Circuit Court for Prince George's County
Case No.: CAL19-26429

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 1262

September Term, 2022

PRINCE GEORGE'S COUNTY
MEMORIAL LIBRARY SYSTEM

v.

JEFFREY NAFTAL

Arthur,
Albright,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Harrell J.

Filed: November 8, 2023

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

A jury in the Circuit Court for Prince George's County found that the Prince George's County Memorial Library System ("the Library"), appellant, terminated unlawfully Jeffrey Naftal, appellee, because of his age, race, and gender. Naftal's case relied primarily on evidence that the Library treated other employees outside his protected classes ("comparators") more favorably despite comparable misconduct. On appeal, the Library contends that this evidence was inadmissible and, in any event, insufficient as a matter of law because Naftal's comparators were not similarly situated to him. In the alternative, the Library contends that the trial court erred by not giving its requested instruction on the relevancy of this evidence.

We conclude that the Library waived its objection to the admissibility of Naftal's comparator evidence. Nevertheless, we find that three of Naftal's four comparators were improper as a matter of law and that the evidence was therefore insufficient to sustain the jury's verdict. We conclude also that the trial court did not err in refusing to give the Library's requested jury instruction. Therefore, we vacate the judgment in this case and remand for further proceedings consistent with this opinion.

BACKGROUND

The Library System

The Library is a quasi-independent agency of the Prince George's County government. *See* Md. Code. Ann., Educ. ("Educ.") § 23-401(a). Through its 19 branches, the Library serves nearly a million visitors every year—providing the community with books, computers, and internet access, together with reading programs for children. The Library is governed by an appointed volunteer Board of Trustees ("the Board"). *See* Educ.

§ 23-401(b). The Board is responsible for establishing policies relating to employees' classification, salaries, work conditions, and discipline. Educ. § 23-406(b). The Board selects and appoints also a Chief Executive Officer ("CEO") to serve at the Board's pleasure. Educ. § 23-406(a)(1), (f).

Certain aspects of Library employment are regulated by statute. For example, the CEO, or his/her/their designee, may suspend any Library employee without pay for up to 10 working days, but only for these reasons: (1) misconduct in office; (2) insubordination; (3) incompetency; or (4) willful neglect of duty. Educ. § 23-406(d)(1). The CEO need not consult the Board before suspending an employee, but he/she/they must "give the suspended employee a written statement that specifies the reasons for the suspension" and place a copy in the employee's official personnel file. Educ. § 23-406(d)(2). The employee may reply, in writing within 10 working days after receiving notice of the suspension, to the CEO and may request also a hearing before the Board. Educ. § 23-406(d)(3).

The process to terminate Library employees is similar, except that the CEO may not terminate unilaterally an employee. Instead, the CEO submits a written recommendation to the Board, and the Board determines whether termination is warranted. Educ. § 23-406(e)(1). The Board may terminate an employee for only the same four reasons as above. *Id.* The CEO is required to "send the employee a written copy of the charges against [him/her/them] and give the employee an opportunity to request a hearing before the [B]oard within 10 working days." Educ. § 23-406(e)(2). If the Board votes unanimously to remove the employee, its decision is final. Educ. § 23-406(e)(3)(i). If "[t]he decision is not

unanimous, the employee may appeal to the State Library Board through the State Librarian." Educ. § 23-406(e)(3)(ii).

Many Library employees are members of the Municipal & County Government Employees Organization Local 1994, a union that has a collective bargaining agreement with the Library. The collective bargaining agreement provides union members with additional rights and protections beyond the statutory ones noted above, including requiring progressive discipline before any termination. Executive Team members, such as the CEO, COO and CFO, are not covered by the collective bargaining agreement. That said, the Library uses the same disciplinary process for both union and nonunion employees. The Board engages in all terminations, regardless of union membership.

Naftal's Employment

The Library hired Naftal—a White male, over 50 years of age—in 2016 to serve as its Director of Human Resources. This was an Executive Team position and reported directly to the CEO. At the time, the CEO was Kathleen Teaze. As HR Director, Naftal was the primary contact for all employee relations. Among other things, he: advised mid-level Library supervisors on Library policies and procedures, such as progressive discipline; negotiated with the union; and, conducted investigations under the Library's harassment policy. While reporting to Teaze, several incidents occurred that resulted in complaints about Naftal's performance. Despite these incidents, however, Naftal received no formal warnings, reprimands, or counseling.

When Teaze resigned in 2017, Naftal reported to interim co-CEOs Michelle Hamiel and Michael Gannon while the Board searched for a permanent replacement CEO. Finally,

in 2019, the Board hired Roberta Phillips as CEO, and Naftal began reporting to her. Phillips was hired to change the Library's culture away from a perceived disciplinarian and adversarial approach towards employees. She met individually with Naftal just five times, but they both attended several large and small group meetings together. Phillips never reprimanded Naftal in writing about his performance, but, in their one-on-one meetings, she expressed that she was dissatisfied with his punitive language and continued adversarial approach towards staff. Phillips did not believe Naftal could change his behavior. So less than three months after her start date, Phillips recommended his termination to the Board.

In the required written notice, Phillips identified the grounds for Naftal's termination as incompetence and willful neglect of duty. She specified four job duties he neglected:

- Creates a welcoming environment, maintains effective relationships and uses all available resources to assist customers (human resource customers are the staff);
- Empowers staff; fosters collaboration, support for new ideas, encourages innovations, allows staff to learn from mistakes in non-punitive settings;
- Strong communication; and
- Acts as an ambassador and advocate for the library.

Naftal appealed his termination, alleging that the Library was discriminating against him because of his race, age, and sex. Prior to the hearing, the Board requested from Phillips relevant documents relating to the statements in Naftal's appeal letter, including additional details supporting the reasons for termination and the personnel files of Naftal's

alleged comparators. Phillips provided the requested documents and a supplemental letter detailing 15 examples supporting her stated grounds for termination. She concluded the letter with: "Whether characterized as incompetency, willful neglect of duty, or insubordination, the criteria for termination have been met and this remains the CEO's recommendation."

The Board held a hearing on 30 May 2019. The hearing focused primarily on Naftal's competence and job performance before Phillips's tenure as CEO. Naftal presented no evidence of race, sex, or age discrimination. The Board voted unanimously to terminate Naftal.

Naftal was replaced initially as HR Director by Andi Sponaugle, a White female, over 60. When she retired soon after her appointment, the position was rebranded as the Director of Talent & Culture and filled by Aishar Pinnock, a Black female, under 40.

Circuit Court Proceedings

After exhausting his administrative remedies with the Prince George's County Human Rights Commission and the Equal Employment Opportunity Commission, Naftal sued the Library in the Circuit Court for Prince George's County, alleging he was fired because of his race, sex, or age. As evidence of the Library's alleged discrimination, Naftal pointed to other Library employees who he alleged were treated more favorably than he was despite comparable misconduct, all of whom were outside at least one of his protected class categories. After discovery, the Library moved for summary judgment on the grounds that Naftal's proposed comparators were not "similarly situated," which foreclosed an inference of discrimination. The circuit court denied this motion without explanation. The

Library moved *in limine* to exclude evidence of three of Naftal's proposed comparators as irrelevant on the same grounds—*i.e.*, they were not similarly situated. The court heard arguments on this motion just before trial and denied it. Then, at the close of Naftal's case-in-chief, the Library moved for a directed verdict on the same grounds—that Naftal's comparators were not similarly situated. The court heard arguments on the motion and denied it. The Library renewed its motion at the close of evidence, which the court denied, without additional argument.

Before submitting the case to the jury, the Library requested that the court issue a non-pattern instruction on the relevance of comparator evidence:

> The similarity between comparators must be clearly established in order to be meaningful. To be relevant, a comparator must be both similarly situated and outside of the Plaintiff's protected class. Plaintiff must show that . . . he and the comparator are similarly situated in all relevant respects, including evidence that the two employees dealt with the same supervisor, were subject to the same standards, and engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the . . . employer's treatment of them.

The court declined to issue the instruction.

The jury returned a verdict in Naftal's favor, awarding him $104,258 in back pay and $208,516 in non-pecuniary damages. The court required the Library to engage in management training relating to the subject of employment discrimination. Following the verdict, the Library moved for judgment notwithstanding the verdict, again arguing that Naftal's comparators were not similarly situated. The court denied the motion. This appeal followed.

We will include additional facts as may be relevant to our discussion of the questions presented.

DISCUSSION

Employment Discrimination Framework

The Maryland Fair Employment Practices Act makes it unlawful for an employer to discharge an employee because of their race, sex, or age, among other grounds. Md. Code Ann., State Gov't § 20-606(a)(1)(i). Likewise, § 2-222 of the Prince George's County Code makes it unlawful for an employer in the County to discharge an employee "because of discrimination." In a discharge case, such as this one, the employee may prove discrimination with either direct or circumstantial evidence. *Dobkin v. Univ. of Balt. Sch. of Law*, 210 Md. App. 580, 591–92 (2013).

Direct evidence "consists of statements by a decision maker that directly reflect the alleged animus and bear squarely on the contested employment decision." *Id.* at 592 (cleaned up). Of course, "smoking gun" evidence of discriminatory intent is rare. *See United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983) ("There will seldom be 'eyewitness' testimony as to the employer's mental processes."). And this case involves none.[1]

[1] When Phillips gave Naftal his written notice, he asked her why he was being terminated. According to him, she responded that he lacked empathy. In response to a question regarding how difficult it would have been for Naftal to develop that core competency, she responded that "after 50 some years it's very difficult to teach somebody to be empathetic who has not exhibited that or was not a pattern for their behavior." Despite the conclusory assertions in Naftal's brief, this is not direct evidence of discrimination. Even if Phillips's testimony was interpreted to mean she believed Naftal was too old to be (continued…)

For employment discrimination cases resting on circumstantial evidence, Maryland has adopted the *McDonnell Douglas* burden-shifting framework. This test is designed to "sharpen the inquiry into the elusive factual question of intentional discrimination." *Texas Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 255 n.8 (1981). Under the standard framework, the employee must first establish a *prima facie* case of discrimination. *Belfiore v. Merch. Link, LLC*, 236 Md. App. 32, 45 (2018). The employer may then rebut the employee's case "by presenting evidence of some legitimate, nondiscriminatory reason for the alleged disparate treatment." *Id.* at 46 (cleaned up). Finally, if the employer rebuts the case, the employee has "an opportunity to prove by a preponderance of the evidence that the reasons offered by the [employer] were not its true reasons, but were [instead] a pretext for discrimination." *Id.*

Comparator Evidence & the Similarly Situated Analysis

An employee may satisfy his/her/their burden at steps one and three of this test by producing "comparator evidence." *See Taylor v. Giant of Md., LLC*, 423 Md. 628, 652 (2011). This refers to evidence that another "similarly situated" employee outside the plaintiff's protected class(es) was treated more favorably than them. *Id.*; *see also Dobkin*, 210 Md. App. at 594. Analyzing whether a proposed comparator is similarly situated to a plaintiff calls for a "flexible, common-sense" examination of all relevant factors. *Coleman*

taught empathy, it does not "bear squarely on the contested employment decision." *Dobkin*, 210 Md. App. at 592 (cleaned up). According to the Library, Naftal was fired for his present lack of empathy, not his inability to later develop it. So Phillips's testimony was, at best, additional circumstantial evidence of discriminatory intent on the basis of age. *See Candolfi v. Allterra Grp., LLC*, 254 Md. App. 221, 239 (2022).

v. Donahoe, 667 F.3d 835, 846 (7th Cir. 2012). "All things being equal, if an employer takes an action against one employee in a protected class but not another outside that class, one can infer discrimination. The 'similarly situated' prong establishes whether all things are in fact equal." *Id.* (cleaned up). Its purpose is to eliminate other possible explanatory variables, "such as differing roles, performance histories, or decision-making personnel, which helps isolate the critical independent variable—discriminatory animus." *Id.* (cleaned up).

Our Supreme Court first addressed "the appropriate legal standard for comparator evidence as it relates to adverse employment actions" in *Taylor v. Giant of Maryland, LLC*. 423 Md. at 651. There, Julia Taylor, a female tractor-trailer driver, sued her employer for gender discrimination after the company fired her based on a medical examination she failed upon returning to work from an absence caused by a gynecological condition. *Id.* at 631–32. At trial, a jury found that Taylor proved successfully her claim based on evidence that four of her male coworkers suffered also from serious health problems—including diabetes, Parkinson's Disease, and severe dizziness—but Giant did not require them to undergo a medical exam before returning to work. *Id.* at 656.

After examining several federal cases addressing the requisite degree of similarity for comparators, the Court concluded that "one who alleges discrimination need not identify and reconcile every distinguishing characteristic of the comparators." *Id.* at 655. The Court reasoned that requiring Taylor to produce a comparator with a gender-specific ailment who also did not have to undergo a medical evaluation "would essentially . . . eradicat[e] disparate treatment based on gender-specific ailments as an actionable form of

discrimination altogether." *Id.* at 656. Looking to the other facts that Giant advanced as distinguishment, the Court concluded that courts should not "parse out every individual aspect and employment factor[] rather than consider the single most relevant fact[.]" *Id.* at 658. In Taylor's case, that single most relevant fact was "that each of the male drivers used as comparators had significant health conditions but were not required to submit to an independent medical examination." *Id.* The Court concluded that a reasonable jury could have found that the male employees, despite their differences, were similarly situated enough to Taylor to find that her disparate treatment was discriminatory. *Id.* at 645.

In general, similarly situated employees "must be directly comparable to the plaintiff in all material respects, but they need not be identical in every conceivable way." *Coleman*, 667 F.3d at 846 (cleaned up). The quest is for comparators, not "clones." *Id.* (cleaned up). So long as the distinctions between the plaintiff and the proposed comparators are not "so significant that they render the comparison effectively useless," the similarly situated requirement is satisfied. *Id.* (cleaned up). A plaintiff's burden here is "not onerous." *Burdine*, 450 U.S. at 253. The Supreme Court "never intended" the requirements "to be rigid, mechanized, or ritualistic . . . [but] merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978). The Court has cautioned that "precise equivalence . . . between employees is not the ultimate question[.]" *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 283 n.11 (1976). The touchstone of the similarly situated inquiry is simply whether the employees are '"comparable.'" *Id.*

(emphasis omitted) (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973)).

Preservation

To begin, Naftal contends that the Library waived its objection to the admissibility of his comparator evidence because it failed to object contemporaneously at trial to any testimony about the comparators. The Library concedes that it failed to do so, but it nevertheless argues that Maryland Rule 2-517(a) saves its admissibility objection because it objected to the evidence "before final argument[.]" Naftal is correct.

Maryland Rule 8-131(a) provides that, generally, an appellate court will not decide an issue "unless it plainly appears by the record to have been raised in or decided by the trial court[.]" In the evidentiary context, unless the trial court grants a continuing objection, Rule 2-517(a) requires an objection "be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived." A denied motion *in limine* to exclude evidence does not preserve the issue for appellate review "unless a contemporaneous objection is made at the time the evidence is later introduced at trial." *Morton v. State*, 200 Md. App. 529, 541 (2011) (cleaned up).

Contrary to the Library's argument, Rule 2-517(a) cannot save its admissibility objection. The portion of the Rule to which the Library refers deals with evidence admitted "subject to the introduction of additional evidence sufficient to support a finding of the fulfillment of [a] condition [of fact]." Md. Rule 2-517(a). The Rule also requires that, to preserve its objection, the objecting party "move[] to strike the evidence on the ground that the condition was not fulfilled." *Id.* The comparator evidence here was admitted with no

such strings attached, and the Library did not move to *strike* the evidence before final argument—it moved for judgment. Thus, the Library waived its objection to the admissibility of Naftal's comparator evidence. Our analysis does not end there, however, because Naftal conceded at argument that the Library preserved nonetheless its objection to the legal sufficiency of the evidence.

Evidentiary admissibility and legal sufficiency are distinct issues. *Terumo Med. Corp. v. Greenway*, 171 Md. App. 617, 623 (2006). As such, they are typically preserved and analyzed distinctly. We illustrated this dichotomy in *Terumo Medical Corp. v. Greenway*, through an example of hearsay testimony:

> The thrust of the hearsay testimony, "The victim told me that it was the defendant who shot him," goes directly to prove a constituent element of the crime. As such, it is a key part of the legal sufficiency equation that is analyzed on a motion for judgment. By contrast, the ancillary qualifiers of the evidence for its admission—such as, "It was the declarant's dying declaration;" "It was the declarant's excited utterance;" or "It was a business record"—do not go to prove an element of the crime and do not, therefore, enter into the legal sufficiency calculation. They may be indispensable prerequisites when admissibility is initially challenged, but the ancillary qualification process does not have to be replicated when the substantive thrust of the evidence is being measured at the end of the case.

Id. at 631–32.

At issue in *Terumo Medical Corp.* was an expert's opinion on the permanency of the plaintiff's disability. *Id.* at 621. Like the Library here, the defendant there failed either to object to the evidence when it was admitted, or to move to strike it afterward, but moved for judgment at the close of evidence. *Id.* We explained why the distinction between these objections mattered and how it constrained our analysis on appeal:

> [The expert's] substantive conclusion, "I felt that she was unable to ever return to work again," had a direct bearing on the constituent element of the claim—the permanency of the total disability. The qualifiers for the admissibility of his opinion, however, did not bear on an element of the claim. When we measure legal sufficiency, we look at the evidence that has been admitted. We do not reevaluate its competence. [The expert's] qualifications, [his] methodology, and the factual basis of [his] opinion do not themselves have any bearing on the element of permanency and are, therefore, not a part of the legal sufficiency equation.

Id. at 632.

At its most fundamental level, the distinction between sufficiency and admissibility is one between "(1) substantive evidence that is offered to prove a matter in issue and (2) ancillary evidence that may be necessary to qualify the substantive evidence." *Id.* at 631. For most forms of evidence, these distinct issues merit distinct analyses, but not so for comparator evidence.

One of the unique quirks regarding comparator evidence is that, unlike hearsay testimony or an expert's opinion, the qualifiers for the admissibility of the evidence are analyzed under the same standard as the substantive conclusion it presents. This flows necessarily from the fact that courts devised the similarly situated analysis to determine the threshold issue of relevance, *see Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 387 (2008),—a hurdle that the above examples presuppose has been cleared.

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. Irrelevant evidence is inadmissible, and trial courts have no discretion to rule otherwise. *Perry v. Asphalt & Concrete Servs., Inc.*, 447 Md. 31, 48 (2016); Md. Rule 5-402. As discussed above, the

purpose of presenting comparator evidence is to make the existence of discriminatory animus more probable. *See Coleman*, 667 F.3d at 846. Evidence that an employer treated another employee more favorably, however, makes this fact more probable *only if* that other employee was similarly situated to the plaintiff. *See Taylor*, 423 Md. at 652. Thus, when determining whether evidence of an employer's more favorable treatment of a comparator is relevant, and, as such, admissible, the court determines first whether that employee was similarly situated to the plaintiff. If they were not, evidence that they were treated more favorably does not make the existence of discriminatory animus more probable. It is, therefore, irrelevant and inadmissible.

Even when admitted improperly and without objection, evidence that a non-similarly-situated employee was treated more favorably than the plaintiff is insufficient as a matter of law to support a discrimination claim. "Evidence is legally sufficient if there is some evidence, including all inferences that may permissibly be drawn therefrom, that, if believed and if given maximum weight, could logically establish all the elements necessary to prove [the] plaintiff's case." *CR-RSC Tower I, LLC v. RSC Tower I, LLC*, 202 Md. App. 307, 333 (2011) (cleaned up). And as just said, evidence that an employer treated another employee more favorably—even if believed and given maximum weight—can establish logically an inference of discrimination *only if* that employee was similarly situated. Absent direct evidence, most employment discrimination cases rely almost exclusively on comparator evidence to establish the element of discriminatory intent. So just as when determining relevance, when assessing whether the evidence is sufficient to infer discriminatory intent, the court determines whether the comparators were

similarly situated to the plaintiff. If they were not, evidence that those employees were treated more favorably cannot establish logically the element of intentional discrimination.

In most cases, the distinction between evidentiary admissibility and legal sufficiency may be dispositive on appeal because preserving an objection to one does not preserve an objection to the other. *See, e.g.*, *Terumo Med. Corp.*, 171 Md. App. at 632–33. In the context of comparator evidence, the issues are analyzed the same, and so it is a distinction without a difference. *Cf. González-Bermúdez v. Abbott Lab'ys P.R. Inc.*, 990 F.3d 37, 45 (1st Cir. 2021) (holding that an employer preserved its objection to comparator evidence by moving for judgment at the close of evidence and conducting a similarly situated analysis). Therefore, because Naftal agrees the Library preserved its sufficiency objection, we will address the merits of its argument.

Naftal's Comparators

To establish discriminatory intent, Naftal pointed to four other employees, all outside at least one of his protected classes, that the Library treated allegedly more favorably than him, despite comparable misconduct:

C.P.-A.[2] is a Hispanic female, under 40, employed as a Library Associate I. This is a non-executive, union position. C.P.-A.'s job duties and responsibilities were different substantially from Naftal's. Her direct supervisor was Michelle Cavanaugh, and her second-line supervisors were Area Assistant Andrea Thomas and Area Manager Heather Jackson. C.P.-A. had repeated attendance issues: She was more than 15 minutes late an

[2] To maintain, as much as possible, the privacy of the comparators, we shall identify them by their initials, unless to do so interrupts the explication of our analysis.

average of 2 to 3 days per week and would not call in beforehand to warn her coworkers or supervisors. Her repetitive tardiness forced others to scramble to cover her tasks, such as the Library's bilingual story time program. C.P.-A. was disciplined progressively: first given an oral warning, then a written reprimand. When her attendance issues did not improve, C.P.-A.'s supervisors involved Naftal to pursue a three-day suspension. Naftal was terminated during this process, however, and Phillips stepped in. Despite her supervisor's concerns, C.P.-A. was not disciplined further following Phillips's intervention.

L.T. is a Black female, under 40, employed as an Accountant in the Library's Finance Department. This is a non-executive, union position. L.T.'s job duties and responsibilities were different substantially from Naftal's. Her direct supervisor was Dereje Salehudres, the Library's CFO. L.T. had minor performance issues related to processing cash receipts and would take occasionally unscheduled leave at the start or end of a week or after scheduled leave. There was also one incident in which a discussion between L.T. and Salehudres "escalated into yelling in a disrespectful way." She received counseling and an oral warning on these matters from her supervisor but no other discipline. This all occurred before Phillips's tenure as CEO.

T.N. is a Black female, under 40, employed as a Circulation Assistant since being demoted from Circulation Supervisor. These are both non-executive, union positions. T.N.'s job duties and responsibilities were different substantially from Naftal's. Her direct supervisor was Branch Manager Derek Gorham, who testified at trial. There were several incidents in which T.N. provided what Gorham called "misinformation" in the course of

executing her duties. She made false statements to patrons, her supervisor, and, in one instance, a news reporter. Gorham described this as a "significant performance or conduct issue[.]" As a result, T.N. was demoted involuntarily and moved to a new position and location. This too occurred before Phillips's tenure as CEO.

D.S. is a Black male, over 40, employed as the Library's CFO. This is an Executive Team position and not covered by the union's collective bargaining agreement. D.S. supervises a small team of accountants. His direct supervisor is the CEO. After receiving complaints about D.S., Naftal investigated, as required by Library policy. D.S.'s staff all complained about the work environment he created—each calling it "toxic"—and that they feared retaliation if they ever expressed concerns. Naftal's investigation noted that these problems were not new and that Teaze placed D.S. on a performance improvement plan. Based on his investigation, Naftal recommended to the CEO D.S.'s immediate termination. The CEO at the time was co-CEO Gannon. Gannon took no action. Upon Phillips's arrival, Naftal provided her the same report and recommendation. She took also no action, and D.S. was not disciplined.

Analysis

For a comparator to be similarly situated, there must be "enough common factors to allow for a meaningful comparison in order to divine whether intentional discrimination was at play." *Coleman*, 667 F.3d at 847 (cleaned up). The "number of relevant factors depends on the context of the case." *Id.* (cleaned up). In the usual differential-discipline case, a plaintiff must at least show that the comparators (1) "dealt with the same supervisor," (2) "were subject to the same standards," and (3) "engaged in similar conduct

without such differentiating or mitigating circumstances as would distinguish their conduct or the employer's treatment of them." *Id.* (cleaned up). This is not a "magic formula," and the inquiry should never devolve into a mechanical, "one-to-one mapping between employees." *Id.* (cleaned up). Again, we are looking for comparators, not clones.

Same Supervisor

In a differential discipline case like this one, the similarly situated requirement "normally entails" the existence of a common supervisor. *Id.* When the same supervisor treats an otherwise equivalent employee better, one can often infer reasonably that an unlawful animus was at play. The inference of discrimination is weaker when there are different decisionmakers because they may rely on different, subjective metrics when deciding whether, and how severely, to discipline an employee. *Id. See also Little v. Illinois Dep't of Revenue*, 369 F.3d 1007, 1012 (7th Cir. 2004) (discipline from a different supervisor "sheds no light" on the disciplinary decision). For this reason, courts require generally a plaintiff alleging differential discipline to show, at a minimum, that a comparator was treated more favorably by the same decisionmaker who fired the plaintiff. *Coleman*, 667 F.3d at 848. That said, the significance of this factor will vary based on the plaintiff's circumstances and theory of the case. *See, e.g.*, *Mendelsohn*, 552 U.S. at 387 (holding that comparator evidence was not *per se* inadmissible when comparators had different supervisors than the plaintiff); *Taylor*, 423 Md. at 657 (recognizing that "having the same supervisor [is] one consideration . . . among many").

The Library argues that only D.S. satisfies this factor, relying on the fact that C.P.-A., L.T., and T.N. all had different *direct* supervisors. Naftal, in contrast, stresses that, by

statute, all Library employees can be terminated only by the CEO and the Board as support for his argument that all four proposed comparators "dealt with the same supervisor[.]" Both miss the point of this factor. Admittedly, courts have phrased sometimes the question ambiguously as whether the comparators "*dealt with* the same *supervisor*[.]" *Coleman*, 667 F.3d at 848 (cleaned up). The real question, however, is whether they were *treated more favorably* by the same *decisionmaker*." *Id.* (cleaned up). This point follows logically from the cause of action itself, which requires proof that the *decision* was motivated by a prohibited reason. *See Town of Riverdale Park v. Ashkar*, 474 Md. 581, 621 (2021). The decisionmaker is not the person who *could* have disciplined an employee, but is instead the person who *actually made* the contested decision(s).

In this case, Phillips recommended Naftal's termination to the Board, making her his decisionmaker. That the Board upheld her recommendation does not change this: "Animus and responsibility for the adverse action can both be attributed to the earlier agent . . . if the adverse action is the intended consequence of that agent's discriminatory conduct." *Staub v. Proctor Hosp.*, 562 U.S. 411, 419 (2011). Phillips made also the decision *not* to discipline D.S. when presented with Naftal's report and recommendation. Similarly, C.P.-A.'s discipline ceased once Phillips took over the process. In contrast, Phillips had no hand in deciding whether or how to discipline L.T. and T.N.; those decisions were made before she arrived. So for purposes of this factor, only Naftal, D.S., and C.P.-A. shared a common decisionmaker.

Same Standards of Conduct

Next, to be similarly situated, comparators must have been subject to the same standards of conduct as the plaintiff. *Coleman*, 667 F.3d at 848. The Library contends that because C.P.-A., L.T., and T.N. had different job titles and duties, they cannot be considered situated similarly to Naftal. It advances a view adopted by some federal courts that "by definition, [a plaintiff's] subordinates [cannot be] 'similarly situated' employees[.]" *Oguezuonu v. Genesis Health Ventures, Inc.*, 415 F. Supp. 2d 577, 584–85 (D. Md. 2005). *See also Trusty v. Maryland*, 28 Fed. Appx. 327, 329 (4th Cir. 2002); *Popo v. Giant Foods LLC*, 675 F. Supp. 2d 583, 589 (D. Md. 2009). We decline to adopt such a bright-line rule. That said, we reject Naftal's argument that the County Code is the relevant standard simply because it applies to all Library employees' termination. The inquiry is more fact specific.

In the context of a differential discipline case, difference in job titles, rank, and even responsibilities—though relevant considerations—are not dispositive necessarily. The question is not whether the employer classified the comparators in the same way, "but whether the employer subjected them to different employment policies." *Coleman*, 667 F.3d at 848 (cleaned up). The application of this "same standards" factor depends also on the specific facts of the case. To be sure, there will be times where an executive-level employee is subject to a different employment policy than a clerical employee. In cases involving the quality of job performance, for example, a would-be comparator's professional role may be so different from the plaintiff's as to "render the comparison effectively useless." *Id.* at 849 (cleaned up). In such a case, the difference between the

plaintiff's and comparators' positions will often by itself account for the less favorable treatment of the plaintiff. *Id.* In contrast, where a plaintiff and their comparators were disciplined not for bad performance, but for violating a general workplace rule that applied to employees in all departments of all ranks, comparisons between employees with different positions are *more* likely to be useful. *Id.*

This factor does not account for whether the plaintiff and the comparators violated the same standards or whether the standards are comparably serious. It asks only whether the standards each violated were general and applied to both the plaintiff and the comparators.

Here, Naftal was terminated for his assertedly punitive and adversarial approach to other employees, something that would not be tolerated in any Library position. We cannot ignore, however, the fact that Naftal was the Library's HR Director and, as such, he was the primary contact for all employee relations. Although an employee in a clerical position who has an adversarial approach toward other employees might be violating a general workplace rule, Naftal's conduct involved the quality of his job performance. In that same vein, D.S., as the Library's CFO, was responsible for managing the accounting department, which involved necessarily some employee relations as part of the job performance. He too had a punitive and adversarial approach to other employees. In contrast, the remaining three proposed comparators all held clerical roles that did not require any employee relations as part of their job duties. Their roles were thus so different from Naftal's that they "render . . . comparison effectively useless." *Id.* (cleaned up). So for purposes of this factor, only Naftal and D.S. were subject to the same standards of conduct.

Conduct of Comparable Seriousness

Finally, comparators must have "engaged in similar—[but] not [necessarily] identical—conduct to qualify as similarly situated." *Id.* at 850 (cleaned up). The Supreme Court has made clear that "precise equivalence in culpability between employees is not the ultimate question: as [the Court] indicated in *McDonnell Douglas*, an allegation that other 'employees involved in acts against [the employer] of *comparable seriousness*'" received more favorable treatment is enough to allow an inference of discrimination. *McDonald*, 427 U.S. at 283 n.11 (quoting *McDonnell Douglas*, 411 U.S. at 804). Thus, to determine "whether two employees have engaged in similar misconduct, the critical question is whether they have engaged in conduct of comparable seriousness." *Coleman*, 667 F.3d at 851 (cleaned up).

As mentioned above, an HR Director acts as the primary contact for all employee relations matters. Naftal's punitive and adversarial approach toward other employees created a hostile environment for them, which made it difficult for those employees to perform their jobs and thus undermined the Library's core functions. No doubt, his conduct was serious in the eyes of the Library and Phillips. But the same could be said of D.S., whose punitive and adversarial approach also created a hostile environment for other employees. In fact, the only distinguishing factor the Library offers is that D.S.'s conduct affected fewer employees. This is a difference in scale, rather than seriousness, and goes instead to the weight of the evidence. Indeed, by making this distinction, the Library has shown that the seriousness of the misconduct is at least *comparable—i.e.*, capable of comparison. *Cf. Humphries v. CBOCS W., Inc.*, 474 F.3d 387, 406 (7th Cir. 2007) (an

employee who left a safe unlocked during business hours committed conduct of comparable seriousness to an employee who left it unlocked overnight despite relative greater potential harm of leaving the safe unlocked at night). It could also be said that T.N., who lied routinely to patrons and coworkers alike (along with news media), engaged in equally serious misconduct because her proffering of misinformation jeopardized potentially the Library's relationship with the community it serves.

In contrast, C.P.-A.'s routine tardiness—though inconvenient for her coworkers—was not serious or pervasive enough to undermine any of the Library's core functions the way Naftal's and D.S.'s misconduct did. Nor was L.T.'s single incident with Salehudres comparably severe. For purposes of this factor, only D.S. and T.N. engaged in conduct of comparable seriousness to Naftal.

Conclusion

In the end, we find that only D.S. was similarly situated to Naftal: Phillips decided whether and how to discipline both of them; their conduct was subject to the same standards; and their violations were of comparable seriousness to the Library's core functions. T.N.'s misconduct may have been comparably serious, but Phillips was in no way involved with either her or L.T.'s disciplinary decisions. Although a different decisionmaker does not *per se* preclude a finding of substantial similarity, it is dispositive here. T.N. and L.T. were disciplined a year or more before Phillips was hired; there is not even evidence that Phillips knew they had ever been disciplined. Their discipline, meted out by different supervisors, sheds no light on Phillips's decision to discipline Naftal.

Similarly, because Naftal's misconduct involved the quality of his job performance, C.P.-A.'s vastly different professional role renders comparison effectively useless.

Because the three improper comparators were Naftal's principal evidence of sex and age discrimination, that evidence was insufficient as a matter of law to support the jury's verdict on those counts, and must be vacated. We find further that, although Naftal presented one proper comparator to support his racial discrimination claim, evidence of the three improper comparators—all of whom were also of a different race than Naftal—is "likely to have affected the verdict below." *Shealer v. Straka*, 459 Md. 68, 102 (2018) (cleaned up). We will vacate also the jury's verdict on that count.

As a final note, having determined that D.S. was Naftal's only proper comparator, we must consider another question: Is one enough to return this case to a jury? Federal courts generally agree that "[a] single comparator will do; numerosity is not required." *Humphries*, 747 F.3d at 406–07. *See also Woodard v. Medseek, Inc.*, 178 F. Supp. 3d 1188, 1198 n.12 (N.D. Ala. 2016) ("[E]ven a single comparator is sufficient to withstand the defendant's motion for summary judgment."). So do we.

As discussed above at length, the purpose of the similarly situated analysis is to weed out irrelevant evidence that cannot support an inference of discriminatory intent. *See Coleman*, 667 F.3d at 846. It follows, then, that if even one comparator survives this gauntlet, a jury could infer reasonably discriminatory intent from their differential discipline. And "[i]f there is any legally relevant and competent evidence, however, slight, from which a rational mind could infer a fact in issue, then a trial court would be invading the province of the jury by declaring a directed verdict." *Terumo Med. Corp.*, 171 Md.

App. at 627 (cleaned up). Thus, on remand, Naftal may present his case again to a jury. Because D.S. is his only valid comparator, however, he will be limited to his claim of racial discrimination and, possibly, his ageism complaint founded solely on the inference he appears to argue should be drawn from Phillips's testimony (*infra* at 7-8, n.1).

Jury Instruction

Because we are remanding the matter for further proceedings, we will address whether the trial court erred in not issuing the Library's requested non-pattern instruction. In reviewing a trial court's denial of a requested jury instruction, we review for an abuse of discretion. *B-Line Med., LLC v. Interactive Digit. Sols., Inc.*, 209 Md. App. 22, 59 (2012). In evaluating that decision, "we consider whether the requested instruction was a correct exposition of the law, whether that law was applicable in light of the evidence before the jury, and finally whether the substance of the requested instruction was fairly covered by the instruction actually given." *Id.* at 60 (cleaned up).

The Library's requested instruction was a correct statement of the law, but it sought improperly to delegate to the jury a legal question, which is the province of the court. As discussed above, comparator evidence presents a question of relevance. Whether evidence is relevant and admissible is a legal question for the judge, not the jury. *See Perry*, 447 Md. at 48. *Cf. Bethlehem Steel Co. v. Munday*, 212 Md. 214, 222 (1957) (holding that the legal question of statutory interpretation should have been determined by the trial judge and not submitted to the jury). The jury remains free to disregard even legally relevant evidence and evaluate it as they see fit. *Est. of Blair by Blair v. Austin*, 469 Md. 1, 17–18 (2020). The Library's instruction here sought to instruct the jury on how to determine what

constitutes relevant evidence—one of the few issues outside its province. The trial court did not err or abuse its discretion in refusing to give the requested instruction.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY VACATED. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE DIVIDED EQUALLY BETWEEN THE PARTIES.