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Beyond Comparators:

Challenging the Legal Shortfalls in Asian American Disparate Treatment Claims

Regina Yoo

ABSTRACT

Asian Americans experience workplace discrimination at disproportionately high rates yet file formal employment discrimination claims at strikingly low levels. This disconnect reflects not only cultural and structural barriers to reporting, but also doctrinal limitations within Title VII jurisprudence that fail to capture the lived realities of Asian American professionals. This Note examines how courts' reliance on the *McDonnell Douglas* burden-shifting framework—particularly its comparator requirement in disparate treatment claims—systematically disadvantages Asian American plaintiffs whose experiences of discrimination often do not fit traditional comparative models.

By situating contemporary employment discrimination doctrine within the social and cultural context of Asian American workplace experiences, this Note argues that strict adherence to comparator-based proof creates an unjust evidentiary barrier that forecloses meaningful legal redress. It contends that the *McDonnell Douglas* framework should not function as a rigid *prima facie* standard and instead advocates for broader adoption of the “mosaic approach,” which permits courts to assess the full constellation of circumstantial evidence surrounding discriminatory conduct. Through doctrinal analysis, social context, and case-study application, this Note proposes a reorientation of Title VII analysis that better aligns with the statute's purpose of ensuring equal employment opportunity and provides more effective protection for Asian American workers.

ABOUT THE AUTHOR

Regina Yoo is a J.D. candidate at St. John's University School of Law, Class of 2026. This Note was born from her research assistant work for Professor Elaine M. Chiu and further shaped by her attendance at the 2024 AABANY Fall Conference, Responding Today to Workplace Injustice for AAPI Americans panel. She is grateful to Professor Chiu for her mentorship and guidance, and to the scholars, practitioners, and advocates whose work and conversations helped inform the development of this piece.

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INTRODUCTION

One in three Asian American employees has considered filing an employment discrimination lawsuit, a rate that is higher than employees of other racial classes.¹ However, lawsuits combatting workplace injustice continue to be underutilized in Asian American communities.² The U.S. Equal Employment Opportunity Commission (EEOC) has noted that Asian Americans file a disproportionately

1. INCLUSION@WORK, 2023/2024 *Executive Leadership Risk Report: Asian Americans—10 Questions Internal Studies Don’t Answer on Revenue, Retention, and Lawsuits*, PRISCA (“Nearly one-third said they have thought and/or talked about filing a lawsuit against their current or former employer because of the way they were treated in relation to their identity or background.”) (fill out form at <https://form.typeform.com/to/Y43cucMq?typeform-source=justice.standwithasianamericans.com>). In a different study, it was found that one in five Asian adults have experienced workplace discrimination because of their race or ethnicity. NEIL G. RUIZ, CAROLYNE IM & ZIYAO TIAN, DISCRIMINATION EXPERIENCES SHAPE MOST ASIAN AMERICANS’ LIVES (Pew Rsch. Ctr. 2023). The data for the 2022–2023 Survey of Asian Americans is drawn from a sample of 7,006 individuals who self-identified as Asian Americans. *Id.* To maintain consistency with the Central Bureau’s definition of “Asian,” individuals who self-identified as being of Southwest Asian, Central Asian, or other non-Asian origins were either excluded from interviews or removed from the final sample. *Id.* American workplace discrimination has been a longstanding issue as a 2005 survey revealed that thirty-one percent of Asian Americans employees reported experiencing workplace discrimination—the highest among all ethnic groups. *Asian American and Pacific Islander Work Group Report to the Chair of the Equal Employment Opportunity Commission*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/federal-sector/reports/asian-american-and-pacific-islander-work-group-report-chair-equal-employment> [<https://perma.cc/SFJH-PRTS>] (last modified Dec. 21, 2008).

2. Michelle Lee, President, General Counsel, and Board Chair, Stand with Asian Americans, Statement at the 2024 Asian American Bar Association of New York Fall Conference on Responding Today to Workplace Injustice for AAPI Americans, New York, NY, (Oct. 12, 2024).

low number of formal complaints, accounting for only 2% of private-sector and 3.26% of federal-sector charges.³ Between 2003 to 2013, the EEOC has filed only twenty lawsuits alleging discrimination on behalf of an Asian American plaintiff.⁴ This shockingly low number suggests that workplace discrimination against Asian Americans is significantly underreported and under-addressed. This Note explores the gap between judicial understandings of employment discrimination and Asian Americans' lived experiences in the workplace. So long as that divide persists, employment discrimination against Asian American professionals will continue.⁵ Achieving equal employment opportunities for the Asian American community will require reforms to existing legal standards.

This Note explores the shortfalls of the *McDonnell Douglas* framework's comparator requirement in Title VII disparate treatment claims from the perspective of Asian American plaintiffs. Ultimately, this Note argues that the *McDonnell Douglas* framework should not be treated as the prima facie standard, and that courts should instead look to the mosaic approach to provide adequate redress for Asian American plaintiffs. Part I explains the origins of Title VII, the *McDonnell Douglas* framework for disparate treatment claims, and the shortcomings of the comparator doctrine. Part II analyzes the stereotypes of Asian American professionals and the unique legal challenges faced by Asian American workers. Part III introduces the Eleventh Circuit's "mosaic approach" and uses a case study to argue that the *McDonnell Douglas* framework's reliance on comparator evidence should only be one of several ways to satisfy the plaintiff's burden at the summary judgment stage. Given that Title VII was established to ensure equal opportunities for all minority groups in the workplace, the time is now ripe to reexamine the comparator requirement in light of the challenges faced by Asian American plaintiffs who experience workplace injustice and yet are often denied redress by the current legal framework.

I. BACKGROUND

A. *Employment Discrimination Claims Under Title VII*

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."⁶ The purpose of this federal law is to curtail discriminatory employment practices—hiring, promoting, assigning, and dismissing—based on an individual's protected class.⁷ Unlawful employment discrimination can arise from all areas of employment decisions including, but not limited to, recruitment, hiring, wages, assignment,

3. *Asian American and Pacific Islander Work Group Report to the Chair of the Equal Employment Opportunity Commission*, *supra* note 1.

4. *Asian-Americans in the American Workforce*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/special-report/asian-americans-american-workforce>[<https://perma.cc/8KXD-TXHJ>].

5. *Infra* Part I(C).

6. 42 U.S.C. § 2000e-2(a)(1).

7. 110 Cong. Rec. 13078 (1964) (statement of Senator Cooper).

promotions, benefits, discipline, discharge, and layoffs.⁸ Legislators and advocates hoped to eliminate an employee's race, color, religion, sex, or national origin from affecting these decisions, and encouraged employers to consider an individual's "training, ability, performance, efficiency, and capacity to be determinative," in order to provide equal workplace opportunities for minority groups.⁹

This landmark legislation provides definitions for employment discrimination cases. For example, Title VII defines an "employer" as a "person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such person."¹⁰ An "employee" is "an individual employed by an employer."¹¹ Interestingly, Title VII neither defines the definition of race nor creates categorical racial groups.¹²

Although not codified in the statute, courts have divided employment discrimination claims into three distinct categories: "disparate treatment," "disparate impact," and "hostile work environment" discrimination.¹³ Disparate treatment is also known as intentional discrimination or discriminatory treatment; it occurs when employment practices and policies exclude individuals from equal employment opportunities because of their race, color, religion, sex, or national origin.¹⁴ This Note examines only this first category.¹⁵

8. *Id.*

9. Frank Cloud Cooksey, *The Role of Law in Equal Employment Opportunity*, 7 B.C. L. REV. 417, 421 (1966). In doing so, Congress and civil rights advocates hoped to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971).

10. 42 U.S.C. § 2000e(b).

11. 42 U.S.C. § 2000e(f).

12. *See id.*

13. David Duke, *Disparate Impact and Disparate Treatment: The Prima Facie Case under Title VII*, 32 ARK. L. REV. 571, 573 (1978); *see generally* Tristin K. Green, *Work Culture and Discrimination*, 93 CAL. L. REV. 623, 654–55 (2005) ("Enforcement efforts under the statute have centered primarily on three theories of discrimination: disparate treatment theory, which holds employers liable for intentionally discriminatory, identifiable employment actions taken by particular wrongdoers and for systematic practices or policies of intentional exclusion; disparate impact theory, which holds employers liable for the use of employment practices that have an adverse effect on members of particular groups and are not justified by business necessity; and hostile work environment theory, which protects employees against harassing conduct that rises to the level of a hostile environment").

14. *CM-604 Theories of Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Aug. 1, 1988), <https://www.eeoc.gov/laws/guidance/cm-604-theories-discrimination> [<https://perma.cc/PK4K-Y2JF>]. This type of employment discrimination "is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

15. Disparate impact discrimination occurs when employment practices and policies are facially neutral but cause minorities to be excluded. 42 U.S.C. § 2000e-2(k)(1)(A)(i); *see Griggs*, 401 U.S. at 430 (holding that Title VII prohibits not only cases of intentional discrimination, but also cases in which practices were fair on its face, "but discriminatory in operation"). The

Courts further differentiate among disparate treatment cases by adopting different rules for claims that allege a single motive versus mixed motives, and for cases that rely on direct evidence versus circumstantial evidence.¹⁶ Disparate treatment cases require proof that “the employee’s protected trait actually played a role in that process and had a determinative influence on the outcome.”¹⁷ A bad motive or hostile intent is not required, as it is not proscribed in the statute.¹⁸ In single-motive cases, the factfinder evaluates two opposing narratives: the employee’s claim that the decision was based on a protected characteristic and the employer’s claim that the decision was made for a non-discriminatory reason.¹⁹ In mixed-motive cases, the factfinder may find that the decision resulted from both discriminatory and non-discriminatory reasons.²⁰

Courts conduct a simple analysis for cases with direct evidence—“evidence that demonstrates discrimination without any required inferences”—presenting the question “whether the worker shows a negative outcome was caused by a protected trait.”²¹ If a plaintiff does not have direct evidence of discrimination based on a protected class, the courts will view the evidence as circumstantial.²² Circumstantial evidence “suggests, but does not definitively prove, that a protected trait influenced an outcome.”²³

B. *Judicial Interpretation of Title VII: The McDonnell Douglas Framework*

The *McDonnell Douglas* framework, established in *McDonnell Douglas Corp. v. Green*, is a burden-shifting framework used to analyze Title VII single-motive disparate treatment claims in which the plaintiff relies on circumstantial evidence.²⁴ There are three steps to the framework. Step one, which has several elements, requires the plaintiff to establish a prima facie case. The plaintiff must establish that: “(1) he or she was a member of a protected class; (2) he or she suffered an adverse employment action; (3) he or she was qualified for the position”; and (4) show that the “circumstances [] [gave] rise to an inference of discrimination.”²⁵ Once the plaintiff establishes a prima facie case of discrimination, the burden shifts to the employer “to articulate some legitimate, nondiscriminatory

hostile work environment theory defines discriminatory harassment as conduct that is hostile or abusive and significantly impacts an employee’s emotional and psychological ability to perform their job. *Harris v. Forklift Sys.*, 510 U.S. 17, 21 (1993) (explaining that Title VII is violated when a workplace is permeated with discriminatory harassment that is severe enough to alter the conditions of employment and create an abusive environment).

16. SANDRA F. SPERINO, *THE LAW OF EMPLOYMENT DISCRIMINATION* 63 (West Academic 1st ed. 2019).

17. *Hazen Paper Co., v. Biggins*, 507 U.S. 604 (1993).

18. *Id.*

19. SPERINO, *supra* note 16.

20. SPERINO, *supra* note 16.

21. SPERINO, *supra* note 16, at 62.

22. SPERINO, *supra* note 16, at 65.

23. SPERINO, *supra* note 16, at 65.

24. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); SPERINO, *supra* note 16, at 66.

25. *Wright v. Murray Guard, Inc.*, 455 F.3d 702, 707 (6th Cir. 2006) (quoting *DiCarlo v. Potter*, 358 F.3d 408, 415 (6th Cir. 2004)); *Bejar v. Dep’t of Veterans Affs.*, 683 F. App’x 656, 658 (10th Cir. 2017).

reason” for its conduct towards the plaintiff.²⁶ If the employer provides a legitimate, non-discriminatory reason, the burden shifts back to the plaintiff to show that the employer’s reason is pretext or to present evidence suggesting that the real reason for the outcome was the plaintiff’s protected trait.²⁷

The plaintiff in *McDonnell Douglas Corp.* was a Black citizen who worked as a mechanic and laboratory technician for the McDonnell Douglas Corporation, an aerospace and aircraft manufacturer, for eight years before being laid off in a general workforce reduction.²⁸ In response, the plaintiff joined Congress on Racial Equality members to protest the layoffs as racially motivated discrimination.²⁹ The protest included a stall-in and a lock-in.³⁰ Three weeks later, the plaintiff applied to a McDonnell Douglas job advertisement for a mechanics position, but the defendant rejected his application on the basis of the plaintiff’s participation in the stall-in and lock-in.³¹ The plaintiff filed a Title VII complaint with the Equal Employment Opportunity Commission alleging employment discrimination and retaliation.³² The EEOC found no reasonable cause to believe there was illegal employment discrimination under Section 703(a)(1), but found reasonable cause to believe defendant retaliated under Section 704(a).³³

Following the Eighth Circuit’s remand for trial after concluding that the plaintiff had established a *prima facie* case of discrimination and that the employer’s asserted reasons could be tested for pretext, the U.S. Supreme Court granted certiorari “to clarify the standard governing the disposition of an action challenging employment discrimination.”³⁴ The Court held that a Title VII complainant must “establish[] a *prima facie* case of racial discrimination . . . by showing (i) that he

26. *McDonnell Douglas Corp.*, 411 U.S. at 802.

27. *Id.* at 804; *Texas Dept. of Cmty. Affs. v. Burdine*, 450 U.S. 248, 258 (1981).

28. *McDonnell Douglas Corp.*, 411 U.S. at 794.

29. *Id.* at 794–95. Congress on Racial Equality was a civil rights organization founded by an interracial group of students at the University of Chicago to fight racial inequality in the United States. *Congress of Racial Equality (CORE)*, MARTIN LUTHER KING, JR. RSCH. & EDUC. INST., <https://kinginstitute.stanford.edu/congress-racial-equality-core> [<https://perma.cc/9QSE-VV72>].

30. *Green v. McDonnell-Douglas Corp.*, 318 F. Supp. 846, 849 (E.D. Mo. 1970) (explaining that the “stall-in . . . was . . . five teams, each consisting of four cars would ‘tie up’ five main roads into McDonnell at the time of the morning rush hour,” and the “‘lock in’ arose out of a demonstration . . . in which plaintiff . . . was in charge of a picket line demonstration against McDonnell . . . [d]uring the demonstration, a chain and padlock were placed on the front door . . . as a result, the defendant’s employees were locked in,” wherein “[p]laintiff testified that he approved of chaining the door”).

31. *McDonnell Douglas Corp.*, 411 U.S. at 796.

32. *Id.*; 42 U.S.C. § 2000e-3(a) (“It shall be unlawful employment practice 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.”).

33. *Definitions of Terms: Reasonable Cause*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/data/definitions-terms> [<https://perma.cc/UR28-24MQ>] (“EEOC’s determination based upon the evidence obtained in the investigation that it believes discrimination did occur. Reasonable cause determinations are followed by efforts to conciliate the discriminatory issues which gave rise to the initial charge.”). Because the EEOC had no congressional authority in 1968 to litigate, and settlement efforts were futile, the EEOC advised the plaintiff to file a civil action. *McDonnell Douglas Corp.*, 411 U.S. at 797.

34. *McDonnell Douglas Corp.*, 411 U.S. at 798.

belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applications from persons of complainant's qualifications."³⁵ Using this test, the Court held that the plaintiff established a prima facie case because (i) plaintiff identified as Black, (ii) he applied for a job in the mechanic trade, (iii) he had the job qualifications and was rejected by defendant, and (iv) defendant continued to look for qualified mechanics after plaintiff's rejection.³⁶ When the burden shifted to the defendant, the defendant offered a legitimate, nondiscriminatory reason for not rehiring the plaintiff—his involvement in the unlawful protest.³⁷ Therefore, the Court remanded the case with instructions for the plaintiff to show that the defendant's actions were pretext for statutorily prohibited discrimination.³⁸

While the *McDonnell Douglas* framework has evolved over the years, the case remains a fixture in employment discrimination jurisprudence for disparate treatment cases.³⁹ In fact, the Supreme Court itself wrote in a later case that the model "was never intended to be rigid, mechanized or ritualistic," and instead was to be modified depending on the facts of an alleged discrimination case.⁴⁰ For example, consider how the *McDonnell Douglas* court created the fourth prong for a prima facie case—whether the defendant continued to seek applications from other individuals with the plaintiff's qualifications—to match the facts of its case because the adverse employment action was hiring.⁴¹ This illustrates the Court's own recognition that the framework was meant to adapt to different types of adverse employment actions rather than impose a one-size-fits-all formula.

One significant evolution to the framework has been the requirement in some federal circuit courts for the plaintiff to "create an inference of discrimination by showing that she was treated differently than people outside of her protected class" in order to satisfy the fourth prong.⁴² Legal scholars have referred to this type of comparative evidence as the "comparator doctrine."⁴³ Although the Title VII statute does not require a comparator, evidence of a comparator has become a common avenue for plaintiffs to satisfy the fourth prong.⁴⁴ The Second Circuit explains

35. *Id.* at 802.

36. *Id.*

37. *Id.* at 806.

38. *Id.* at 805.

39. SPERINO, *supra* note 16, at 66 ("*McDonnell Douglas Corp. v. Green* is one of the most important cases in employment discrimination jurisprudence.").

40. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) ("The method suggested in *McDonnell Douglas* . . . was never intended to be rigid, mechanized, or ritualistic . . . it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.").

41. *McDonnell Douglas Corp.*, 411 U.S. at 802.

42. SPERINO, *supra* note 16, at 78.

43. Suzanne Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 743–51 (2011).

44. *Contra Olmstead v. L.C. by Zimring*, 527 U.S. 581, 617 (1999) (Thomas, J., dissenting) ("Under Title VII, a finding of discrimination requires a comparison of otherwise similarly situated persons who are in different groups by reason of certain characteristics provided by statute.").

that “a plaintiff can make a showing of disparate treatment simply by pointing to the adverse employment action and the many employees who suffered no such fate.”⁴⁵ When the employer denies discriminatory treatment of an individual, the court must find whether the employer acted because of the plaintiff’s protected trait.⁴⁶ In other words, the question requires a showing of causation; that “but for” the plaintiff’s protected trait, the adverse employment action would not have occurred.⁴⁷ Comparators are similarly situated to the plaintiff but differ from them in the protected characteristic, so if they receive better treatment by the defendant, “but for” causation is met.⁴⁸ Thus, the comparator requirement remains popular for two reasons. First, it aligns with judicial preferences for clear, fact-based analysis.⁴⁹ Second, it avoids complex sociological questions and minimizes reliance on subjective interpretations of workplace dynamics.⁵⁰

The circuit courts that use comparator evidence to satisfy the fourth prong of *McDonnell Douglas* conflict in their applications.⁵¹ Some circuits require a comparator at the summary judgment stage.⁵² Other courts require or encourage production of comparator evidence at the pretext stage.⁵³ In fact, the Eighth Circuit noted

45. *Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 467 (2d Cir. 2001).

46. “[W]hether the employer is treating ‘some people less favorably than others because of’ any of the protected characteristics. *Furnco Constr. Corp.*, 438 U.S. at 577 (quoting *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977)).

47. Goldberg, *supra* note 43, at 731.

48. Title VII considers “unlawful employment practice for an employer” to act “because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1) (2006). The “because of” statutory language has led courts to seek a similarly situated comparator to prove discriminatory intent. Goldberg, *supra* note 43, at 794. (“The comparator heuristic . . . gives the appearance that the facts of differential treatment, rather than the courts’ own assumptions and judgments, are doing the work to show that trait-based discrimination has occurred and that, as required by the applicable discrimination law, the court must intervene.”).

49. Goldberg, *supra* note 43, at 740 (“[T]he comparator methodology has retained its popularity in large part because it serves entrenched judicial-legitimacy preferences that favor clearly defined and identifiable categories and, relatedly, disfavor sociologically oriented inquiries. With the advantage of an empirical patina, comparators suggest that the slippery interactions between law and lived experience in this area are susceptible to data-driven analysis based on workplace facts and that the resolution of claims does not rest on a judge’s subjective perceptions of complex workplace dynamics.”).

50. Goldberg, *supra* note 43.

51. LEX K. LARSON, 3 LAB. & EMP. L. § 54.02[6] (2010) (“[F]ailure of the plaintiff to present evidence of comparative qualifications of persons subsequently hired was sometimes viewed as fatal to a plaintiff’s prima facie case.”); *cf. id.* § 47D.05 (2d ed. 2009) (“[A] plaintiff’s failure to provide comparative evidence was not fatal to her case.”).

52. *See, e.g., Lee v. Kansas City S. Ry.*, 574 F.3d 235 (5th Cir. 2009); *Adebisi v. Univ. of Tenn.*, 341 F. App’x 111 (6th Cir. 2009); *Nagle v. Vill. of Calumet Park*, 554 F.3d 1106 (7th Cir. 2009); *Fields v. Shelter Mut. Ins. Co.*, 520 F.3d 859 (8th Cir. 2008); *Drake-Sims v. Burlington Coat Factory Warehouse*, 330 F. App’x 795 (11th Cir. 2009).

53. Goldberg, *supra* note 43, at 747 n.49 (“*See, e.g., King v. Hardesty*, 517 F.3d 1049, 1063 (8th Cir. 2008) (describing and applying comparator requirement in the context of the pretext evaluation); *Wright v. Murray Guard, Inc.*, 455 F.3d 702, 707–09 (6th Cir. 2006) (finding that the plaintiff had established a prima facie case of race discrimination but lacked an adequate comparator to demonstrate pretext); *Harvey v. Anheuser-Busch, Inc.*, 38 F.3d 968, 972 (8th Cir. 1992) (same as *King*).”).

the different applications of the comparator prong within its own circuit, which demanded a strong comparator showing either at the prima facie stage or the pretext stage.⁵⁴ The requirement of a comparator to establish a prima facie showing narrows the number of employment discrimination claims that survive the pre-trial motion stage.⁵⁵

C. *Shortfalls of a Comparator*

Professor Suzanne Goldberg identifies five general challenges faced by discrimination claimants who are required to find a comparator to show that the protected characteristic was the reason for the adverse treatment.⁵⁶ First, and the most common challenge, is a lack of sufficiently comparable coworkers due to differing job duties or different supervisors.⁵⁷ The modern workplace has undergone significant transformation, moving away from its traditional, Tayloresque structure.⁵⁸ Jobs are now framed around competencies, with employees valued for their flexible skills and adaptability.⁵⁹ The flexible workplace highlights the limitations of relying on comparators.⁶⁰ Second, some courts are hesitant to accept comparators selected from a small sample size. Courts tend to be skeptical that an employee's protected characteristic, rather than the individual's unique characteristics or behavior, is the cause of adverse employment action when the employee relies on a comparator who is one of the few—or even the only one—with a certain protected characteristic.⁶¹ Third, there are some situations in which finding a comparator is not possible.⁶² For instance, employees who hold unique positions within their organizations struggle

54. In a race discrimination case, the Eighth Circuit acknowledged inconsistencies within its own rulings regarding the comparator standard, with some cases applying a strict requirement at the prima facie stage, while others set a “low threshold” at that stage but implemented a more detailed review at the pretext stage. *Rodgers v. U.S. Bank, N.A.*, 417 F.3d 845, 851 (8th Cir. 2005).

55. See Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 192–93, 208 (2009); see also Ernest F. Lidge III, *The Courts' Misuse of the Similarly Situated Concept in Employment Discrimination Law*, 67 MO. L. REV. 831, 839 (2002) (arguing that requiring plaintiffs to produce an actual comparator to establish a prima facie showing “violates the statutory language and also has a number of other problems”).

56. Goldberg, *supra* note 43, at 753–64. The fifth challenge pertains to pregnancy and breastfeeding related cases in which courts have said that pregnancy discrimination does not amount to sex discrimination because there is “lack of identity” between pregnant women and gender. Goldberg, *supra* note 43, at 761.

57. See, e.g., *Galdiери-Ambrosini v. Nat'l Realty & Dev. Corp.*, 136 F.3d 276, 291 (2d Cir. 1998) (“Given their quite different positions, no rational inference of disparate treatment on the basis of gender could be drawn from evidence that [the comparators] were not given the secretarial-type tasks assigned to [the female plaintiff].”); Goldberg, *supra* note 43, at 753. The Supreme Court has held that there is no requirement that the comparator must come from the same supervisor. *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379 (2008).

58. Goldberg, *supra* note 43, at 756. A Tayloresque workplace is one in which workers participate in tasks that are specific and standardized with managerial supervision which makes it relatively easy to find comparators. Goldberg, *supra* note 43, at 755.

59. Goldberg, *supra* note 43, at 756.

60. Goldberg, *supra* note 43.

61. Goldberg, *supra* note 43, at 757.

62. Goldberg, *supra* note 43, at 757–59.

to find a similarly situated person who shares similar job responsibilities.⁶³ This is even harder when the court seeks a nearly identical comparator. Employees in senior management positions or specialists in a niche field are “uniquely situated in terms of both work product and related responsibilities,” making the task of finding a comparator a severe obstacle.⁶⁴ Last, in homogenous workplaces, the comparator doctrine will fail because other persons who share comparable job positions will also share the plaintiff’s protected characteristic.⁶⁵

Strict adherence to the comparator requirement as part of the *prima facie* elements can undermine employment discrimination claims. For example, in a Second Circuit decision, a Black female plaintiff claimed she was racially discriminated against after her requests for post-injury accommodations were denied while white colleagues received accommodations for similar conditions.⁶⁶ The Second Circuit ruled against her, focusing on the plaintiff’s inability to satisfy the fourth prong—the comparator requirement—which mandated that plaintiffs show similarly situated employees outside their protected class were treated better.⁶⁷ The other two disabled white workers were not comparators because they did not engage in conduct similar to the plaintiff nor were subject to the same performance evaluation and disciplinary standards.⁶⁸ Since the court found no sufficient comparators, the plaintiff’s claim failed despite the workplace injustice she experienced.⁶⁹

Ultimately, the existing comparator requirement under the *McDonnell Douglas* framework has numerous flaws. It fails to adequately capture the complexities of discrimination faced by Asian American professionals and other racial minorities, as well as the changing contemporary workplace. By requiring a comparator, the *McDonnell Douglas* framework creates too tough of a requirement for a *prima facie* case, leading to unjust dismissals. Asian Americans already file employment discrimination lawsuits at low rates, and the stringent comparator requirement creates an additional and significant hurdle, further limiting their access to legal redress.⁷⁰

II. THE ASIAN AMERICAN EXPERIENCE WITH WORKPLACE DISCRIMINATION

Asian Americans’ challenges in the workplace are often shaped by deeply ingrained stereotypes and perceptions. Despite their growing presence in various industries, they remain underrepresented in leadership positions and are frequently subjected to discriminatory treatment that undermines their contributions and

63. Goldberg, *supra* note 43, at 757–58.

64. Goldberg, *supra* note 43, at 758.

65. Goldberg, *supra* note 43, at 759–60.

66. *Norville v. Staten Island Univ. Hosp.*, 196 F.3d 89, 95–96 (2d Cir. 1999). The court noted that the state and city antidiscrimination laws followed the *McDonnell Douglas* framework which required the plaintiff to establish a *prima facie* case. *Id.* at 95.

67. *Id.* at 95–96.

68. *Id.* at 96.

69. *Id.*

70. *Asian American and Pacific Islander Work Group Report to the Chair of the Equal Employment Opportunity Commission*, *supra* note 1.

individuality.⁷¹ This Part explores the kinds of workplace discrimination faced by Asian Americans. It will begin by discussing the contradictory perceptions of their leadership capabilities, and the limitations these perceptions impose on Asian Americans as a group.

A. *The Double-Edged Sword: Perceptions of Asian American Professionals*

Like other racial classes, Asian Americans are subject to a unique set of biases and stereotypes.⁷² Similar to a double-edged sword, Asian Americans professionals can be positively and negatively affected by the “model minority” stereotype.⁷³ The “model minority” stereotype reinforces the image of Asian Americans as highly competent hard workers but lacking warmth because of their reserved and traditional values.⁷⁴ Some characteristics like competence can be used against Asian Americans who may be looking to be promoted or hired.⁷⁵ Competence is a characteristic that generally carries a positive meaning. But when applied to Asian American professionals, competence is linked to the stereotype that Asians are unsociable.⁷⁶

There is a disconnect between how Asian Americans are perceived in the professional setting and how Asian American professionals behave at work. Asian American workers are expected to adhere to the stereotypes that they are quiet and passive, but these qualities are antithetical to the qualities that employers look for in leadership positions.⁷⁷ Asian American workers are “often perceived as isolated and not engaging in the communities other than their own,” yet nearly half of Asian American workers disagree and “say[] they do participate and are ‘team players.’”⁷⁸ The stereotypes that Asian Americans are not team players, have poor communication skills, and are better suited for technical roles cause Asian Americans to be structurally excluded from opportunities for leadership advancement.

Asian American workers face a double standard when deviating from stereotypes and thus can provoke negative reactions when doing so.⁷⁹ Research suggests

71. *Infra* Part II(A).

72. For further discussion about civil rights issues that Asian American experience, see generally Ki-Taek Chun & Nadja Zalokar, *Civil Rights Issues Facing Asian Americans in the 1990s*, OFF. JUST. PROGRAMS (Feb. 1992), <https://www.ojp.gov/pdffiles1/Digitization/135906NCJRS.pdf> [<https://perma.cc/7HE5-7LGE>].

73. Tiffany J. Huang, *Negotiating the Workplace: Second-generation Asian American Professionals' Early Experiences*, 47 J. ETHNIC & MIGRATION STUD. 2477 (2020).

74. Monica H. Lin, Virginia S.Y. Kwan, Anna Cheung & Susan T. Fiske, *Stereotype Content Model Explains Prejudice for an Envied Outgroup: Scale of Anti-Asian American Stereotypes*, 31 PERSONALITY & SOC. PSYCH. BULL. 34, 35 (2005).

75. *Id.*

76. *Id.* (“Compared to Whites, Asians also have been categorized as more self-disciplined and traditional (again, relatively competent) but as less popular, sexually loose, and materialistic (again, relatively unsociable).”).

77. Lisa Kiang, Virginia W. Huynh, Charissa S. L. Cheah, Yijie Wang & Hirokazu Yoshikawa, *Moving Beyond the Model Minority*, 8 ASIAN AM. J. PSYCH. 1 (2017).

78. INCLUSION@WORK, *supra* note 1.

79. Jennifer L. Berdahl & Ji-A Min, *Prescriptive Stereotypes and Workplace Consequences for East Asians in North America*, 18 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCH. 141, 149 (2012).

that East Asians who display dominant behaviors—contrary to the stereotype of being unsocial and submissive—are often unwelcome among coworkers and face increased risks of mistreatment and discrimination.⁸⁰ Thus, whether Asian American professionals conform to these stereotypes or challenge them, they remain at risk of workplace discrimination and are less likely to gain acceptance from their white colleagues.

Furthermore, the long-standing “model minority” myth stands in direct contradiction to the notion of an invisible barrier faced by Asian Americans.⁸¹ The “bamboo ceiling” is a metaphor for the artificial barrier that explains why Asian Americans are one of the fastest growing labor markets entrants, and yet under-represented in senior managerial positions in corporate America.⁸² Despite more than fifty-six percent of Asian Americans having at least a bachelor’s degree, and having some of the highest median incomes and the lowest unemployment rates, Asian Americans have the lowest chance at advancing to management compared to African Americans, Hispanics, and women.⁸³ Asian Americans make up thirteen percent of the professional workforce, yet Asian Americans are significantly under-represented in corporate leadership positions.⁸⁴

80. The study asked 187 undergraduate students to read through eight human resources employee records and then provide first impressions of their assigned employee. *Id.* at 145–46. The fictitious employees varied depending on their last names and dominant or nondominant characteristics. *Id.*

81. *Id.* at 143. Like other ethnic and racial minorities, Asian American professionals experience challenges in advancing to leadership roles across white collar industries but are often excluded from conversations surrounding career advancement that are available for white professionals. Michael Chui, Kweilin Ellingrud, Ishanaa Rambachan & Jackie Wong, *Asian American Workers: Diverse Outcomes and Hidden Challenges*, MCKINSEY & CO. (Sep. 7, 2022), <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/asian-american-workers-diverse-outcomes-and-hidden-challenges> [<https://perma.cc/Y87G-R8L6>].

82. JANE HYUN, *BREAKING THE BAMBOO CEILING* xvii–xviii (2005).

83. Jens Manuel Krogstad & Carlyne Im, *Key Facts About Asians in the U.S.*, PEW RSCH. CTR. (May 1, 2025), <https://www.pewresearch.org/short-reads/2025/05/01/key-facts-about-asians-in-the-us/> [<https://perma.cc/YJ7J-T3UB>]; Buck Gee & Denise Peck, *Asian Americans Are the Least Likely Group in the U.S. to be Promoted to Management*, HARV. BUS. R. (June 1, 2018), <https://hbr.org/2018/05/asian-americans-are-the-least-likely-group-in-the-u-s-to-be-promoted-to-management> [<https://perma.cc/G5CR-L68H>].

84. Joy Chen & Angela Cheng-Cimini, *Stop Overlooking the Leadership Potential of Asian Employees*, HARV. BUS. R. (July 3, 2024), <https://hbr.org/2024/06/stop-overlooking-the-leadership-potential-of-asian-employees> [<https://perma.cc/K85T-HAKP>]. In the federal government, Asian Americans make up 5.8% of the workforce, but only 3.5% of senior executives. Chris Westfall, *Battling Discrimination and the Bamboo Ceiling: The Bias Facing Asian American Managers*, FORBES (Sep. 14, 2021), <https://www.forbes.com/sites/chriswestfall/2021/09/14/discrimination-and-bamboo-ceiling-the-unconscious-bias-facing-asian-american-managers> [<https://perma.cc/NAL7-CDTW>]. In the Silicon Valley tech industry, “although 27 percent of professionals working at [five, large established tech companies] are Asian or Asian-American, fewer than 19 percent of managers, and just under 14 percent of executives, are.” *Often Employees, Rarely CEOs: Challenges Asian-Americans Face In Tech*, NPR (May 17, 2015, at 18:51 ET), <https://www.npr.org/2015/05/17/407478606/often-employees-rarely-ceos-challenges-asian-americans-face-in-tech> [<https://perma.cc/WZ4W-RP6J>]. Asian American account for thirteen percent of associates in major law firms but hold only four percent of equity partner positions, representing the smallest proportion among minority groups. Karen Sloan, *More Asian Americans on the*

The concern that Asian Americans are facing a cultural and structural barrier to leadership in corporate America is not new. In 1989, advocates for Asian American civil rights expressed their deep concern for the lack of career advancement for Asian Americans:⁸⁵

I am of the opinion that most Asian Americans are facing an insurmountable glass wall in the corporate world. As a matter of fact, most of us have given up hope of advancing up the corporate ladder. The more we think about it, the more frustrated, discouraged, and depressed we become

Within my company there are about 800 to 1,000 research and engineering professional staff members. About 60 of them are of Asian origin. We think that there are altogether about 200 management and management track positions in the company. There are no Asians in management positions and only one Asian in a management track position

I suspect that the minds of many corporate managers and the senior staff members who have direct control . . . are still in the 1960s. As a consequence, for most of them we Asians are a suspect class, and we usually have to prove that we are better in order to be equal

Even after we pass a certain test or a certain set of tests, the rules or penalties are much harsher against us if we ever make any mistake

Most of us have proved our technical capability. However, many major corporations tend to overlook the non-technical side of many Asian Americans. Corporations pick pigeon holes for us. And what is worse, they believe that we are quite content staying in those technologically airtight pigeon holes.⁸⁶

Today, there is still a strong perception among Asian American professionals that racism and discrimination are the underlying causes limiting their career advancement.⁸⁷ Sixty-five percent of Asian American managers view this “bamboo ceiling” as a moderate to severe obstacle in their careers as they advance from junior-level positions.⁸⁸ Work assignments and promotions are business decisions made by managers who “can subscribe to stereotypical views of Asian Americans as not having the qualities that make a good manager,” exposing Asian American professionals to possible employment discrimination.⁸⁹ One of the ways to ensure Asian American professionals have access to equal opportunities at work—including work

Federal Bench; Progress Lacking at Big Law, REUTERS (Dec. 5, 2022), <https://www.reuters.com/legal/legalindustry/more-asian-americans-federal-bench-progress-lacking-big-law-2022-12-05> [<https://perma.cc/L2E3-CYT6>].

85. Chun & Zalokar, *supra* note 72.

86. Wayne Liauh, Statement at the U.S. Commission on Civil Rights Roundtable Conference on Asian American Civil Rights Issues for the 1990s (May 27, 1989), in VOICES ACROSS AMERICA: ROUNDTABLE DISCUSSIONS OF ASIAN CIVIL RIGHTS ISSUES 1, 66–68 (Harriet Duleep, Audrey Wright & Gloria Hong Izumi eds.).

87. In a survey of 308 Asian American professionals and managers working in the San Francisco Bay Area, there was a sentiment that racism was a very significant factor causing underrepresentation at managerial levels. Amado Cabezas, Tse Ming Tam, Brenda M. Lowe, Anna S. Wong & Kathy Turner, *Empirical Study of Barriers to Upward Mobility of Asian Americans in the San Francisco Bay Area*, in FRONTIERS OF ASIAN AM. STUD.: WRITING, RSCH. AND COMMENT. 85, 93 (Gail M. Nomura, Russell Endo, Stephen H. Sumida & Russell C. Long, eds., 1989).

88. Westfall, *supra* note 84.

89. Chui et al., *supra* note 81, at 135.

assignments and promotions—is to address the challenges Asian American plaintiffs face in proving a disparate treatment claim.

B. *Monolith: Who Counts as Asian American?*⁹⁰

There are an estimated twenty-four million U.S. residents who identify as Asian, with their roots tracing back to more than twenty countries across East Asia, Southeast Asia, and the Indian subcontinent.⁹¹ However, the Asian population is commonly seen as one entity, which perpetuates the idea that all the groups share the same culture and values.⁹² In reality, the Asian American classification is used for groups from many different parts of Asia, all of which have their own culture, value, beliefs, language, religion, and so on.⁹³

The category Asian-American . . . is a composite that lumps together ethnic groups separated by socioeconomic, historical, and generational differences (citations omitted). Chinese and Japanese, for example, began immigrating to the United States more than 150 years ago and today have sizable multigeneration populations (citations omitted). The Vietnamese, in contrast, have only a burgeoning second generation because of their recent arrival (citations omitted). The influx of Asian newcomers has undoubtedly influenced public perceptions of Asian-Americans because most Americans, white and nonwhite, are unable or unwilling to recognize ethnic much less generational differences between and within Asian groups (citations omitted). For instance, for a fourth-generation Chinese-American to be mistaken for a Korean immigrant is common. During times of doubt, all persons perceived to have Asian features are assumed to be newcomers to this country (citations omitted). Media coverage highlighting hardworking Asian immigrant families, desperate Asian refugees, and more recently, shadowy foreign campaign donors, along with film and screen representations of thickly accented and socially awkward Asian immigrants, plainly have done little to dispel the foreigner image (citations omitted).⁹⁴

90. Jennifer Kim & Zhida Shang, *Research: How Anti-Asian Racism Has Manifested at Work in the Pandemic*, HARV. BUS. REV. (Mar. 13, 2023), <https://hbr.org/2023/03/research-how-anti-asian-racism-has-manifested-at-work-in-the-pandemic> [<https://perma.cc/T3CA-4J3S>].

91. *Exploring the Diversity and Growth of the Asian American Population*, U.S. CENSUS BUREAU (Feb. 22, 2024), <https://www2.census.gov/about/training-workshops/2024/2024-02-22-asian-americans-presentation.pdf> [<https://perma.cc/C6D4-7GGK>]; see also *U.S. Census Bureau Releases Key Stats in Honor of 2023 Asian American, Native Hawaiian, and Pacific Islander Heritage Month*, U.S. DEP'T. COM. (May 1, 2023), <https://www.commerce.gov/news/blog/2023/05/us-census-bureau-releases-key-stats-honor-2023-asian-american-native-hawaiian-and> [<https://perma.cc/8HSS-XXAS>]; *Key Facts about Asian Americans, a Diverse and Growing Population*, PEW RSCH. CTR. (Apr. 29, 2021), <https://www.pewresearch.org/short-reads/2021/04/29/key-facts-about-asian-americans> [<https://perma.cc/YJ7J-T3UB>].

92. Cliff Cheng & Tojo Joseph Thatchenkery, *Why Is There a Lack of Workplace Diversity Research on Asian Americans?*, 33 J. APPLIED BEHAV. SCI. 270 (1997); Rowena Fong & Noreen Makuau, *Not Simply "Asian Americans": Periodical Literature Review on Asians and Pacific Islanders*, 39 SOC. WORK 298 (1994).

93. LAURA UBA, *ASIAN AMERICANS: PERSONALITY PATTERNS, IDENTITY, AND MENTAL HEALTH* 2 (1994).

94. MIA TUAN, *FOREVER FOREIGNERS OR HONORARY WHITES?: THE ASIAN ETHNIC EXPERIENCE TODAY* 38–39 (1998).

For example, the U.S. Census Bureau's racial category for Asians groups individuals whose national origins include the Far East, Southeast Asia, or South Asia.⁹⁵ Similarly, the U.S. Office of Management and Budget defines "Asian" as a "person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam."⁹⁶ Other than sharing the historical experience of "exclusion from White racial status and U.S. citizenship," the "national origin groups subsumed under the Asian rubric do not share a common language, culture, religion, or history of immigration" to the United States.⁹⁷

In light of the broad racial categories created by federal agencies like the U.S. Census Bureau, there remains a disconnect between official government racial categories and self-identified racial assignments.⁹⁸ Data from the 2016 National Asian American Survey demonstrates that the default for how the general population perceives the Asian or Asian American racial category is East Asian.⁹⁹ The limited racial recognition of Asian diversity results in an incomplete and biased understanding of Asian Americans' experiences, outcomes, and perspectives by overrepresenting East Asian narratives and neglecting others.¹⁰⁰ Nevertheless, Asians are treated as a monolithic group using biases and stereotypes that are frequently associated with East Asians.¹⁰¹ In doing so, ethnic group differences and individual variations among Asians are overlooked. Stereotypes based on one Asian group can negatively impact other Asian minorities.¹⁰²

95. Jennifer Lee & Karthick Ramakrishnan, *Who Counts as Asian*, ETHNIC & RACIAL STUD. (Sep. 9, 2019).

96. U.S. OFF. MGMT. & BUDGET, REVISIONS TO THE STANDARDS FOR THE CLASSIFICATION OF FEDERAL DATA ON RACE AND ETHNICITY (1997).

97. Lee & Ramakrishnan, *supra* note 95, at 2–3.

98. Lee & Ramakrishnan, *supra* note 95, at 5 ("While the general public has an opportunity to weigh in on potential changes to racial categorization via public comments to the Federal Register, the process of determining how respondent-furnished categories are aggregated and reported remains an elite, [social science] expert-driven endeavour."); Lee & Ramakrishnan, *supra* note 95, at 5 ("[R]acial assignment is a multi-pronged, potentially fraught process that involves how governments define racial categories and assign groups to those categories, how immigrant and national origin groups understand and assign themselves into racial categories, and how out-groups understand and assign immigrant and national origin groups to the same racial category.").

99. Lee & Ramakrishnan, *supra* note 95, at 10 ("While Asians are more likely than Whites, Blacks, and Latinos to assign Indians and Pakistanis as Asian, their assignment of Chinese, Japanese, Koreans and Filipinos as Asians is significantly higher than their assignment of South Asian groups.").

100. Lee & Ramakrishnan, *supra* note 95, at 19.

101. Shania Kuo, *Not Just a Monolith: Complicating Asian American Identity*, SOCIETY PAGES (Nov. 28, 2023), <https://thesocietypages.org/trot/2023/11/28/not-just-a-monolith-complicating-asian-american-identity> [<https://perma.cc/XRZ4-UJW3>].

102. Duoc V. Nguyen, Caryn J. Block, Jennifer Y. Kim & Hong Yu, *General and Stereo-Based Microaggressions Experienced by Asians and Asian Americans in the Workplace: A Qualitative Study*, AM. BEHAV. SCIENTIST (Mar. 1, 2024).

The invalidation of individual differences in the workplace reduces Asian American workers to one homogenous group.¹⁰³ Often times, there is an assumption that one Asian American can speak on behalf of the entire Asian community, giving little acknowledgment to the many differences within the Asian community.¹⁰⁴ This assumption can influence the subjective employment decisions covered by Title VII: actions that significantly change an employee's terms, conditions, or privileges of employment.¹⁰⁵ Moreover, treating the Asian American community as a monolith leads to the invalidation of Asian American needs and protests in the workplace.¹⁰⁶ The erasure of individual differences in the workplace leads some individuals to "code-switch"—change the ways they behave and communicate to better fit into corporate culture—to challenge racist stereotypes against them and achieve career advancements.¹⁰⁷ The necessity for Asian American professionals to change themselves to meet certain standards for equal workplace opportunities fundamentally contradicts the goals of Title VII to provide equal opportunities in the workplace.

Consider the hypothetical scenario of a Korean woman working in an environment where her four Asian American colleagues have been promoted, but she has not been.¹⁰⁸ She presents herself in ways that are more traditionally associated with Asians than her four peers.¹⁰⁹ Unlike her colleagues, who were born in the United States, this Korean woman immigrated as a teenager and speaks English with a faint Korean accent. She also adheres to traditional Korean work values, emphasizing hard work and avoiding conflicts to maintain harmonious relationships, which may be perceived negatively in a workplace emphasizing assertiveness or self-promotion.¹¹⁰ Despite possessing comparable qualifications for a promotion, her Title VII claim could be undermined by the requirement to identify a comparator

103. *Id.*

104. *See, e.g., id.* at 9 ("One Chinese female participant indicated that her supervisor would ask her questions about other Asians she had met. '[My supervisor] was telling me about this other Asian woman in her apartment building . . . who would never say "hi," never talked to her. She asked me . . . "Is this an Asian thing?"').

105. 42 U.S.C.S. § 2000e-2(a)(1). In April 2024, the Supreme Court adopted a new standard for an adverse employment action. The Court held that a plaintiff challenging a job transfer under Title VII must show harm to his or her condition of employment, but the harm does not need to be significant. *Muldrow v. City of St. Louis*, 601 U.S. 346, 346–48 (2024).

106. Monica M. De La Cruz, Shaniece Criss, Melanie Kim, Nhung Thai, Katrina Makres, Junaid S. Merchant & Thu T. Nguyen, *Not a Monolith: Understanding of Racism and Racialization Among Korean, Pacific Islander, South Asian, and Vietnamese Women*, 11 J. ETHNIC & CULTURAL STUD. 58, 60 (2024) ("The model minority myth and its portrayal of all Asians as a successful monolith provides reason to ignore Asian American protests about discrimination and racial inequalities and often renders them invisible in discussion of race.").

107. *Id.* at 70.

108. The hypothetical scenario is inspired by the "problem of the fifth Black woman" example. Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 714–19 (2001) (explaining that proof of an employer's non-discrimination against four other Black employees is highly persuasive that the employer did not discriminate against the fifth despite intra-racial differences).

109. *Id.*

110. Laura Toyryla, *Korean Business Etiquette – Culture and Practices in the Workplace*, 90 DAY KOREAN, <https://www.90daykorean.com/korean-business-etiquette/> [<https://perma.cc/A7RU-HCXH>] (last modified Nov. 5, 2024).

from outside her protected class.¹¹¹ Even if she successfully identifies a non-Asian colleague who is similarly or nearly identically situated, the fact that her four Asian American colleagues received promotions would hinder her ability to satisfy the comparator prong.¹¹²

At the heart of this plaintiff's inability to produce a comparator is the unique expansiveness of the Asian American racial category. The broadness of the Asian racial category creates additional challenges in identifying suitable comparators.¹¹³ This classification encompasses a wide array of cultures and experiences, and when courts consider the Asian racial category in its most expansive terms, the odds for finding appropriate comparators significantly narrows for plaintiffs.¹¹⁴ It is unjust to treat the various ethnic groups within the Asian category uniformly, as each group faces distinct biases and stereotypes.¹¹⁵ This was true for the plaintiff when compared to her four colleagues. By perpetuating a monolithic view of Asian Americans, the comparator prong fails to account for the diversity of experiences and values within the Asian community but also increases the challenges Asian American professionals face in achieving workplace equality under Title VII.

III. RECOGNIZING ASIAN AMERICAN PROFESSIONALS AS PLAINTIFFS TO PROVIDE ADEQUATE LEGAL REDRESS FOR TITLE VII VIOLATIONS

The mosaic approach offers a more comprehensive framework for addressing workplace discrimination under Title VII compared to the comparator requirement. By examining all surrounding circumstances to uncover how a plaintiff's protected characteristic may have influenced an employer's decision, the mosaic approach captures the complexity of modern workplace discrimination against Asian Americans. The mosaic approach incorporates comparator evidence as just one piece of the broader circumstantial evidence a court can consider to understand the context surrounding an adverse employment action.¹¹⁶ By embracing a more holistic analysis, this approach better aligns with Title VII's mission to promote equal workplace opportunities for minority groups compared to the rigid comparator requirement under the *McDonnell Douglas* framework.¹¹⁷

A. *The Mosaic Approach*

Recently, the Eleventh Circuit's decision in *Tynes v. Florida Department of Juvenile Justice* considered whether the *McDonnell Douglas* framework should be

111. Carbado & Gulati, *supra* note 108.

112. Carbado & Gulati, *supra* note 108.

113. *Supra* Part I(C).

114. Neil G. Ruiz, Luis Noe-Bustamante & Sono Shah, *Diverse Cultures and Shared Experiences Shape Asian American Identities*, PEW RSCH. CTR. (May 8, 2023), <https://www.pewresearch.org/race-and-ethnicity/2023/05/08/asian-identity-in-the-us/> [<https://perma.cc/R92Q-2LRQ>] ("Asians in the United States trace their origins to a vast continent that spans more than 20 countries in East and Southeast Asia and the Indian subcontinent.").

115. *Id.*

116. Goldberg, *supra* note 43, at 807–11.

117. Goldberg, *supra* note 43, at 807–11.

the standard burden of proof for employment discrimination claims.¹¹⁸ The Eleventh Circuit held that the ultimate question in a discrimination case was whether there was enough evidence proffered to show that the reason for an adverse employment action was based on race, color, religion, sex, or national origin.¹¹⁹ Rather than requiring the plaintiff to satisfy all parts of the *McDonnell Douglas* framework, the *Tynes* court clarified that the framework was only one of the ways to answer the ultimate question.¹²⁰ The *Tynes* court stressed that an employment discrimination claim under Title VII should be like other summary judgment proceedings where the ultimate liability question should be whether “a ‘convincing mosaic’ of circumstantial evidence is simply enough evidence for a reasonable factfinder to infer intentional discrimination.”¹²¹ Specifically, the court held that *Tynes*’s circumstantial evidence may not be sufficient for a Title VII claim, but that question should be left to the jury, and courts should not dictate “how much weight the comparator evidence should be given.”¹²² In the Eleventh Circuit, courts do not instruct juries on the *McDonnell Douglas* framework, instead instructing them that there may be intentional discrimination shown through a “convincing mosaic of circumstantial evidence.”¹²³ The *Tynes* court pointed out that one of the problems with holding plaintiffs to the *McDonnell Douglas* prima facie framework is that a plaintiff’s inability to produce a comparator meant that “the plaintiff cannot prove a necessary element for his employment case.”¹²⁴

The mosaic approach is the kind of analysis in which a court will look to “all of the surrounding circumstances” for ways in which the plaintiff’s protected characteristic may have influenced an employer’s decisions.¹²⁵ In doing so, Professor Goldberg reframes comparators as one piece of a mosaic analysis—an “observational tool[]” that may inform an inference of discrimination, rather than a prima facie requirement without which discrimination cannot be shown.¹²⁶ Under this approach, a plaintiff is not confined to a strict binary approach of relying solely on direct evidence of discriminatory intent, or satisfying each step of the *McDonnell Douglas* framework.¹²⁷

118. *Tynes v. Fla. Dep’t of Juv. Just.*, 88 F.4th 939 (11th Cir. 2023).

119. *Id.* at 947.

120. *Id.* at 946–47.

121. *Id.* at 947. The court also writes this opinion for claims filed under 42 U.S.C.A. § 1981 (“Section 1981”). Interestingly, in Jane Hyun’s *Breaking the Bamboo Ceiling*, she noted that “[a]s America has become more diverse, the melting pot model has evolved into a . . . ‘mosaic’ concept.” HYUN, *supra* note 82; *Tynes*, 88 F.4th at 947.

122. *Tynes*, 88 F.4th at 947.

123. See *Dudley v. Wal-Mart Stores, Inc.*, 166 F.3d 1317, 1322 (11th Cir. 1999) (“[T]he final charge the court gave before the jury retired was this definitive one: ‘I remind you again that in order for a Plaintiff to recover she must prove by a preponderance of the evidence that any adverse employment decision complained about in this case was a result of racial or sexual discrimination. If it was not, then the Defendant is entitled to recover.’”); *Tynes*, 88 F.4th at 946 (quoting *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1327–28 (11th Cir. 2011)).

124. *Tynes*, 88 F.4th at 946.

125. Goldberg, *supra* note 43, at 780.

126. Goldberg, *supra* note 43, at 780.

127. SPERINO, *supra* note 16, at 62–65.

In *Tynes*, the court did an excellent job demonstrating the mosaic approach. It looked at immense circumstantial evidence—policies, employer conduct, and treatment of other employees—and found that there was a convincing mosaic of evidence for a reasonable factfinder to infer discrimination.¹²⁸ The Eleventh Circuit’s mosaic approach demonstrated that even without clear comparator evidence, other circumstantial factors were sufficient to infer discrimination, suggesting a mosaic of discriminatory intent. Therefore, the mosaic approach is not limited to comparator evidence, but includes a range of factors: stray remarks, employer history, unequal opportunities, workplace dynamics, and how employer actions align with contemporary trends in discrimination.

This type of analysis has been applied in sexual harassment cases in which the Supreme Court explained “that observing discrimination in the workplace requires consideration of not only ‘the words used or the physical acts performed’ but also ‘a constellation of surrounding circumstances, expectations, and relationships.’”¹²⁹ Similar to sexual harassment cases, finding a perfect comparator in racial discrimination cases can be challenging. Focusing on the cumulative weight of circumstantial evidence through the mosaic approach better captures the nuanced and complex nature of discrimination against Asian American professionals.

For Asian American plaintiffs, under the mosaic approach, a court can consider all circumstantial evidence of racial discriminatory intent or behavior that may have influenced an employer’s decisions. For example, a court can review patterns of qualified Asian American employees being passed up for promotion opportunities, any inconsistencies or weaknesses in an employer’s reason for their adverse employment action, or performance evaluations that mentioned “being too quiet” or “not being social enough.” At the summary judgment stage, the mosaic of circumstantial evidence needs to be merely enough evidence for a jury to infer discrimination.¹³⁰ Therefore, the mosaic approach will provide another opportunity to survive the summary judgment stage even if a plaintiff cannot produce a similarly situated or a nearly identical comparator.

B. *Applying the Mosaic Approach*

Applying the mosaic approach allows Asian Americans who experience employment discrimination on the basis of their race to have better protection under Title VII. The following case study is based off the facts of a real gender and race discrimination complaint filed against Facebook by a former employee.

In 2015, Chia Hong, a Taiwanese American, filed a sexual and racial discrimination suit against her former employer, Facebook, Inc., and her former supervisor in California’s San Mateo Superior Court.¹³¹ The complaint alleged that Hong’s

128. *Tynes*, 88 F.4th at 947.

129. Goldberg, *supra* note 43, at 782 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998)). Courts do not use the term “mosaic approach” to describe its analysis of sexual harassment cases, but the note uses the term because the analysis is similar.

130. *Tynes*, 88 F.4th at 947.

131. Heather Kelly, *Facebook Gets Sued for Gender Discrimination*, CNN Bus. (Mar. 19, 2015), <https://money.cnn.com/2015/03/18/technology/facebook-discrimination-suit/index.html> [<https://perma.cc/ZH7W-5M4R>].

professional opinions were belittled or ignored in group meetings wherein she was “one of the only employees of Chinese descent”; she was told that she was not integrated into the team because she looked different and talked differently than other team members; she was told she was an “order taker” because she did not exercise independent discretion in the execution of her job duties; and she was replaced by a less qualified, less experienced Indian male.¹³²

Under the *McDonnell Douglas* framework, Hong’s case would most likely not survive summary judgment particularly because someone in her protected racial class, an Indian male, was hired.¹³³ This reasoning, however, is flawed because it assumes that all Asian employees are a monolithic group who face identical treatment in the workplace, failing to account for the significant cultural and ethnic differences between Taiwanese and Indian employees. For instance, East Asians may communicate less assertively than South Asians in professional settings, a pattern that scholars argue contributes to their underrepresentation in leadership positions in the U.S., a phenomenon referenced above as the “bamboo ceiling.”¹³⁴ Alternatively, applying a mosaic approach to her experiences reveals a mosaic of racial discrimination that warrants further examination. This approach considers the significance of the patterns of treatment Hong faced, suggesting that her professional contributions were unfairly devalued in a workplace that may not have openly acknowledged its racial biases.

The circumstantial evidence in Hong’s case highlights a workplace culture where her viewpoints were disregarded and where she was made to feel alienated due to her racial background. Even without a comparator, the cumulative instances of discrimination that Hong encountered leading up to her replacement could lead a reasonable jury to infer that race played a role in the adverse treatment she received. The overall workplace culture at Facebook, which may favor conformity and marginalize those who do not fit the dominant demographic, adds weight to Hong’s claims.¹³⁵ It is racial discrimination to call Hong an “order taker” because the perception of being an order taker is aligned with the stereotype that Asians are submissive model minorities and not leaders. Stray remarks like “order taker” and “looks different and talks differently than other team members,” would also be considered in the mosaic of evidence.

Although not stated in the court documents, the mosaic approach would also weigh other circumstantial evidence, such as the following: whether Hong spoke

132. Compl., *Chia Hong v. Facebook, Inc. et al.*, No. 532943 (Cal. Super. Ct. Mar. 16, 2015), <https://static01.nyt.com/packages/pdf/business/ChiaHongvsFacebookcomplaint.pdf> [<https://perma.cc/R7ZL-L39R>].

133. See discussion in Part II(B) about the broad classification of Asians including East Asians and South Asians despite the many differences between the groups.

134. Jackson G. Lu, Richard E. Nisbett & Michael W. Morris, *Why East Asians but Not South Asians Are Underrepresented in Leadership Positions in the United States*, 117 PROC. NAT’L ACAD. SCI. U.S. AM. 4590, 4599 (arguing that East Asians but not South Asians hit the bamboo ceiling because of East Asian norms of communication and American norms of leadership).

135. At the time Hong filed her lawsuit against Facebook, nearly fifty-seven percent of Facebook’s U.S. workplace was white and thirty-four percent Asian. Victor Luckerson, *Almost 70% of Facebook’s Employees Are Male*, TIME (June 25, 2014), <https://time.com/2924724/facebook-employee-diversity> [<https://perma.cc/KN7F-2QEB>].

with an accent; whether she was subjected to stereotypes about her race, similar assumptions about her being overly submissive or lacking leadership qualities; whether there were stray remarks or jokes about her race; evidence that she was constantly bypassed for promotions or high-visibility projects; or whether she was consistently excluded from informal mentoring or networking opportunities that were accessible to others.

Because Hong's case faces challenges under the *McDonnell Douglas* framework, specifically the comparator prong, the mosaic approach gives Hong a chance to survive the summary judgment stage. This case study highlights the importance of considering circumstantial evidence beyond the comparator to account for subtle yet significant patterns of bias.

CONCLUSION

In conclusion, continuing to treat the *McDonnell Douglas* framework as the prima facie standard for Title VII claims hurts Asian Americans because the burden of proof is too high. Under the current evidentiary framework, it is difficult for Asian Americans to prove that the racial discrimination they experience in the workplace rises to the level of circumstantial evidence required by *McDonnell Douglas*, especially when a court requires a prima facie showing of a comparator. The *McDonnell Douglas* framework continues to be a powerful method to establish discrimination for plaintiffs who performed to employer expectations but still experienced adverse treatment while others outside of the protected class did not. Given the unique biases and stereotypes faced by Asian American professionals, including the dual-edged nature of the model minority stereotype, the *McDonnell Douglas* framework and its comparator prong should be considered as only one among many tools available to Title VII plaintiffs for addressing the cultural and structural barriers to workplace equality. There must be an effort to expand traditional paradigms in applying Title VII to truly achieve the protection it was intended to provide. The mosaic approach offers an alternative by capturing the surrounding context of discriminatory actions, which is particularly effective in addressing racism often faced by Asian American workers because of stereotypes that Asians are submissive, quiet, and a monolithic group. By allowing courts to consider a broader range of evidence at the summary judgment stage, more Asian American workers experiencing workplace injustice can receive legal redress.

