence, the Tenth Circuit’s rule unnecessarily hamstring plaintiffs who are unlucky enough to have any opposite sex comparators in their workforce, a problem that can be particularly acute when sex-plus discrimination is alleged (given its level of specificity).<sup>278</sup> This point was made explicit in a recent First Circuit Court of Appeals decision applying the sex-plus doctrine in a case alleging a sexually hostile work environment, *Franchina v. City of Providence*.<sup>279</sup>

In *Franchina*, a former Providence, Rhode Island, employee, Lori Franchina, sued the City asserting a Title VII sexual harassment claim.<sup>280</sup> After losing at trial,<sup>281</sup> the City argued on appeal that Franchina failed to present sufficient evidence under a sex-plus theory because she failed to “identify a corresponding sub-class of the opposite gender and show that the corresponding class was not subject to similar harassment or discrimination.”<sup>282</sup> The First Circuit Court of Appeals rejected the City’s argument for numerous reasons.<sup>283</sup> First, the court declared that the City’s argument, if accepted, “would permit employers to discriminate free from Title VII recourse so long as they do not employ any subclass member of the opposite gender,” a result that would “be inapposite to Title VII’s

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<sup>277</sup> *Coleman v. B-G Maint. Mgmt. of Colo., Inc.*, 108 F.3d 1199, 1204 (10th Cir. 1997).

<sup>278</sup> *See Franchina v. City of Providence*, 881 F.3d 32, 52–53 (1st Cir. 2018). *See also* Goldberg, *supra* note 15, at 764–65 (arguing that plaintiffs in “trait-plus cases” are particularly unlikely to find an adequate comparator in their workforce).

<sup>279</sup> *See id.* at 45–46 (summarizing Franchina’s claims). *See also* Brief of Plaintiff-Appellee Lori Franchina at 26, *Franchina*, 881 F.3d 32 (2017) (No. 16-2401).

<sup>280</sup> *Franchina*, 881 F.3d at 37, 45–46.

<sup>281</sup> *Id.* at 37–38.

<sup>282</sup> *Id.* at 52. More specifically, the City argued, Franchina “is required to have presented evidence at trial of a comparative class of gay male firefighters who were not discriminated against,” because without such evidence, “it would not be possible to prove that any sort of differential treatment a plaintiff experiences is necessarily predicated on his or her gender.” *Id.*

<sup>283</sup> *See id.* at 52 (stating that the City’s argument “has some rather obvious flaws”). *But see* *Coleman v. B-G Maint. Mgmt. of Colo., Inc.*, 108 F.3d 1199, 1202–04 (10th Cir. 1997) (ruling in a sex-plus-marital status claim that a female plaintiff must show that her male co-workers with the same marital status were treated differently, and reversing jury verdict for the plaintiff due to a lack of evidence on that point).

mandate against sex-based discrimination.”<sup>284</sup> In a related point, the court declared that “Title VII is not to be diluted because discrimination adversely affects a plaintiff who is unlucky enough to lack a comparator in his or her workplace.”<sup>285</sup>

In the final analysis, sex discrimination claims require proof that “the employer actually relied on [plaintiff’s] gender in making its decision,”<sup>286</sup> or more simply, that the defendant intentionally discriminated against the plaintiff “because of” her sex.<sup>287</sup> What matters most, then, is not whether the plaintiff can generate evidence of how the employer treated an opposite sex comparator, but rather whether the plaintiff can show that her gender motivated the employer.<sup>288</sup> Opposite sex comparator evidence is one means of establishing the requisite intent, but it is not the only means.<sup>289</sup>

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<sup>284</sup> *Franchina*, 881 F.3d at 52–53. See also *King*, 971 F. Supp. 2d at 1209, 1217 (making a similar point, and stating that permitting a defendant to escape liability for having no comparator in its workforce “is not now, nor has it ever been, the law in [the Eleventh Circuit]”).

<sup>285</sup> *Franchina*, 881 F.3d at 53. The court additionally declared that the City’s proposed comparator requirement “conflicts . . . with Title VII’s text and jurisprudence.” *Id.* The court explained:

Requiring a plaintiff to point to a comparator of the opposite gender implies the inquiry is that of “but-for” causation. That is to say, the City’s approach requires *Franchina* to make a showing that, all else being equal (the “plus” factors being the same), the discrimination would not have occurred but for her gender. Title VII requires no such proof. The text bars discrimination when sex is “a motivating factor,” not “the motivating factor.”

*Id.* (citing 42 U.S.C. § 2000e-2(m)).

<sup>286</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989).

<sup>287</sup> See 42 U.S.C. § 2000e-2(a)(1) (2018) (making it unlawful for an employer to take certain adverse actions against an individual “because of such individual’s . . . sex”); *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983) (stating that “[t]he ‘factual inquiry’ in a Title VII case is ‘whether the defendant intentionally discriminated against the plaintiff’”) (quoting *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981)).

<sup>288</sup> See *Goldberg*, *supra* note 15, at 777–78 (arguing that plaintiffs ought to be able to prove discrimination even in cases where comparison is not possible). It remains arguably unclear whether Title VII’s “motivating factor” provision applies in so-called single motive claims, as well as mixed motive claims. See *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94 n.1 (2003) (“This case does not require us to decide when, if ever, § 107 applies outside of the mixed-motive context.”). At least two circuit courts, however, have applied the standard in single motive claims. See *Franchina*, 881 F.3d at 53; *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 853–54 (9th Cir. 2002) (discussing the issue and concluding that “the plaintiff in any Title VII case may establish a violation through a preponderance of evidence (whether direct or circumstantial) that a protected characteristic played ‘a motivating factor’” in the employer’s adverse action).

<sup>289</sup> See *Johnston v. U.S. Bank Nat. Ass’n*, No. 08-CV-0296 PJS/RLE, 2009 WL 2900352, at \*9 (D. Minn. Sept. 2, 2009); see also *Fisher v. Vassar Coll.*, 70 F.3d 1420, 1447 n.12 (2d Cir. 1995) (recognizing that when “the complainant establishes by evidence that there are no [similarly situated] males [with the same plus factor at issue] and that it is unlikely that there would be any, then it may be that the complainant would be able to

Finally, as between direct and circumstantial evidence, Title VII does not require, or even prefer, one or the other when proving the ultimate fact of discrimination. This much was made clear in the 1991 amendments to Title VII, which set forth a “motivating factor” standard without any mention of direct or circumstantial evidence,<sup>290</sup> as well as the Supreme Court’s subsequent ruling in *Desert Palace*, which held that direct evidence of discrimination is not required to prove a mixed motive claim.<sup>291</sup> It is also reflected in standard jury instructions that ascribe the same weight to direct and circumstantial evidence.<sup>292</sup> Moreover, although courts have traditionally channeled direct and indirect evidence into distinct frameworks,<sup>293</sup> more recent decisions have begun allowing a plaintiff to present both types of evidence in a unified attempt to prove the requisite discriminatory intent.<sup>294</sup> In sum, evidence is evidence, and what matters most is its relevancy and persuasiveness, regardless of its label.<sup>295</sup>

## VII. CONCLUSION

This Article has considered the role of comparator evidence in proving sex-plus discrimination. Although some courts have declared that sex-plus plaintiffs can never be successful without proof of how the employer treated the corresponding subclass of opposite sex individuals, this is analytically incorrect and should not be adopted as the law, given that there are other forms of evidence equally capable of proving the requisite discriminatory intent. Nevertheless, in those instances when a sex-plus plaintiff attempts to prove her claim solely through comparator evidence,

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prevail by providing some other evidence of discrimination”), *aff’d en banc*, 114 F.3d 1332 (2d Cir. 1997).

<sup>290</sup> 42 U.S.C. § 2000e-2(m); *Desert Palace*, 539 U.S. at 98–99. *See also Costa*, 299 F.3d at 853–54 (concluding that “the plaintiff in any Title VII case may establish a violation through a preponderance of evidence (whether direct or circumstantial) that a protected characteristic played ‘a motivating factor’” in the employer’s adverse action).

<sup>291</sup> *See Desert Palace*, 539 U.S. at 101–02; *Costa*, 299 F.3d at 853–54.

<sup>292</sup> *See* ELEVENTH CIR. PATTERN JURY INSTR. - CIV. § 3.3 (2019) (defining “direct” and “circumstantial” evidence and explaining that “[t]here’s no legal difference in the weight you may give to either direct or circumstantial evidence”).

<sup>293</sup> *See, e.g., Philipsen v. Univ. of Mich. Bd. of Regents*, No. 06-CV-11977-DT, 2007 WL 907822 (E.D. Mich. Mar. 22, 2007).

<sup>294</sup> *See, e.g., Ortiz v. Werner Enter. Inc.*, 834 F.3d 760, 765–66 (7th Cir. 2016) (holding, in part, that courts in the Seventh Circuit “must stop separating ‘direct’ from ‘indirect’ evidence and proceeding as if they were subject to different legal standards,” and stating that “all evidence belongs in a single pile and must be evaluated as a whole”).

<sup>295</sup> *See generally Johnston v. U.S. Bank Nat. Ass’n*, No. 08-CV-0296 PJS/RLE, 2009 WL 2900352, at \*9 (D. Minn. Sept. 2, 2009). *Cf. Desert Palace*, 539 U.S. at 100 (quoting *Rogers v. Mo. Pac. R. Co.*, 352 U.S. 500, 508 n.17 (1957)) (“The reason for treating circumstantial and direct evidence alike is both clear and deep rooted: ‘Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.’”).

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opposite sex comparator evidence is vital because without such evidence, it would be impossible to prove that the plaintiff's sex played a factor in the employer's decision, a necessary component of any sex discrimination claim. When combined with opposite sex comparator evidence, same sex comparator evidence can then be used to prove that the employer does not engage in sex discrimination across-the-board, but rather employs a more specific sex-based animus targeting only a particular subgroup of male or female employees, thereby establishing the claim as a sex-plus claim rather than a pure sex discrimination claim. For this reason, this Article has shown that the strongest sex-plus discrimination claims are those where the two types of comparator evidence are used in tandem, an approach courts should more readily allow.