No. 23-12285

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

YOLANDA HERNANDEZ,
Plaintiff-Appellant,

v.

CAREERSOURCE PALM BEACH COUNTY, INC. and PALM BEACH WORKFORCE DEVELOPMENT CONSORTIUM,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Florida, No. 9:22-cv-81149
Hon. Aileen M. Cannon, United States District Judge

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF APPELLANT AND IN FAVOR OF REVERSAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, the Equal Employment Opportunity Commission (EEOC) as amicus curiae certifies that, in addition to those listed in the certificates filed by the plaintiff-appellant and the defendants-appellees, the following persons and entities may have an interest in the outcome of this case:

1. Equal Employment Opportunity Commission (EEOC) (Amicus Curiae)
2. Goldstein, Jennifer S. (Associate General Counsel, EEOC)
3. Reams, Gwendolyn Young (Acting General Counsel, EEOC)
4. Smith, Dara S. (Assistant General Counsel, EEOC)
5. Winkelman, Steven J. (Attorney, EEOC)

Pursuant to Federal Rule of Appellate Procedure 26.1, the EEOC, as a government agency, is not required to file a corporate disclosure statement. The EEOC is not aware of any publicly traded corporations or companies that have an interest in the outcome of this case or appeal.

/s/ Steven Winkelman
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STATEMENT OF INTEREST

Congress tasked the Equal Employment Opportunity Commission (EEOC) with administering and enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* This appeal presents important questions concerning the appropriate pleading standard for sex discrimination claims under Title VII when a plaintiff relies on allegations about comparators. Because the EEOC has a substantial interest in the proper resolution of these questions, the agency offers its views. *See* Fed. R. App. P. 29(a)(2).

STATEMENT OF ISSUES[1]

1. Whether a plaintiff's allegations that her employer fired her based on rumors that she was having an affair with the company's former CEO yet declined to fire or even discipline male employees who reputedly had in-office affairs with subordinates were sufficient to state a plausible claim for sex discrimination under Title VII.

2. Whether the district court improperly applied the plausibility pleading standard by requiring a Title VII plaintiff to allege facts sufficient to show that she and her comparators were similarly situated "in all

[1] The EEOC takes no position on any other issues in this appeal.

material respects," thereby requiring her to make out a prima facie case of discrimination at the pleading stage, and by imposing a "nearly identical" standard that this Court has squarely rejected.

3. Whether the district court erred by dismissing the operative complaint—with prejudice and without leave to amend—on the alternative ground that it constituted a "shotgun pleading."

STATEMENT OF THE CASE

A. Statement of the Facts[2]

Yolanda Hernandez worked at CareerSource Palm Beach County, Inc., a nonprofit corporation. R.14 at 1 (¶ 3), 3 (¶ 15).[3] There, she most recently served as a Program Manager, and she "always performed her job in a satisfactory manner." R.14 at 3 (¶¶ 15-16).

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[2] The EEOC draws these facts from Hernandez's operative complaint and makes all reasonable inferences in her favor, as required at the pleading stage. *See Newton v. Duke Energy Fla., LLC*, 895 F.3d 1270, 1275 (11th Cir. 2018). For record citations, "R.# at #" refers to the district court docket entry and CM/ECF-assigned page numbers. Where appropriate, original paragraph numbers are provided parenthetically.

[3] Hernandez also alleges that another entity, the Palm Beach Workforce Consortium, acted as her joint employer. R.14 at 1-3 (¶¶ 2, 11-14). The EEOC addresses only the claims against CareerSource and takes no position on the claims against the Consortium.

Hernandez alleges that CareerSource fired her because of "rumors that she was having an affair with the former CEO." R.14 at 4 (¶ 20). According to Hernandez, the CEO's ex-wife believed that he and Hernandez were having an affair, and rumors of the alleged relationship spread at CareerSource. R.14 at 3-4 (¶¶ 17, 20). These rumors, Hernandez claims, ultimately led to her termination. R.14 at 4 (¶¶ 20-21); *see also* R.14 at 7 (EEOC charge).

Hernandez further alleges that "male executives suspected of having affairs with subordinates in the organization were not fired and thus, treated more favorably because of their gender than [she]." R.14 at 3 (¶ 17). In support, Hernandez points to two comparators: (i) a male Vice President who "was discovered by a cleaning worker having sex with a subordinate female employee in a conference room," and (ii) a male Chief Operating Officer who "was rumored to be having an affair with a subordinate whom he married very shortly after his wife died." R.14 at 3 (¶¶ 18-19). CareerSource took no disciplinary action against either male employee. R.14 at 3 (¶¶ 18-19).

B. District Court's Decision

Hernandez filed this lawsuit and, in her amended complaint, asserted a claim for gender discrimination under Title VII and the Florida Civil Rights Act (FCRA). R.14 at 4-5 (¶¶ 22-28). On the magistrate judge's recommendation, the district court dismissed the amended complaint for failure to state a claim. R.27 at 5-6; R.24 at 4-7.

The court reasoned that Hernandez had to show that she and her comparators were similarly situated "in all relevant respects," which it understood to mean "nearly identical," and it found that she differed from her comparators in two ways. R.24 at 5 (quoting *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1091 (11th Cir. 2004)). First, they held different positions: the men "held executive titles," whereas Hernandez "held a middle management title." R.27 at 5; R.24 at 6. Second, their conduct differed: the men "engaged in affairs with subordinates," whereas Hernandez "allegedly engaged in an affair with the former leader." R.27 at 5; R.24 at 6. The court also suggested that CareerSource "may well have had legitimate business reasons—unrelated to sex discrimination—to terminate an employee who was rumored to have had an affair with the former leadership." R.27 at 5; R.24 at 6. Based on these apparent

differences, the court concluded that Hernandez's operative complaint "fail[ed] to identify similarly situated comparators who were 'nearly identical' to [her]," R.24 at 6, and thus failed to "set forth a prima facie case for sex discrimination," R.27 at 6.

As an alternative ground for dismissal, the district court also determined that the operative complaint was a "shotgun pleading." R.27 at 4-5; R.24 at 3-4. Specifically, the court found that Hernandez had impermissibly combined her Title VII and FCRA claims into a single count. R.27 at 4; R.24 at 3-4. It further found that she improperly referred to "multiple theories of discrimination combined into a single count, including disparate treatment, hostile work environment, and age discrimination." R.27 at 4; R.24 at 4. The court also declined to allow Hernandez to amend, stating that because it had already given Hernandez one opportunity to amend, it saw "no basis to grant [her] a further opportunity to replead." R.27 at 5.

On these grounds, the court dismissed the entire action with prejudice. R.27 at 6. Hernandez timely appealed. R.28.

SUMMARY OF ARGUMENT

It is well settled that a Title VII plaintiff may plead an inferential claim of discrimination by identifying comparators, that is, similarly situated employees outside her protected class whom her employer treated more favorably. The key question in this case concerns how much factual detail a plaintiff must provide about her putative comparators to survive a motion to dismiss.

The correct answer is straightforward. Under the familiar plausibility pleading standard, a plaintiff needs to provide only enough factual detail (taken as true) to "suggest" intentional sex discrimination. Longstanding precedent dictates that where, as here, an employer fires a plaintiff for alleged misconduct, the plaintiff can ordinarily meet that standard by identifying another employee who falls outside her protected class, engaged in misconduct of "comparable seriousness," and was "nevertheless retained." *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282, 283 n.11 (1976) (citation omitted). Here, Hernandez's allegations cleared that hurdle.

In reaching the contrary result, the district court relied on two central holdings: (1) that a plaintiff must provide enough details about her

comparators to show that they were similarly situated "in all material respects," thereby making out a prima facie case under the *McDonnell Douglas*[4] burden-shifting framework; and (2) that being similarly situated "in all material respects" means being "nearly identical." Both are incorrect.

The first holding misstates a Title VII plaintiff's burden at the pleading stage. To state a claim for discrimination, a plaintiff does not need to make out a prima facie case under *McDonnell Douglas*—that framework is an evidentiary standard, not a pleading requirement. By requiring Hernandez to provide enough details about her comparators to prove a prima facie case, the district court thus imposed a heightened pleading requirement, which—as this Court recently explained in *Gomez v. City of Doral*, No. 21-11093, 2022 WL 19201 (11th Cir. Jan. 3, 2022)—cannot be reconciled with the plausibility standard.

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[4] To make out a prima facie case under *McDonnell Douglas*, the plaintiff must show that (1) she belongs to a protected class, (2) she suffered an adverse employment action, (3) she was qualified to perform the job in question, and (4) her employer treated "similarly situated" employees outside her class more favorably. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Jenkins v. Nell*, 26 F.4th 1243, 1249 (11th Cir. 2022).

With respect to the second holding, this Court has expressly rejected the "nearly identical" standard for assessing comparators. The district court erred by continuing to apply that standard here, which in turn infected its analysis of Hernandez's comparator allegations. Contrary to that analysis, a plaintiff is not required to show—at any stage—that her comparators held *identical* positions or engaged in *identical* conduct. Instead, what matters is whether the plaintiff and her comparators were subject to the same workplace policies and engaged in conduct of "*comparable* seriousness."

Finally, the district court also erred in finding that Hernandez's amended complaint was a "shotgun pleading," and in dismissing with prejudice. Because Hernandez pursues just one theory of discrimination—namely, a discriminatory termination theory—and the same legal standards govern Title VII and FCRA claims, Hernandez was not required to split her state and federal claims into separate counts. Even if her complaint could be construed as a shotgun pleading, the appropriate remedy would be for the court to either dismiss only the state claim, thereby leaving the federal claim intact, or grant leave for Hernandez to replead at least her federal claim.

For these reasons, the district court's dismissal of Hernandez's Title VII claim should be reversed and the case remanded for further appropriate proceedings.

ARGUMENT

I. Hernandez's allegations were sufficient to state a plausible claim for sex discrimination under Title VII.

Title VII makes it unlawful for an employer to "discharge any individual … because of such individual's … sex." 42 U.S.C. § 2000e-2(a)(1). At the pleading stage, courts apply the familiar *Iqbal/Twombly* plausibility standard, under which "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In this context, that means a plaintiff need only "provide 'enough factual matter (taken as true) to suggest' intentional [sex] discrimination." *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 974 (11th Cir. 2008) (quoting *Twombly*, 550 U.S. at 556); *accord Surtain v. Hamlin Terrace Found.*, 789 F.3d 1239, 1246 (11th Cir. 2015).[5]

[5] This Court has occasionally suggested in dicta that *Iqbal* and *Twombly* abrogated *Davis* on other grounds. *See, e.g.*, *LaCroix v. W. Dist. of Ky.*, 627 F. App'x 816, 818 (11th Cir. 2015). But *Twombly* could not have abrogated

One way—but not the only way—for a plaintiff to satisfy that standard is by identifying comparators: similarly situated employees outside the plaintiff's protected class whom the employer treated more favorably. In cases where an employer fires a plaintiff for alleged misconduct, for instance, the plaintiff can generally plead a plausible discrimination claim by identifying other employees who fall outside her protected class, engaged in misconduct of "comparable seriousness," and "were nevertheless retained." *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282, 283 n.11 (1976) (citation omitted). As the Supreme Court has explained, such allegations are "adequate to plead an inferential case that the employer's reliance on [its] discharged employee's misconduct as grounds for terminating [her] was merely a pretext." *Id.* at 283 n.11; *cf. Paul*

Davis because *Davis* came after and relied on *Twombly*. And *Iqbal* did not abrogate *Davis* because *Iqbal* simply extended *Twombly*'s plausibility pleading standard—which *Davis* had already expressly adopted—to all civil actions. *See Davis*, 516 F.3d at 974 & n.43 ("We understand *Twombly* as a further articulation of the standard by which to evaluate the sufficiency of *all* claims brought pursuant to Rule 8(a)." (emphasis added)). Furthermore, *Surtain* and other decisions confirm that *Davis*'s articulation of the pleading standard in Title VII cases remains good law. *See, e.g.*, *Surtain*, 789 F.3d at 1246; *Nurse v. City of Alpharetta*, 775 F. App'x 603, 606 (11th Cir. 2019); *Glover v. Donahoe*, 626 F. App'x 926, 930 (11th Cir. 2015); *Pouyeh v. Bascom Palmer Eye Inst.*, 613 F. App'x 802, 810 (11th Cir. 2015).

v. Americold Logistics, LLC, 450 F. App'x 850, 854 (11th Cir. 2012) ("In a discriminatory termination case involving alleged misconduct, we will look to whether the plaintiff was treated less favorably than similarly situated employees outside of his protected class."); *Anderson v. WBMG-42*, 253 F.3d 561, 564 (11th Cir. 2001) (plaintiff may survive summary judgment by showing that "comparator employees are 'involved in or accused of the same or similar conduct' yet are disciplined in a different, more favorable manner" (citation omitted)).

Here, that is precisely what Hernandez did. In her operative complaint, she alleged that CareerSource fired her based on reputed misconduct, namely, "rumors that she was having an affair with the former CEO." R.14 at 4 (¶ 20). In assessing the original complaint, the magistrate judge likewise acknowledged that, based on Hernandez's allegations, CareerSource "may well have disapproved of her romantic relationship with the company's former CEO" and "may have terminated [her] for this very reason." R.10 at 4.[6] Hernandez also alleged that at least two male

[6] For its part, CareerSource does not appear to dispute that it was aware of and believed the rumors that Hernandez was engaged in an affair with the

employees were similarly involved in or accused of in-office affairs, one of whom was caught having sex with a subordinate in an office conference room. R.14 at 3 (¶¶ 17-19). According to Hernandez, CareerSource not only declined to fire these employees, but it did not discipline them in any fashion. R.14 at 3 (¶¶ 17-19).

Under a straightforward application of the plausibility pleading standard, those allegations (taken as true) were enough to "nudge[]" Hernandez's sex discrimination claim "across the line from conceivable to plausible," *Twombly*, 550 U.S. at 570, and "allow a court to draw the reasonable inference that [CareerSource] is liable for the intentional [sex] discrimination alleged," *EEOC v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1023 (11th Cir. 2016) (cleaned up). Indeed, courts have commonly found similar allegations of disparate discipline sufficient to plead discrimination. *See, e.g.*, *Ward v. Sys. Prods. & Sols., Inc.*, 631 F. Supp. 3d 1134, 1147 (N.D. Ala. 2022) ("Retaining [a male employee who had a balance on his company AmEx card] but firing Plaintiff because of her AmEx balance 'is

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former CEO. To the contrary, in its motion to dismiss, CareerSource referred to the CEO as Hernandez's "boyfriend." R.17 at 8, 10.

adequate to plead an inferential case that the employer's reliance on his discharged employee's misconduct as grounds for terminating him was merely a pretext.'" (citation omitted)); *Shadduck v. City of Arcadia*, No. 2:21-cv-00741, 2022 WL 45052, at *3 (M.D. Fla. Jan. 5, 2022) (plaintiff's allegations that "a male colleague 'did exactly the same thing' but did not suffer the same circumstances" were sufficient "to state a plausible claim for discrimination").

To be sure, firing an employee because of an alleged in-office affair, standing alone, is not sex discrimination. But meting out discipline for that conduct to a woman and not men at least "suggest[s]" intentional sex discrimination. *Davis*, 516 F.3d at 974; *Surtain*, 789 F.3d at 1246. Because Hernandez plausibly alleged that was the case here, she has stated a claim for sex discrimination.

II. The district court did not properly apply the plausibility pleading standard.

In assessing the original complaint, the district court accepted that Hernandez could plead a plausible claim for sex discrimination with comparator allegations, for instance, that similarly situated men were "subject to similar rumors of extramarital affairs within the company" yet

"treated more favorably." R.10 at 5. In reviewing the amended complaint, however, the court held that Hernandez had not stated a claim for sex discrimination because: (1) she had not provided enough factual details about her comparators to show that she and they were similarly situated "in all material respects," and thus had not set forth a prima facie case under the *McDonnell Douglas* framework, R.27 at 6; and (2) she could not show that she and her comparators were "nearly identical," R.24 at 6. Neither rationale for dismissing the amended complaint is correct.

A. The district court improperly required Hernandez to plead enough facts to show that she and her comparators were similarly situated "in all material respects," and to make out a prima facie case under *McDonnell Douglas*.

Contrary to the district court's holding, at the pleading stage a plaintiff need not allege with specificity that she and her comparators were similarly situated "in *all* material respects." That inquiry is reserved for the prima facie stage of the *McDonnell Douglas* burden-shifting analysis, as this Court recently held in *Lewis v. City of Union City*, 918 F.3d 1213, 1224 (11th Cir. 2019) (en banc). At *that* stage, the "proper test for evaluating comparator evidence" is whether a plaintiff and her comparators were "similarly situated in all material respects." *Id.* at 1218.

It is firmly established, however, that *McDonnell Douglas* does not apply at the pleading stage. The Supreme Court and this Court have long held that "*McDonnell Douglas*'s burden-shifting framework is an evidentiary standard, not a pleading requirement." *Surtain*, 789 F.3d at 1246 (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510 (2002)). For this reason, "a Title VII complaint need not allege facts sufficient to make out a classic *McDonnell Douglas* prima facie case." *Davis*, 516 F.3d at 974 (quoting *Swierkiewicz*, 534 U.S. at 511). The upshot is that a plaintiff need not demonstrate in her complaint that she and her comparators are similarly situated "in all material respects." *Cf. Hess v. Garcia*, 72 F.4th 753, 760 (7th Cir. 2023) (stating, in Equal Protection Clause context, that "even in cases where identification of a similarly situated individual may be necessary at trial, such identification is not required in the pleadings").

Consistent with this understanding, district courts within this Circuit have widely held that "[a] substantive analysis on whether comparators are similarly situated in all material respects is better reserved for the summary judgment stage to allow the parties to conduct discovery on the issue." *Howell v. Baldwin Cnty. Bd. of Educ.*, No. 1:20-cv-00502, 2021 WL 6050452, at *7 (S.D. Ala. July 27, 2021) (collecting cases); *see also Alvarez v.*

Lakeland Area Mass Transit Dist., 406 F. Supp. 3d 1348, 1354 (M.D. Fla. 2019) ("Determining whether a plaintiff and comparator are 'similarly situated in all material respects' is a fact-intensive inquiry better suited to summary judgment."); *Bartholomew v. Lowe's Home Ctrs., LLC*, No. 2:19-cv-00695, 2020 WL 321372, at *6 (M.D. Fla. Jan. 21, 2020) ("[A] substantive assessment of comparators is left to later stages of a case.").

This order of operation is sensible because the probing comparator analysis that *Lewis* demands is a poor fit at the pleading stage. *Cf. Nanko Shipping, USA v. Alcoa, Inc.*, 850 F.3d 461, 467 (D.C. Cir. 2017) ("The burden at the summary judgment stage and at trial is different and substantially more onerous than the pleading burden."). After all, as courts have stated in other contexts, "determining whether individuals are similarly situated is generally a factual issue for the jury," *Eggleston v. Bieluch*, 203 F. App'x 257, 264 (11th Cir. 2006), and "it is precisely in light of the inquiry's fact-intensive nature that [courts] have cautioned against deciding whether two comparators are similarly situated on a motion to dismiss," *Hu v. City of New York*, 927 F.3d 81, 97 (2d Cir. 2019).

Furthermore, much of the evidence germane to the comparator analysis—for example, a comparator's disciplinary history or the identities

of relevant decisionmakers—will often be unavailable to a plaintiff without the benefit of discovery. As the Seventh Circuit has explained, such considerations "are critical in figuring out who else might have been similarly situated," and "[t]he employee often will not be able to answer those questions without discovery." *Carlson v. CSX Transp., Inc.*, 758 F.3d 819, 830 (7th Cir. 2014).

This Court recently confirmed this understanding in *Gomez v. City of Doral*, No. 21-11093, 2022 WL 19201 (11th Cir. Jan. 3, 2022). Much like Hernandez, the plaintiff in *Gomez* asserted a Title VII sex discrimination claim and alleged that her employer treated her less favorably than similarly situated male employees, including by disciplining them differently for similar conduct. *Gomez v. City of Doral*, No. 1:20-cv-20389, 2021 WL 848867, at *2 & n.2 (S.D. Fla. Mar. 5, 2021).[7] Much like the district

[7] Notably, the plaintiff in *Gomez* also alleged that her employer disciplined her based on rumors of misconduct. For instance, the plaintiff alleged that "false rumors began to circulate that [she] was going to work in pajamas," that she was later "reprimanded for wearing 'pajamas', meaning jeans, on Sundays," and that "[m]any similarly situated male officers … wore jeans on the weekends, but [the plaintiff], a female, was the only officer reprimanded for this common practice." Sec. Am. Compl. at ¶ 37, *Gomez v. City of Doral*, No. 1:20-cv-20389 (S.D. Fla. June 17, 2020) (ECF No. 10).

court here, the district court in *Gomez* held that these allegations were deficient because the plaintiff "failed to explain how those [male] employees are similarly situated to her 'in all material respects.'" *Id.* at *2 (quoting *Lewis*, 918 F.3d at 1218). On this ground alone, the court dismissed the sex discrimination claim. *Id.*

On appeal, this Court held that the plaintiff's purported failure to show that she and her comparators were similarly situated "in all material respects" was not "a valid reason to dismiss her complaint." *Gomez*, 2022 WL 19201, at *2. By requiring such a showing at the pleading stage, this Court explained, the district court had effectively "fault[ed] [the plaintiff] for failing to make out a prima facie case of sex discrimination under *McDonnell Douglas*." *Id.* (cleaned up). And by doing that, the district court has "erred as a matter of law." *Id.* Accordingly, this Court vacated the dismissal of the plaintiff's sex discrimination claim and remanded for the district court to apply the appropriate standard: "the *Iqbal/Twombly* plausibility standard that our precedents—and those of the Supreme Court—demand." *Id.* (cleaned up).

This case is on all fours with *Gomez*. Here, as in *Gomez*, the district court held that Hernandez's complaint was deficient because she failed to

show that she and her comparators were similarly situated "in all material respects." R.27 at 6. Here, as in *Gomez*, the district court likewise faulted Hernandez for failing to "set forth a prima facie case for sex discrimination." R.27 at 6. Thus, here, as in *Gomez*, the court "erred as a matter of law." *Gomez*, 2022 WL 19201, at *2.

None of this is to suggest that courts may never critically assess a plaintiff's comparator allegations at the pleading stage. They can. A complaint may be deficient, for example, when it offers "nothing more than conclusory statements" that a plaintiff "was treated less favorably than similarly situated employees" outside her protected class. *Jones v. Unity Behav. Health, LLC*, No. 20-14265, 2021 WL 5495578, at *1 (11th Cir. Nov. 23, 2021). So too if the plaintiff's own pleadings "affirmatively demonstrate" that she and her comparator were not "disciplined for the same or similar misconduct" or were otherwise incomparable. *Lacy v. City of Huntsville*, No. 21-11410, 2022 WL 303385, at *4 (11th Cir. Feb. 2, 2022). What this Court has said a district court may not do, however, is to demand that a plaintiff provide enough details about her comparators to make out a prima facie case of discrimination in her complaint. As *Gomez* explained,

that heightened requirement is inconsistent with the *Iqbal/Twombly* plausibility pleading standard.

For these reasons, the EEOC urges this Court to make clear that at the pleading stage, a plaintiff is not required to allege with specificity that she and her comparators are similarly situated "in all material respects." Because the district court held Hernandez to this heightened requirement, its dismissal of her Title VII claim should be reversed.

B. The district court incorrectly applied a "nearly identical" standard that this Court has rejected, which affected its analysis of Hernandez's comparators allegations.

Even putting aside the foregoing problem, the district court erred in another critical respect. The magistrate judge, whose reasoning the district court accepted, stated that Hernandez had to show that she and her comparators were "nearly identical." R.24 5-6; *see Galatolo v. United States*, 394 F. App'x 670, 672 n.2 (11th Cir. 2010) ("When the district court adopts a magistrate's R & R, it adopts the reasoning of the R & R to the extent that it is not explicitly rejected.").

This Court has unequivocally rejected this "nearly identical" standard for assessing comparators. In *Lewis*, this Court sitting en banc held that "a plaintiff *needn't* show that she and her comparators were

'nearly identical.'" 918 F.3d at 1229 (emphasis added). *Lewis* also overruled prior decisions that had suggested such a requirement, stating, "we are *rejecting as too strict* the 'nearly identical' standard that has pervaded our case law for decades." *Id.* at 1226 n.10. That standard, this Court explained, incorrectly suggests "something akin to doppelganger-like sameness," creating an unacceptable risk that lower courts applying it will "reflexively … dismiss potentially valid antidiscrimination cases." *Id.* at 1226.

The district court not only articulated an incorrect requirement, but then applied the standard in a manner that infected its analysis of Hernandez's comparator allegations. Indeed, the magistrate judge expressly faulted Hernandez for "fail[ing] to identify similarly situated comparators who were 'nearly identical' to [herself]." R.24 at 6. The court found, for instance, that the two male employees Hernandez identified were not suitable comparators because they "held executive titles," whereas Hernandez "held a middle management title." R.27 at 5; R.24 at 6.

That is a distinction without a difference, at least in this context. Even at summary judgment or trial, it is not "necessary for a plaintiff to prove purely formal similarities—*e.g.*, that she and her comparators had precisely the same title." *Lewis*, 918 F.3d at 1227; *see also West v. City of Albany*, 830 F.

App'x 588, 595 (11th Cir. 2020). As this Court has explained, "[t]he relevant inquiry is not whether the employees hold the same job titles, but whether the employer subjected them to different employment policies." *Lathem v. Dep't of Child. & Youth Servs.*, 172 F.3d 786, 793 (11th Cir. 1999). Here, CareerSource has not suggested that it subjected employees with "executive titles" to different policies regarding in-office relationships than those with "middle management title[s]." And it strains credulity to suppose that a reasonable employer would adopt workplace policies allowing its executives to engage in such relationships while prohibiting managers from doing so. *Cf. Hargett v. Nat'l Westminster Bank, USA*, 78 F.3d 836, 840 (2d Cir. 1996) ("Requiring higher-ups to conform to a higher standard of decency … does conform with common sense.").

The district court also found that the male employees were not suitable comparators because they "engaged in affairs with subordinates, whereas [Hernandez] allegedly engaged in an affair with the former leader of the organization." R.27 at 5; R.24 at 6. But what matters is whether a plaintiff and her comparators engaged in acts of "*comparable* seriousness," not their "precise equivalence in culpability." *McDonald*, 427 U.S. at 283 n.11 (emphasis added); *see also Perez v. Tex. Dep't of Crim. Just., Institutional*

Div., 395 F.3d 206, 212 (5th Cir. 2004) (plaintiffs are not "required to plead with particularity the degree of similarity in culpability").

At a minimum, Hernandez has plausibly alleged that her male comparators were involved in conduct of *comparable* seriousness. If anything, the fact that the comparators were executives who allegedly had affairs with subordinates—combined with the fact that one comparator was caught having sex with a subordinate in an office conference room—arguably makes their conduct more severe relative to the conduct Hernandez was accused of. *See King v. Piggly Wiggly Ala. Distrib. Co.*, 929 F. Supp. 2d 1215, 1223 (N.D. Ala. 2013) (misconduct sufficiently comparable where "an argument can be made that the admitted misconduct of the [comparators] … is not only similar in nature, but actually more serious than what [plaintiff] was found to have done"); *cf. Moore v. City of Charlotte*, 754 F.2d 1100, 1107 (4th Cir. 1985) (courts must assess "the gravity of offenses on a relative scale").

Further compounding these errors, the court speculated that CareerSource "may well have had legitimate business reasons—unrelated to sex discrimination—to terminate an employee who was rumored to have had an affair with the former leadership" rather than subordinates. R.27 at

5; R.24 at 6. CareerSource did not volunteer any such reasons, nor did the court identify what they might have been. In any event, the questions whether an employer can establish legitimate, non-discriminatory reasons for its actions and whether a plaintiff can rebut those reasons by showing pretext are reserved for the second and third steps of the *McDonnell Douglas* burden-shifting analysis. *See Tex. Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 253 (1981). As explained above, that analysis does not apply at the pleading stage. *See Swierkiewicz*, 534 U.S. at 510-11; *Surtain*, 789 F.3d at 1246; *Davis*, 516 F.3d at 974. And insofar as a plaintiff is not required to rebut her employer's proffered reasons for firing her in her complaint, she certainly is not required to rebut reasons that her employer has not even offered.

In short, as *Lewis* predicted, the court's application of a "nearly identical" standard caused it to "reflexively dismiss" Hernandez's "potentially valid" sex discrimination claim. 918 F.3d at 1226. For this reason alone, its decision should be reversed.

III. The district court erred in dismissing the entire complaint as a "shotgun pleading" with prejudice and without leave to amend.

The district court alternatively found that the operative complaint was a "shotgun pleading" because it contained "multiple theories of

discrimination combined in a single count, including disparate treatment, hostile work environment, and age discrimination," and it impermissibly merged Title VII and FCRA claims into a single count. R.27 at 4-5; R.24 at 3-4. Neither rationale warranted dismissal, let alone dismissal *with prejudice*.

Under any fair reading of Hernandez's allegations, she advances just one theory of discrimination: that CareerSource discriminated against her on the basis of sex because it fired her for alleged misconduct while declining to fire men for comparable misconduct. That is a textbook "sex discrimination through disparate discipline" theory. *Lathem*, 172 F.3d at 790; *see also Paul*, 450 F. App'x at 854 (discussing "discriminatory discharge" cases where employees "are disciplined in different ways" for similar conduct). The operative complaint gives no indication that Hernandez intended to separately pursue hostile work environment[8] or

[8] Importantly, in the amended complaint, Hernandez removed significant allegations that may have suggested a hostile work environment theory. In her original complaint, Hernandez alleged that "she was subjected to a work environment ridiculed with sexual innuendo and suggestion," and that a manager and colleagues harassed her. R.1 at 2-3 (¶ 15). In the amended complaint, however, Hernandez omitted these allegations. *See generally* R.14 at 4-5 (¶¶ 22-28). Although Hernandez continued to allege that CareerSource's conduct "created a workplace which was objectively and subjectively discriminatory to her because of her gender," R.14 at 4

age discrimination[9] claims. To the contrary, she expressly disavowed pursuing them, stating in her opposition papers: "It ought to be sufficiently clear that there [is] only one substantive issue for determination in the Amended Complaint. That issue is sex discrimination." R.21 at 3.

Because Hernandez pursues a single theory of discrimination, she also was not required to split her Title VII and FCRA claims into separate counts. The federal rules provide that, "[i]f doing so would promote clarity, each claim founded on *a separate transaction or occurrence* … must be stated in a separate count." Fed. R. Civ. P. 10(b) (emphasis added); *see also* Wright & Miller, Federal Practice & Procedure, Civil § 1324 (4th ed.). The rule thus allows plaintiffs, under at least some circumstances, to "combine[] state and federal claims in a single count" so long as the claims "are based on the same facts." *Fed. Deposit Ins. Corp. v. Miller*, 781 F. Supp. 1271, 1278 n.5 (N.D. Ill. 1991); *see also Baker v. John Morrell & Co.*, 266 F. Supp. 2d 909, 925-

(¶ 24), it is difficult to read that single paragraph as asserting a standalone hostile work environment claim.

[9] In her EEOC charge, which accompanied her amended complaint, Hernandez checked only the box for sex discrimination and left unchecked the box for age discrimination. R.14 at 7. This further suggests that Hernandez was not asserting an age discrimination claim.

26 (N.D. Iowa 2003) (acknowledging that "a plaintiff may combine state and federal claims in a single count" and collecting cases in which plaintiffs "specifically alleged violations of separate statutes but combined those allegations into a single count"), *aff'd*, 382 F.3d 816 (8th Cir. 2004).

Here, although Hernandez alleges violations of separate statutes, both claims are premised on the same operative facts, namely, her termination for alleged misconduct. Moreover, "[s]ex discrimination claims under the FCRA are analyzed using the same standards as Title VII." *Smith v. City of New Smyrna Beach*, 588 F. App'x 965, 975 n.6 (11th Cir. 2014); *see also Wilbur v. Corr. Servs. Corp.*, 393 F.3d 1192, 1195 n.1 (11th Cir. 2004) ("The [FCRA] was patterned after Title VII, and Florida courts have construed the act in accordance with decisions of federal courts interpreting Title VII."); *Gamboa v. Am. Airlines*, 170 F. App'x 610, 612 (11th Cir. 2006) ("Claims under Title VII and the FCRA are analyzed under the same burden-shifting framework.").

Insofar as Hernandez's Title VII and FCRA claims were premised on the same underlying event and subject to the same standards, she reasonably included them in a single count. And she can hardly be faulted for doing so because district courts within this Circuit have often taken no

issue with that practice. *See, e.g.*, *Scribner v. Collier Cnty.*, No. 2:10-cv-00728, 2012 WL 1058149, at *1, *4 (M.D. Fla. Mar. 28, 2012) (noting that plaintiff alleged violations of Title VII and FCRA in a single count, and denying defendant's motion to dismiss); *Wallace v. DM Customs, Inc.*, No. 8:05-cv-00115, 2006 WL 8440090, at *1, *5 (M.D. Fla. May 12, 2006) (noting that plaintiff's first count alleged discrimination under both FCRA and Title VII, and granting plaintiff's motion for leave to amend complaint); *cf. Terry v. Sacred Heart Health Sys., Inc.*, No. 3:21-cv-00830, slip. op. at 4 (N.D. Fla. Sept. 9, 2021) (ECF No. 15) ("The statutory violations alleged within each count are effectively a single claim for relief because race discrimination claims under Title VII and § 1981 have the same prima facie elements and are governed by the same legal standards.").[10]

To be sure, many district courts in Florida have held that "allegations arising from separate statutory authority should be contained in separate counts." *Patsalides v. City of Fort Pierce*, No. 15-cv-14431, 2016 WL 11503007, at *2 (S.D. Fla. Aug. 12, 2016). But even if combining federal and state claims into a single count were impermissible, it would not justify

[10] The *Terry* decision is available on the district court docket at R.22.

dismissing *both* claims. The district court's decision in *Bialek v. Delvista Towers Condominium Association, Inc.*, 994 F. Supp. 2d 1277 (S.D. Fla. 2014), is instructive. There, the plaintiff asserted five counts alleging various claims under Title VII, the FCRA, and the Age Discrimination in Employment Act. *Id.* at 1278-79. As pertinent here, the court noted that "each count cites more than one statute," and determined that "[a]llegations arising from separate statutory authority should be contained in separate counts." *Id.* at 1281. Rather than dismissing all claims, however, the court denied the motion to dismiss "as it relates to the federal causes of action," granted the motion "as it pertains to the [FCRA]," and allowed the plaintiff to refile her complaint to "plead one claim per count." *Id.*

Here, if this Court were to conclude that Hernandez should have asserted her Title VII and FCRA claims as separate counts, *Bialek* points to a sensible and fair path forward. Because Hernandez has stated a plausible claim for sex discrimination under Title VII, the appropriate procedure

would be for this Court to reverse the dismissal at least as it relates to the Title VII claim.[11]

Finally, even if this Court were to agree that merging federal and state claims into a single count warranted dismissal of the entire complaint, the district court nonetheless abused its discretion by dismissing *with* prejudice and *without* leave to amend. Courts disfavor dismissals based on "mere technicalities," *Foman v. Davis*, 371 U.S. 178, 181 (1962)—especially so when the offending technicality is readily curable. After all, leave to amend must be freely given "when justice so requires." Fed. R. Civ. P. 15(a)(2). And even when a court finds that a complaint is a shotgun pleading, "a dismissal with prejudice, whether on motion or *sua sponte*, is an extreme sanction that may be properly imposed only when: (1) a party engages in a clear pattern of delay or willful contempt (contumacious conduct); and (2) the district court specifically finds that lesser sanctions would not suffice." *Weiland v. Palm Beach Cnty. Sheriff's Off.*, 792 F.3d 1313, 1321 n.10 (11th Cir. 2015) (cleaned up).

[11] The EEOC takes no position on whether, if the Court were to take this approach, Hernandez should also be allowed to amend her complaint to replead her claim under the FCRA.

Here, the dismissal with prejudice was especially harsh because the district court did not dismiss Hernandez's original complaint based on a purportedly improper merger of state and federal claims. *See* R.10 at 6. Indeed, the original complaint alleged sex discrimination under only Title VII, not the FCRA. *Compare* R.1 at 2-4 (¶¶ 14-20), *with* R.14 at 4-5 (¶¶ 22-28). Thus, while Hernandez had an opportunity to cure other deficiencies the court had identified in its first dismissal order, she never had an opportunity to cure this one. Thus, at a bare minimum, Hernandez should be given leave to replead her federal claim.

CONCLUSION

For the foregoing reasons, the district court's grants of summary judgment with respect to Hernandez's Title VII sex discrimination claim should be reversed and the case remanded for further appropriate proceedings.

Respectfully submitted,

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September 28, 2023

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 6,361 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 11th Cir. R. 32-4.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 365 in Book Antiqua 14 point.

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September 28, 2023

CERTIFICATE OF SERVICE

I certify that on September 28, 2023, I electronically filed the foregoing brief in PDF format with the Clerk of Court via the appellate CM/ECF system. I certify that all counsel of record are registered CM/ECF users, and service will be accomplished via the appellate CM/ECF system.

I further certify that I caused four paper copies of the foregoing brief to be mailed to the Clerk of Court.

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