

AUG 16 2005

In the
District of Columbia
Court of Appeals

KWANGHO JUNG,

Appellant,

v.

THE GEORGE WASHINGTON UNIVERSITY OF AMERICA,

Appellee.

On Appeal from the Superior Court of the District of Columbia,

**BRIEF OF THE METROPOLITAN WASHINGTON
EMPLOYMENT LAWYERS ASSOCIATION AS AMICUS
CURIAE IN SUPPORT OF PETITION FOR REHEARING
AND SUGGESTION OF REHEARING EN BANC**

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TABLE OF CONTENTS

	<i>Page</i>
STATEMENT OF INTEREST.....	1
STATEMENT OF THE ISSUES PRESENTED FOR REVIEW.....	2
STATEMENT OF THE CASE.....	3
ARGUMENT.....	5
I. The division’s disposition of Mr. Jung’s proffer of comparative evidence reflects an unduly narrow approach.....	5
II. The division’s formulation of the evidence sufficient to permit an inference of impermissible discrimination under the Human Rights Act is incorrect.....	7
CONCLUSION.....	10

TABLE OF AUTHORITIES

	<i>Page(s)</i>
Cases	
<i>Arthur Young & Co. v. Sutherland</i> , 631 A.2d 354 (D.C. 1993)	8
<i>Baston v. Kentucky</i> , 476 US 79 (1986)	9
<i>Chang v. Institute for Public-Private Partnerships, Inc.</i> , 846 A.2d 318 (D.C. 2004).....	8
<i>Daka, Inc. v. Breiner</i> , 711 A.2d 86 (D.C. 1998).....	8
<i>Desert Palace, Inc. v. Costa</i> , 539 U.S. 90 (2003).....	7
<i>Estate of Mary Underwood v. National Credit Union Administration</i> , 665 A. 2d 621 (D.C. App. 1995)	2
<i>Freas v. Archer Services, Inc.</i> , 716 A. 2d 998 (1998)	2
<i>Gray v. Citizens Bank</i> , 602 A.2d 1096, 1097, <i>vacated, id.</i> at 1102, <i>opinion</i> <i>reinstated on denial of rehearing en banc</i> , 609 A.2d 1143 (D.C. 1992).....	2
<i>Hollins v. Federal Nat’l Mortgage Ass’n</i> , 760 A.2d 563 (D.C. 2000).	7
<i>Hollins v. Federal National Mortgage Ass’n</i> , 760 A. 2d 563 (D.C. 2000).....	2
* <i>Jung v. George Washington University</i> , 875 A. 2d 95 (D.C. 2005).	2, 3, 4, 5, 6, 7
<i>Lively v. Flexible Packaging Ass’n</i> , 830 A. 2d 874 (2003) <i>en banc</i>	2
<i>McDonnell Douglas Corp. v. Green</i> , 411 U.S. 792 (1973)	5
* <i>Miller-El v. Dretke</i> , __ U.S. __, 125 S. Ct. 2317 (2005),	5, 6, 7, 9
<i>Millstein v. Henske</i> , 722 A.2d 850 (D.C. 1999).....	8
<i>Price Waterhouse v. Hopkins</i> , 490 U.S. 228 (1989).....	7, 8
* <i>Reeves v. Sanderson Plumbing Products, Inc.</i> , 530 U.S. 133 (2000).....	6, 9
* <i>Robinson v. United States</i> , 2005 D.C. App. LEXIS 386 (No. 02-CF-320, July 21, 2005)	9
<i>Thigpen v. Greenpeace, Inc.</i> , 657 A. 2d 770 (1995).....	2
<i>Wallace v. Skadden, Arps, Slate, Meagher & Flom</i> , 715 A.2d 873 (D.C. 1998)	8

Statutes

D.C. Code § 2-1402.11(a).....8
District of Columbia Human Rights Act, D.C. Code §§ -1401.01, *et seq*.....1
U.S.C. §§ 2000e-2(m) and 2000e-5(g)(2)(B).7

discrimination. Accordingly, MWELA's expertise should be useful to the court in resolving the issues presented in this appeal.¹

We believe this case is important because the division has incorrectly stated several important principles relating to the orders and burdens of proof of discrimination under the District of Columbia Human Rights Act.² First, the division's treatment of the comparative evidence offered by the Appellant reflects an inappropriately narrow view of the relevance of such evidence to discrimination claims. Since such evidence is often a necessary part of the proof of discrimination, the division's incorrect formulation has potentially broad importance. Second, the division's treatment of plainly biased comments made contemporaneously by one of the decision-makers improperly trivializes evidence from which a jury may properly infer discrimination.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

- I. Whether the circumstances of a comparator proffered by a plaintiff advancing claims under the D.C. Human Rights Act must be virtually identical to those of the plaintiff in order to constitute probative evidence of discrimination.
- II. Whether the division's conclusion that "[d]iscriminatory remarks which are unrelated to the decisional process, even when uttered by a decision maker, are insufficient to support a claim of discrimination" constitutes proper treatment of evidence proffered by a plaintiff advancing claims of discrimination under the D.C. Human Rights Act.

¹ MWELA has appeared as *amicus curiae* before this court with some frequency. See *Gray v. Citizens Bank*, 602 A.2d 1096, 1097, *vacated, id.* at 1102, *opinion reinstated on denial of rehearing en banc*, 609 A.2d 1143 (D.C. 1992); *Estate of Mary Underwood v. National Credit Union Administration*, 665 A. 2d 621 (D.C. App. 1995); *Thigpen v. Greenpeace, Inc.*, 657 A. 2d 770 (1995); *Freas v. Archer Services, Inc.*, 716 A. 2d 998 (1998); *Hollins v. Federal National Mortgage Ass'n.*, 760 A. 2d 563 (D.C. 2000) *Lively v. Flexible Packaging Ass'n.*, 830 A. 2d 874 (2003) *en banc*.

² The division's decision is reported as *Jung v. George Washington University*, 875 A. 2d 95 (D.C. 2005).

STATEMENT OF THE CASE³

Appellant, Kwangho Jung, sued The George Washington University, contending that the University's decision to terminate his Ph.D. candidacy violated the D.C. Human Rights Act's proscriptions against national origin discrimination. The trial court excluded evidence of another student's written essay examination that had received a "bare pass" grade about seven months prior to Mr. Jung's failing essay. Mr. Jung contended that "such evidence would have allowed the jury to conclude that his examination was superior to the other student's, and therefore, his failing grade must have been the result of unlawful discrimination." *See Jung v. George Washington University*, 875 A. 2d at 109.

In addition, at trial, Mr. Jung adduced "evidence that Dr. East, one of the committee members who graded his last examination, harbored views to the effect that Korean students tended to engage in rote learning and to state material verbatim . . . without analysis or responsiveness to the question." 875 A. 2d at 110. Dr. East admitted that he had shared these views with his fellow decision makers, and the division acknowledged that "Dr. East's generalized comments about Korean students are of the type suggesting a biased attitude based on the students' ethnicity or national origin." 875 A. 2d at 111. Mr. Jung contended this constituted "direct evidence of discrimination" which should have shifted to the University the burden to prove that he would have received a failing grade in any event. 875 A. 2d at 109-10. The trial court disagreed. The case was then submitted to the jury, which returned a verdict for the University. *Ibid.*

³ This Statement is taken principally from the division's description of the proceedings below.

The division held that the trial court’s exclusion of Mr. Jung’s proffered comparative evidence was proper because “performance on an examination given in one semester cannot be fairly [compared to] performance on the examination in another semester.”⁴ 875 A. 2d at 109. The division also held that “since the University’s grading system includes evaluation of the student’s written and oral performances, a comparison of John Doe’s written examination would not be sufficient to compare performances of the two candidates for the degree.” *Ibid.*

In addition, the division held that the trial court’s refusal to give a “mixed motive” instruction was correct because Mr. Jung, in fact, had offered no “direct evidence” of discrimination. The division acknowledged that “Dr. East was one of the decision makers,” and that the evidence of his comments “reflect[ed] a generalized assessment of the analytical abilities of Korean students based upon nationality.” 875 A. 2d at 112. However, it concluded that because his statement were not “temporally related or otherwise connected to the decisional process [and because] there [was] no showing that his sentiments influenced or were shared by any of the three other [decision makers],” the biased comments did not constitute direct evidence of discrimination. *Ibid.*⁵ The division did not offer any rationale for distinguishing between “direct” and circumstantial evidence. Rather it explained its conclusion by observing categorically that “[d]iscriminatory remarks which are unrelated to

⁴ We do not address Appellant’s contentions regarding the trial court’s exclusion of expert testimony. Nor do we address the issues relating to Appellant’s retaliation claim.

⁵ The division’s suggestion that Dr. East’s statement was not “temporarily related . . . to the decisional process” is puzzling, since, as the division itself notes, Dr. East acknowledged that he shared his biased views with his fellow decision makers. *See Jung*, 875 A. 2d at 110. Moreover he reiterated these views at trial. *See* Petition for Rehearing, p. 3 (citing the trial record).

the decisional process, even when uttered by a decision maker, are insufficient to support a claim of discrimination.” *Ibid.*

Mr. Jung has filed a Petition for Rehearing and Suggestion for Rehearing *En Banc*. We believe that the court should grant rehearing in order to clarify and correct what we believe are important errors in the division’s reasoning, and that the case should be remanded for a new trial in which the jury will be allowed to hear the additional evidence proffered by Mr. Jung.

ARGUMENT

I. The division’s disposition of Mr. Jung’s proffer of comparative evidence reflects an unduly narrow approach.

At the heart of any discrimination claim is the contention that one has been treated differently because of a protected characteristic. Accordingly, comparative evidence, evidence that similarly situated persons outside the plaintiff’s protected group received more favorable treatment, is invariably an important part of the evidence advanced by a plaintiff. *See e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973)(“Especially relevant to [a showing of pretext] would be evidence that white employees involved in acts against [the employer] of comparable seriousness . . . were nevertheless retained or rehired.”) The Supreme Court reemphasized this as recently as two months ago. In *Miller-El v. Dretke*, ___ U.S. ___, 125 S. Ct. 2317 (2005), a case involving prosecutorial racial discrimination during jury selection, the Court emphasized the probative force of “side-by-side comparisons of some black venire panelists who were struck and white ones who were not.” The Court observed that “[i]f a prosecutor’s proffered reason for striking a black panelist applies just as

well to a white panelist allowed to serve, that is evidence tending to prove purposeful discrimination.” 125 S.Ct. at 2319-20.⁶

Here, the division’s formulation requires that in order to be found similarly situated a comparator’s circumstances must be virtually identical to those of the plaintiff. Otherwise, the evidence of differential treatment will be excluded. Thus, the division notes that the fact that a student’s treatment “in one semester cannot fairly be” compared to “a student’s treatment “in another semester,” even if, as in this case, the two semesters were consecutive. The division further held that, because the grading system includes both oral and written components, evidence comparing Mr. Jung’s treatment on the written component with that of another student is not probative. 875 A. 2d at 109. Thus, the division appears to have concluded that in order to be admissible, evidence of differential treatment of similarly situated persons must include virtually identical timeframes and subject matter.⁷ We submit that this is an unduly constricted view, one that if left unchanged, will unfairly limit the ability of aggrieved persons to establish their claims under the Human Rights Act.

To be sure, courts must be alert to ensure that a proffered comparison is reasonable. However, they need equally to ensure that the utility of this type of proof is not destroyed by reliance on immaterial differences—or differences going only to weight—to exclude the evidence altogether. The division’s holding that examinations are not to be compared if they

⁶ It is important to note that the Court in *Miller-El* cited its earlier decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), an employment discrimination case, illustrating that its discussion of probative evidence was intended to extend broadly across the field of civil rights law.

⁷ We recognize that “academic deference” was a part of the division’s basis for excluding this comparative evidence. But we submit that the division’s complete rationale, as it expressed it, goes too far and is potentially harmful.

are given at different times goes way too far and will adversely and unfairly impact future litigation under the Human Rights Act. As the Supreme Court stated in *Miller-El*, there is no “rule that no comparison is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one.” Indeed, such a rule “would leave [the constitutional protections against race discrimination in jury selection] inoperable; potential jurors are not products of a set of cookie cutters.” 125 S. Ct. at 2329 n.6.

Like the Court in *Miller-El*, we contend that a rule that effectively requires that a person claiming discrimination under our Human Rights Act cannot win unless he can find an identically situated person outside of his class who was treated differently will render our Act “inoperable.” We respectfully urge the court to reconsider this holding.

II. The division’s formulation of the evidence sufficient to permit an inference of impermissible discrimination under the Human Rights Act is incorrect.

In addressing Mr. Jung’s contention that he was entitled to a “mixed motive” instruction, the division relied principally on the Supreme Court’s decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) and the decision of this court in *Hollins v. Federal Nat’l Mortgage Ass’n*, 760 A.2d 563 (D.C. 2000). *See Jung*, 875 A. 2d at 112.⁸ In

⁸ We seriously question the division’s reliance on the “mixed motive/direct evidence” portion of *Price Waterhouse* for three reasons. First, in the Civil Rights Act of 1991 Congress responded to the Court’s holding that an employer may escape liability by proving the “same decision” defense, by providing that the establishment of such a defense would still result in liability where a plaintiff has proved that a forbidden characteristic was “a motivating factor” in the challenged decision. *See* 42 U.S.C. §§ 2000e-2(m) and 2000e-5(g)(2)(B). Second, any requirement that “mixed motives” be established under Title VII by “direct evidence” was ended by the Court’s decision in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003). Finally, and perhaps most important, the *Price Waterhouse* Court and the Civil Rights Act of 1991 were, of course, addressing the language of Title VII, not the D.C. Human Rights Act. Unlike Title VII, which as originally enacted, prohibited discrimination “because of” a protected characteristic, our Human Rights Act, prohibits such discrimination

doing so, we submit that the division incorrectly conflated Justice O'Connor's formulation of the sort of direct evidence required to shift the burden of proof to the employer in a Title VII case, with the sort of evidence, circumstantial or direct, that is sufficient to permit a jury to infer impermissible discrimination under the Human Rights Act.

The division concluded that “[d]iscriminatory remarks [of a decision maker] which are unrelated to the decisional process, . . . are insufficient to support a claim of discrimination.” 875 A. 2d at 112. To the contrary, it would seem indisputable that evidence that a decision maker harbored a contemporary bias⁹ against a plaintiff because of his ethnicity or national origin should be allowed in as part of the mix of evidence supporting an inference of discrimination. Indeed, this was the result in *Price Waterhouse*, where evidence of stereotyped remarks made, not by the decision makers, but by partners to the decision makers, was cited as evidence that gender was a motivating factor in the decision to withhold partnership from Ann Hopkins. As the Court put it:

that is based “wholly or partially” on such characteristics. *See* D.C. Code § 2-1402.11(a). The latter language appears, on its face, intended to impose liability where a protected characteristic played any part in an employer’s decision to impose an adverse action on an employee. *See generally Chang v. Institute for Public-Private Partnerships, Inc.*, 846 A.2d 318, 324, 2004 (D.C. 2004) (“The DCHRA makes it an ‘unlawful discriminatory practice’ for an employer to discharge an employee ‘wholly or partially for a discriminatory reason based upon [a] . . . disability’”); *Millstein v. Henske*, 722 A.2d 850, 853 n. 6 (D.C. 1999) (“One right thus protected is the right not to be discriminated against in employment based “wholly or partially” on “race, color, religion, . . . [or] sex”). And while this court has, of course, looked for guidance to decisions construing Title VII, it has also regularly distinguished the two statutes. *See, e.g., Wallace v. Skadden, Arps, Slate, Meagher & Flom*, 715 A.2d 873, 889 (D.C. 1998) (distinguishing the two statutes’ definitions of “employer”); *Daka, Inc. v. Breiner*, 711 A.2d 86, 102 (D.C. 1998) (“although we often look to Title VII for guidance when interpreting the DCHRA, we are not necessarily bound by Title VII’s strictures, particularly when it comes to damages”); *Arthur Young & Co. v. Sutherland*, 631 A.2d 354, 372 (D.C. 1993) (holding punitive damages available under the D.C. Human Rights Act).

⁹ As noted, the evidence supports the conclusion that Dr. East’s views were stated and held on a contemporary basis. *See* note 4, *supra*.

Remarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually relied on her gender in making its decision. In making this showing, stereotyped remarks can certainly be *evidence* that gender played a part.

490 U.S. at 252 (emphasis in original). More recently, in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, the Supreme Court found that biased remarks on the part of the decision maker, coupled with evidence of disparate treatment and pretext, must be considered in assessing whether it was proper for a jury to infer age discrimination.

In resolving allegations of discrimination in the context of jury selection, another division of this court recently used principles that are equally applicable to discrimination claims under the Human Rights Act. *Robinson v. United States*, 2005 D.C. App. LEXIS 386 (No. 02-CF-320, July 21, 2005). Citing the Supreme Court's decision in *Miller-El*, the court agreed that "[A] prima facie case of discrimination can be made out by offering a wide variety of evidence, so long as the sum of the proffered facts gives 'rise to an inference of discriminatory purpose.'" *Id.* at *23-*24. (quoting *Miller-El v. Dretke*, 125 S.Ct. 2317, 2319–20, 73 U.S.L.W. at 4462 (quoting *Batson*, 476 U.S. at 94)). In contrast, the division here failed to recognize that evidence of biased or stereotypical thinking must surely be part of the mix of evidence that can be considered by a jury in determining whether or not an action was the product of discrimination violative of the Human Rights Act. The division's contrary conclusion should be corrected by this court *en banc*.

CONCLUSION

We believe this case transcends the interests of the parties because the division's reasoning will sharply and improperly limit the ability of persons alleging discrimination to prove their cases. Discrimination is present in our society but usually hard to prove. A person alleging discrimination must generally stitch together a variety of pieces of evidence in order to prove his case. As here, comparisons of one's own treatment with the treatment of others, as well as evidence of biased or stereotyped thinking on the part of decision makers or others near the decision making process, will frequently be among the types of evidence employed. In assessing whether there is sufficient evidence to send a claim of discrimination to a jury, a court must take into account the whole picture—"the sum of the proffered facts"—not just a part of it. The court must determine, not whether a single piece of evidence proves discrimination, but whether the evidence, taken as a whole, permits an inference that discrimination has occurred.

Here, Mr. Jung proffered comparative evidence that he said would have shown that a student performing work comparable to his had received more favorable treatment. He also adduced evidence that demonstrated the bias of a key decision maker. In our view this evidence should all have been allowed in, so that the jury could assess the whole picture in determining whether the University's decision was taken "wholly or partially" because of Mr. Jung's national origin.

We respectfully urge the court to vacate the decision of the division, and remand the case for a new trial in which the jury may hear the complete mix of evidence. Alternatively, we urge the court to vacate the division's decision and issue a new decision that corrects the errors we have highlighted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

**DC Court of Appeals
NO. 99-CV-1087**

-----)
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-----)

I, John C. Kruesi, Jr., being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

I am retained by OSBORNE & DEUTSCH Attorney for Amicus.

That on the 16th day of August, 2005, I served 1 copy of the within **BRIEF OF THE METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC** in the above captioned matter upon:

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Unless otherwise noted, 11 copies have been sent to the Court via hand delivery on the same date.

August 16, 2005
