To establish a violation of Title VII of the Civil Rights Act of 1964 (Title VII), must a plaintiff show that a similarly situated person outside of the protected class committed exactly the same offense, but was disciplined less severely? Courts often must address this question to determine if a plaintiff has met his or her burden of production with respect to one element of the Title VII prima facie case: that the adverse employment action occurred under circumstances giving rise to an inference of discrimination. A typical way in which a plaintiff meets this burden is by presenting evidence that he or she was treated less favorably than a “similarly situated” employee outside of the plaintiff’s protected category. As discussed below, however, what it means to be “similarly situated” to a coworker can vary significantly from circuit to circuit. The Supreme Court recently denied a petition for certiorari filed by the plaintiff in Hervey v. County of Koochiching, leaving this split unresolved.

Illustrative of this split are the Eighth Circuit’s decision in Hervey v. County of Koochiching and the Second Circuit’s decision in Graham v. Long Island Rail Road. The Eighth Circuit ruling is consistent with the comparatively strict approach of the Third, Sixth, and Eleventh Circuits, all of which require that there be almost no distinction between the plaintiff and the comparators. In contrast, the First, Second, Fourth, Fifth, Seventh, and Tenth Circuits apply less stringent standards generally requiring a plaintiff to show reasonably similar—as opposed to identical—circumstances between the plaintiff’s and comparator’s conduct and the disciplinary measures taken in response.

THE EIGHTH CIRCUIT’S HERVEY DECISION

In Hervey, plaintiff worked for 25 years as a corrections officer in the Koochiching County Jail. In 2002, she was promoted to a newly created position of jail administrator, reporting directly to the sheriff. In 2003, a new undersheriff was appointed and all employees, including plaintiff, were directed to report to the undersheriff. Disputes arose between plaintiff and the sheriff and undersheriff, and over time, the plaintiff’s duties were reduced or eliminated.

In February 2004, after receiving a mixed performance review, with low ratings for teamwork,
judgment, and dependability, plaintiff took three days off to prepare a formal complaint. Although plaintiff alleged that she left voicemails for the undersheriff informing him of her absences, he claimed that no messages were left. Upon plaintiff’s return to work, the undersheriff held a meeting with plaintiff to discuss her unannounced absences, at which time plaintiff told the undersheriff that she had filed a complaint with the Minnesota Department of Human Services. Plaintiff also filed a Charge of Discrimination with the Equal Employment Opportunity Commission (EEOC).

Following receipt of a right-to-sue letter from the EEOC, plaintiff filed a claim in the United States District Court for the District of Minnesota, in which she alleged, among other things, sex discrimination and retaliation in violation of Title VII and the Minnesota Human Rights Act. Plaintiff’s claim included allegations that, among other things, defendant did not discipline similarly situated male employees as severely for their misconduct, and that this differential treatment constituted sex discrimination. Plaintiff claimed that the undersheriff lied on his application to become a licensed police officer and was not suspended for this falsehood, but she was suspended for allegedly lying about leaving a voicemail message informing her supervisor of her absences. She also claimed that the undersheriff was not disciplined for mishandling a disciplinary hearing, while she was disciplined for a similar incident, and that the undersheriff’s collective violations of department policy over his career were more serious than her acts of insubordination. Finally, she claimed that another male employee was not disciplined for driving while intoxicated. The District Court granted summary judgment to defendants on both the sex discrimination and retaliation claims and the Eighth Circuit affirmed the District Court’s decision.

One critical aspect of the Eighth Circuit’s affir-
mance was the court’s determination that the plain-
tiff was not similarly situated to the male employees to whom she sought to compare herself and the alleged misconduct in which they engaged was not the same as her transgressions. Therefore, the fact that the plaintiff was disciplined differently than the male comparators did not give rise to an inference of discrimination. The Eighth Circuit explained that “to prove discrimination based on similarly-sit-
tuated persons of another sex, ‘the individuals used for comparison must have dealt with the same supervisor, have been subject to the same standards, and engaged in the same conduct without any mitigating or distinguishing circumstances.’”5

Under the Eighth Circuit’s analysis, the focus of the inquiry is whether other employees were treated differently despite committing the same violations. In Hervey, the Eighth Circuit concluded that the plaintiff’s misconduct was not the same as the alleged misconduct by the undersheriff and the other male employee, and therefore treating their behaviors differently did not create an inference of sex discrimination.6 In so holding, the Eighth Circuit applied the “similarly situated” standard very narrowly.

THE SECOND CIRCUIT’S GRAHAM DECISION

The Second Circuit’s approach in Graham v. Long Island Rail Road stands in contrast to that of the Eighth Circuit. In Graham, the plaintiff, an African American employee, was dismissed following a disciplinary trial in which he was found guilty of drug use after failing a urine test.7 The plaintiff was not given a “last chance waiver,” which was typically given to an employee upon their first drug or alcohol offense, allowing that employee to be reinstated after passing a fitness exam, and on condition that such employee submit to future random drug or
alcohol testing at the employer’s request. Therefore, the plaintiff appealed his dismissal to a mediation board, which reinstated him to work under a last chance waiver. Two months later, defendant ordered the plaintiff to submit to a drug and alcohol test, which he did by submitting two samples, one to defendant’s medical center, which tested positive for alcohol, and one to his personal physician, which reported no alcohol. On the basis of the positive test, the plaintiff was terminated, and the termination was upheld after a disciplinary trial. The plaintiff unsuccessfully appealed to the mediation board.

The plaintiff then filed a claim in the United States District Court for the Eastern District of New York, alleging his employer discriminated on the basis of race in violation of Title VII when it terminated him. The plaintiff claimed that his employer treated white employees better than it treated him, by giving white employees last chance waivers for first time offenses automatically and multiple last chance waivers before terminating their employment.9 The District Court granted summary judgment in favor of the defendant on the grounds that the disciplinary records of other employees who had tested positive for alcohol or drugs revealed that black and non-black employees were treated alike.9 Individuals whom the plaintiff alleged had been more favorably treated, the court ruled, were not similarly situated.

The Second Circuit reversed the grant of summary judgment in favor of the defendant on the grounds that the disciplinary records of other employees who had tested positive for alcohol or drugs revealed that black and non-black employees were treated alike.9 Individuals whom the plaintiff alleged had been more favorably treated, the court ruled, were not similarly situated.

The Second Circuit reversed the grant of summary judgment, finding that there were material questions of fact as to whether the plaintiff had carried his burden of showing unequal treatment of similarly situated employees. For example, the plaintiff had identified white employees who were subject to last chance waivers that provided—as did the one applicable to the plaintiff—that any future violation of the terms of the waiver would result in termination of employment. The plaintiff also established that the comparators had violated the terms of the waivers and remained employed, whereas he was terminated immediately upon his first violation. The Second Circuit deemed irrelevant to the issue of whether the employees were similarly situated certain factors relied upon by the District Court—such as the nature of the post-waiver offenses and the position held by the employee when such offense occurred.

The Second Circuit held that the District Court had applied an overly rigid formulation of the similarly situated test to the facts in Graham. When considering whether a plaintiff has raised an inference of discrimination by showing that he was subjected to disparate treatment, the Second Circuit requires the plaintiff to show that he or she was “similarly situated in all material respects” to the individuals with whom he or she seeks to make a comparison.10 What constitutes “all material respects,” will vary from case to case and:

must be judged taking into account (1) whether the plaintiff and those he maintains were similarly situated were subject to the same workplace standards and (2) whether the conduct for which the employer imposed discipline was of comparable seriousness11… In other words, there should be an “objectively identifiable basis for comparability.”12 Hence, the standard for comparing conduct requires a reasonably close resemblance of the facts and circumstances of plaintiff’s and comparator’s cases, rather than a showing that both cases are identical.13
Thus, the Second Circuit rejects the notion that employees must engage in the exact same offense to be similarly situated, and instead examines the acts and the context and surrounding circumstances in which those acts are evaluated.

DECISIONS BY OTHER CIRCUITS

Although the circuits that have addressed this issue are split, more seem to be in accord with the Second Circuit, applying a variation of the “comparable seriousness” test. For example, the First Circuit recently held that “the comparison cases ‘need not be perfect replicas,’ but they must ‘closely resemble one another in respect to relevant facts and circumstances.’”

The law in the Seventh Circuit appears to be less settled. In a 1995 decision, the Seventh Circuit applied a standard similar to that of the Eighth Circuit: the plaintiff must show “that the two employees dealt with the same supervisor, were subject to the same standards, and had engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their conduct or the employer’s treatment of them.”

However, more recently, when faced with a district court decision dismissing the plaintiff’s claim for failing to produce a non-Caucasian employee who committed exactly the same infraction and was treated more favorably, the Seventh Circuit cautioned that the law is not this narrow and the other employees must have engaged in “similar—not identical-conduct” to qualify as similarly situated.

Yet, in applying this standard the Sixth Circuit cautioned that “courts should not demand exact correlation, but should instead seek relevant similarity.” For example, in Perry v. McGinnis, the Sixth Circuit reversed the lower court’s grant of summary judgment to defendants in an employment discrimination case where the plaintiff raised genuine issues of material fact as to whether he was treated differently than similarly situated colleagues. The Sixth Circuit stated that where all hearing officers were supervised by the same officials, subject to the same standards, and charged with the same duties, they were, “indeed similarly situated.” Given that the plaintiff produced evidence that non-minority hearing officers committed, without reprimand, the same types of errors for which the plaintiff was disciplined, he raised an inference of discrimination and his claim should have been permitted to proceed.

LOOKING AHEAD

The Supreme Court has denied Hervey’s petition for certiorari, leaving this issue unsettled for the foreseeable future. Therefore, the jurisdiction in which an employer is located will remain an important factor when litigating employment discrimination claims. The frequency with which these issues arise and the number of courts that have grappled with them however, highlight the importance of adopting even-handed and uniform disciplinary
procedures to avoid litigation when possible. Human resources professionals and supervisory personnel, in particular, should be trained in the importance of evaluating types of policy violations and the appropriate disciplinary measures to impose in response. Moreover, where appropriate, proposed disciplinary actions should be reviewed before instituted to maintain organizational consistency.

_______________________________

Howard S. Lavin is a Partner and Elizabeth E. DiMichele a Special Counsel in the Employment Law Practice Group of Stroock & Stroock & Lavan LLP, concentrating in employment law counseling and litigation. The authors can be reached at hlavin@stroock.com and edimichele@stroock.com, respectively.

1. *Hervey v. County of Koochiching*, 527 F.3d 711, 720 (8th Cir. 2008), quoting *Clark v. Runyon*, 218 F.3d 915, 918 (8th Cir. 2000).
3. *Id. at 715.*
4. *Id. at 716.*
5. *Id. at 720* quoting *Clark v. Runyon*, 218 F.3d 915, 918 (8th Cir. 2000).
6. *Id. at 721.*
8. *Id. at 41.*
9. *Id. at 37.*
10. *Id. at 39,* quoting *Shumway v. United Parcel Serv., Inc.*, 118 F.3d 60 (2d Cir. 1997).
11. *Id. at 40,* citing *Norville v. Staten Island Univ. Hosp.*, 196 F.3d 89, 96 (2d Cir. 1999).
12. *Id. at 40,* quoting *Cherry v. American Tel. & Tel. Co.*, 47 F.3d 225, 229 (7th Cir. 1995).
This publication may be attorney advertising. 
Prior results do not guarantee a similar outcome.