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Presuming Disparate Treatment: A Solution to Title VII's Doctrinal Puzzle of Accent Discrimination

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ABSTRACT

In Professor Mari Matsuda's article *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, Professor Matsuda identifies a doctrinal puzzle in the courts' approach to accent discrimination cases: Courts recognize that accent discrimination can be a form of national origin discrimination, yet courts are overly deferential to employers' claims that a plaintiff's accent materially interferes with job performance. This puzzle persists in the doctrine today. This Comment builds on Professor Matsuda's scholarship and argues that her proposed framework may not be fully responsive to all the various ways accent discrimination can be perpetuated. In particular, a phenomenon arises in accent discrimination where employers will accommodate other communication-related issues but will refuse to accommodate accent, a dynamic known as selective nonaccomodation. This Comment first explores the social science research on accent discrimination then explores selective nonaccomodation, as it appears in other forms of employment discrimination, including disability, pregnancy, breastfeeding, and family responsibilities. In response to selective nonaccomodation within the accent discrimination context, this Comment calls for a presumption of disparate treatment in cases where the plaintiff can show an employer failed to accommodated employees with accents but did accommodate employees who are similarly situated in terms of their comprehensibility in speaking English. This Comment concludes by applying the presumption to recent cases of accent discrimination, examining how the presumption would have changed the outcome in favor of plaintiffs and move our society closer to Professor Matsuda's vision of linguistic tolerance and diversity.

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INTRODUCTION

In *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, critical race scholar and activist Professor Mari Matsuda explores a Title VII doctrinal puzzle.[1] Courts recognize accent discrimination as a form of national origin discrimination under Title VII.[2] Yet, courts are also overly deferential to employers' claims that communication is an important element of job ability and thus conclude that employers may legitimately discriminate if the plaintiff's accent materially interferes with job performance.[3] In response to this puzzle, Matsuda calls for progression toward a more expansive definition and application of reasonable accommodation[4], beginning with accent:

> A more progressive argument is that even if accent is changeable, no citizen should have to alter core parts of identity in order to participate

1. *See* Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991).
2. *Id*. at 1332. Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees on the basis of race, sex, national origin, religion, disability, or age. Civil Rights Act of 1964, tit. VII, Pub. L. No. 88-352, 78 Stat. 241, 253 (1964) (codified as amended in scattered sections of 42 U.S.C.).
3. *Id.* Current Equal Employment Opportunity Commission (EEOC) guidance maintains this strong deference to the employer in accent discrimination cases: "Under Title VII, an employment decision may legitimately be based on an individual's accent if the accent 'interferes materially with job performance.'" *EEOC Enforcement Guidance on National Origin Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Nov. 18, 2016), https://www.eeoc.gov/laws/guidance/eeoc-enforcement-guidance-national-origin-discrimination [https://perma.cc/W7E7-EB2U] (quoting Fragante v. City & County of Honolulu, 888 F.2d 591, 596 (9th Cir. 1989)).
4. Reasonable accommodation is defined as:
   - (i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or
   - (ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position; or
   - (iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

   29 C.F.R. § 1630.2(o) (1991).

> in society. A true antisubordination agenda would apply reasonable accommodation to all differences, whether chosen or immutable, that are historically subject to exploitation or oppression by dominant groups.[5]

Accent discrimination and, more broadly, national origin discrimination, remain as perverse a problem as when Matsuda first explored accent discrimination in 1991.[6] Matsuda proposes a framework adopting the principle of reasonable accommodation to move away from the current standard's deference to employers and reliance on direct evidence of discriminatory intent. Matsuda's framework instead ultimately requires employers to reasonably accommodate employees with accents.[7] In Matsuda's view, reasonable accommodation of accent is a part of the campaign toward a pluralistic society that celebrates linguistic tolerance and diversity.[8]

Matsuda's proposed framework, however, is just one way of solving the doctrinal puzzle of accent discrimination and may not be fully responsive to the various ways accent discrimination could be perpetuated. For example, in *EEOC v. West Customer Management Group*, a Jamaican plaintiff, Derrick Roberts, interviewed for but was denied a customer service position because of his heavy accent.[9] Except for Roberts and one other applicant with poor communication issues, all the rejected applicants, including those who had non-accent

5. Matsuda, *supra* note 1, at 1400. Antisubordination is the principle that "guarantees of equal citizenship cannot be realized under conditions of pervasive social stratification and . . . that law should reform institutions and practices that enforce the secondary social status of historically oppressed groups." Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIA. L. REV. 9, 9 (2003).

6. Over 6000 charges of national origin discrimination were filed with the EEOC in the 2021 fiscal year, which represents just over 10 percent of all charges filed that year. *Charge Statistics (Charges Filed With EEOC) FY 1997 Through FY 2022*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/data/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2021 [https://perma.cc/Y43R-RYQ4]. Yet national origin discrimination likely remains underreported. For example, around 70 percent of Latinx and Asian immigrants in California believed they experienced discrimination in the workplace due to their skin color or accent. NADEREH POURAT, MARIA-ELENA DE TRINIDAD YOUNG, BRENDA MORALES & LEI CHEN, UCLA CTR. FOR HEALTH POL'Y RSCH., LATINX AND ASIAN IMMIGRANTS HAVE NEGATIVE PERCEPTIONS OF THE IMMIGRANT EXPERIENCE IN CALIFORNIA 2 (2021), https://healthpolicy.ucla.edu/publications/Documents/PDF/2021/LatinxAsianImmigrants-ImmigrantExperience-factsheet-nov2021.pdf [https://perma.cc/7GHT-PC6C].

7. Matsuda, *supra* note 1, 1368.

8. *Id.* at 1403 ("[T]he antisubordination rationale for accent tolerance suggests a radically pluralistic re-visioning of national identity. The only center, the only glue, that makes us a nation is our many-centered cultural heritage. Just as our use of language is rich, varied, interactive, and changeable, so is our national culture.").

9. EEOC v. W. Customer Mgmt. Grp., LLC, 899 F. Supp. 2d 1241 (N.D. Fla. 2012).

communication issues, were given a chance to reapply for the position.[10] Thus, the employer chose to accommodate the applicants who did not have accents but chose to not accommodate the applicant with an accent,[11] which is a typical case of disparate treatment.[12] This selective nonaccommodation of employees with accents is accent discrimination and thus is national origin discrimination.

This Comment proposes a new framework for analyzing accent discrimination grounded in disparate treatment, rather than reasonable accommodation, that still prioritizes linguistic tolerance and diversity: Courts should presume disparate treatment when an employer does not accommodate employees with accents but does accommodate employees who are similarly situated in terms of their comprehensibility in speaking English. Part I explores the current approach to accent discrimination and language discrimination to highlight problems with the existing analytical framework. Part II explores current social science research on accent discrimination and bias, as Matsuda did when constructing her framework, and then further analyzes Matsuda's framework by assessing each step's doctrinal strength and ability to fully anticipate the various ways accent discrimination can be perpetuated. Part III considers how selective nonaccommodation is used in other areas of employment discrimination law and how Matsuda's framework does not necessarily anticipate this dynamic. Part IV proposes an alternative framework for accent discrimination cases: presuming disparate treatment when the plaintiff can show the employer engaged in selective nonaccommodation. Part IV concludes by applying this proposed presumption to recent accent discrimination cases and discussing how the presumption would both benefit plaintiffs and further Matsuda's vision of linguistic tolerance and diversity.

10. *Id.* at 1248.
11. *See id.* at 1257 ("[T]he facts show that the interviewer expressly commented on Roberts's 'thick accent' without inviting him to reapply or reinterview when others who were soft spoken but did not have accents appear to have been given this courtesy.").
12. According to the Equal Employment Opportunity Commission (EEOC), "disparate treatment occurs when an employer treats some individuals less favorably than other similarly situated individuals because of their race, color, religion, sex, or national origin." *CM-604 Theories of Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Aug. 1, 1988), https://www.eeoc.gov/laws/guidance/cm-604-theories-discrimination [https://perma.cc/F98A-Y6QT].

I. CURRENT MODELS

A. Disparate Treatment: The Current Approach to Accent Discrimination

Accent discrimination cases are often brought and analyzed by courts as disparate treatment claims under Title VII.[13] Disparate treatment claims under Title VII are analyzed using the burden-shifting framework that the U.S. Supreme Court first articulated in *McDonnell Douglas Corp. v. Green*.[14] Under the *McDonnell Douglas* framework, to succeed on their claim, the plaintiff must first establish a prima facie case of discrimination.[15] In the context of national origin discrimination, the plaintiff must show that:

(1) They have an identifiable national origin;
(2) They applied and were qualified for a job for which the employer was seeking applicants;
(3) They were rejected despite their qualifications; and
(4) After their rejection, the position remained open and the employer continued to seek applications from persons with the plaintiff's same qualifications.[16]

After the plaintiff establishes a prima facie case, the burden shifts to the employer to rebut the presumption by asserting a legitimate nondiscriminatory reason for the adverse action.[17] Once the employer produces a nondiscriminatory reason, a plaintiff may establish that the employer's proffered reason was pretext for discrimination "either directly, by showing that the employer was more likely motivated by a discriminatory reason, or indirectly, by showing the employer's proffered reason is unworthy of credence."[18]

Fragante v. City & County of Honolulu, a case in which Matsuda herself represented the plaintiff[19] and that she discusses extensively in *Voices of America*, is illustrative of the courts' present approach to accent discrimination.[20] A Filipino plaintiff, Manuel Fragante, alleged that he was denied a civil service job on

13. *See, e.g.*, Berke v. Ohio Dep't of Pub. Welfare, 628 F.2d 980 (6th Cir. 1980); Carino v. Univ. of Okla. Bd. of Regents, 750 F.2d 815 (10th Cir. 1984); Fragante v. City & County of Honolulu, 888 F.2d 591, 595 (9th Cir. 1989).
14. 411 U.S. 792 (1973).
15. *Id.* at 802.
16. *Fragante*, 888 F.2d at 595.
17. *Id.*
18. *Id.*
19. *Id.* at 593.
20. See Matsuda, *supra* note 1, at 1333–40.

the basis of his accent.[21] The Ninth Circuit recognized that discrimination on the basis of accent could amount to national origin discrimination.[22] Yet without much scrutiny, the court deferred to the employer's argument that employees' oral communication skills in English were reasonably related to their job performance.[23] Furthermore, the court agreed with the employer that Fragante's accent made him difficult to understand.[24] Since the court found that oral communication skills were required to perform the civil service job and Fragante's accent interferes with his ability to communicate, they concluded the employer could legitimately choose not to hire Fragante based on his accent and upheld the dismissal of Fragante's complaint.[25] Thus, despite recognizing that accent discrimination can be a form of national origin discrimination, the court deferred to the employer and found in its favor.

B. Language Discrimination & Direct Evidence of Discriminatory Intent

On first impression, given that both accent and language are tied to national origin, examining how courts treat language discrimination cases could provide further insight into how courts treat accent discrimination cases.[26] Accent discrimination plaintiffs appear to have more success when there is evidence that supervisors or co-workers have made disparaging comments about the plaintiff's accent.[27] This reliance on direct evidence of discriminatory intent is similar to how courts treat language discrimination cases. The language discrimination case *Maldonado v. City of Altus*[28] illustrates this approach to discrimination that privileges direct evidence of discriminatory intent. In *Maldonado*, Hispanic

21. *Fragante*, 888 F.2d at 594.
22. *Id.* at 595–96.
23. *Id.* at 597.
24. *Id.* at 599.
25. *Id.*
26. *See EEOC Enforcement Guidance on National Origin Discrimination*, *supra* note 3 ("Restrictive language policies implicate national origin because an individual's primary language is closely tied to his or her cultural and ethnic identity.").
27. *See, e.g.*, Iyoha v. Architect of the Capitol, 927 F.3d 561, 569 (D.C. Cir. 2019) (reversing summary judgment for the employer, based, in part, on the plaintiff showing that the interviewer was biased against people with accents); Ki v. Svnicki, No. GJH-20-130, 2021 WL 3857855, at *6–*7 (D. Md. Aug. 30, 2021) (denying summary judgment to the employer when the Asian plaintiff pointed to comments by coworkers mocking and mimicking Asian accents); *cf.* Tseng v. Fla. A&M Univ., 380 F. App'x 908, 909–10 (11th Cir. 2010) (affirming summary judgment for the employer where there was no evidence of disparaging comments or mockery about the plaintiff's accent).
28. 433 F.3d 1294 (10th Cir. 2006).

employees were harassed about speaking Spanish after the employer implemented an English-only policy.[29] The district court granted summary judgment for the employer on the plaintiffs' Title VII claims.[30] The circuit court, however, found that the racist comments established at least a genuine issue of material fact that the English-only policy created a hostile work environment.[31] Thus, the circuit court reversed summary judgment for the employer.[32] Reliance on direct evidence of discriminatory intent, however, is problematic for plaintiffs because such evidence is either nonexistent or difficult for plaintiffs to identity even in the most egregious discrimination cases.

Fragante illustrates how reliance on direct evidence of discriminatory intent in accent discrimination cases is detrimental to antisubordination goals. The employer in *Fragante* clearly acted on the basis of accent. In a letter to Fragante notifying him that he was not selected for the job, the employer wrote, "we felt the two selected applicants were both superior in their verbal communication ability."[33] Similarly, in the employer's interview notes, the interviewers described Fragante as speaking with a "[h]eavy Filipino accent" that "[w]ould be difficult to understand over the telephone."[34] Thus, the employer appears to have refused to hire Fragante on the basis of his accent, which was associated with his Filipino national origin. Despite acting on the basis of accent, the employer was still able to avoid liability by hiding behind a neutral job qualification—good communication skills—to justify its actions.

Scholarship in the equal protection context further explains how reliance on direct evidence of discriminatory intent is detrimental to antisubordination goals. In *Discriminatory Intent and the Taming of* Brown, constitutional law scholar Professor David A. Strauss writes that "impartiality—and discriminatory intent—fail as a comprehensive account of discrimination."[35] As an example in the employment context, Strass critiques the U.S. Supreme Court's decision in

29. *Id.* at 1301. The plaintiffs, city employees, alleged that, after promulgation of the English-only rule, their coworkers teased the Spanish-speaking plaintiffs, who were made the subject of jokes because of the English-only policy. *Id.* In fact, the plaintiffs were first informed of the English-only policy in private by their supervisor out of fear that the plaintiffs would be teased. *Id.* In addition, the mayor allegedly referred to the Spanish language as "garbage." *Id.*
30. *Id.* at 1301–02.
31. *Id.* at 1316.
32. *Id.*
33. Fragante v. City & County of Honolulu, 888 F.2d 591, 598 (9th Cir. 1989).
34. *Id.* at 597.
35. David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 938 (1989).

Personnel Administrator v. Feeney.[36] In *Feeney*, the Court held that a Massachusetts statute creating a preference for veterans over nonveterans for state civil service jobs did not violate the Equal Protection Clause, even though men were more likely to be veterans than women and thus the law advantaged men.[37] Strauss argues that this apparently impartial preference for veterans can in fact mask a conscious or unconscious desire to give the best civil service jobs to men.[38] Applied to the accent discrimination context, a neutral job qualification of good communication skills can be used to mask conscious or unconscious xenophobia.

II. MATSUDA'S PROPOSED FRAMEWORK FOR ACCENT DISCRIMINATION

Matsuda relied on social science research in accent bias and discrimination in proposing her framework, so this Section begins with reviewing recent social science research to inform the analysis of Matsuda's framework. Next, this Section considers the doctrinal foundations of Matsuda's framework and identifies limitations, primarily that her framework may not fully anticipate the dynamics of selective nonaccommodation.

A. Social Science Research

Because Matsuda framed her arguments around social science research on accent bias and discrimination, reviewing more recent research may help us understand how we can build on her framework.[39] Courts' recognition that accent discrimination can be a form of national origin discrimination is backed by social

36. *See id.* at 1000–03.
37. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979).
38. *See* Strauss, *supra* note 35, at 1000–03. In *Intentional Blindness*, Professor Ian Haney López similarly critiques the requirement of discriminatory intent within equal protection doctrine more broadly. *See* Ian Haney López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1785 (2012) ("Malicious intent, characteristic of contemporary jurisprudence, declares direct proof of injurious motives a prerequisite and, more pertinently, renders contextual evidence irrelevant.").
39. *See* Matsuda, *supra* note 1, at 1360–67.

science research.[40] Listeners interpret foreign-accented speech as less credible,[41] intelligent,[42] and knowledgeable[43] compared to unaccented native speech. Moreover, speakers with nonnative accents experience stigma and stereotype threat.[44] These studies suggest that addressing accent discrimination is necessary to advance an antisubordination agenda, as Matsuda argues.[45] But even outside of accent, listeners perceived speakers as more competent and socially attractive when the speaker spoke at a rate similar to their own.[46] This observation suggests that listeners may make negative associations with speech unlike their own, even outside of national origin-linked accent. Social science research suggests that foreign accent bias may be motivated either by processing difficulty[47] or prejudice and stereotypes[48] associated with speakers with accents. With respect to processing difficulty, when individuals hear foreign-accented speech, they do not rely on the linguistic cues they normally rely on to process native speech.[49] As

40. Anne-Sophie Deprez-Sims & Scott B. Morris, *Accents in the Workplace: Their Effects During a Job Interview*, 45 INT'L J. PSYCH. 417, 418 (2010) ("Accents are likely to serve as indicators for social categories such as ethnicity or country of origin."); *see also* Sharon L. Segrest Purkiss, Pamela L. Perrewé, Treena L. Gillespie, Bronston T. Mayes & Gerald R. Ferris, *Implicit Sources of Bias in Employment Interview Judgments and Decisions*, 101 ORG. BEHAV. & HUM. DECISION PROCESSES 152, 155 (2006) ("A combination of ethnic minority cues [e.g., ethnic name and ethnic accent] may be more likely to trigger an unconscious and automatic negative reaction because of the salience of the cues and the ease in which one is more confident about placing someone in a class or category; essentially, stereotyping.").
41. *See* Shiri Lev-Ari & Boaz Keysar, *Why Don't We Believe Non-Native Speakers? The Influence of Accent on Credibility*, 46 J. EXPERIMENTAL SOC. PSYCH. 1093, 1093 (2010).
42. John Tsalikis, Oscar W. DeShields, Jr. & Michael S. LaTour, *The Role of Accent on the Credibility and Effectiveness of the Salesperson*, 11 J. PERS. SELLING & SALES MGMT. 31, 36–37 (1991).
43. *Id.*
44. Regina Kim, Loriann Roberson, Marcello Russo & Paola Briganti, *Language Diversity, Nonnative Accents, and Their Consequences at the Workplace: Recommendations for Individuals, Teams, and Organizations*, 55 J. APPLIED BEHAV. SCI. 73, 83 (2019). Stereotype threat is defined as "a situational predicament in which a person feels at risk of confirming a negative stereotype about one's social group." *Id.* at 76.
45. *See* Matsuda, *supra* note 1, at 1400.
46. Stanley Feldstein, Faith-Anne Dohm & Cynthia L. Crown, *Gender and Speech Rate in the Perception of Competence and Social Attractiveness*, 141 J. SOC. PSYCH. 785, 802 (2001). Rate refers to global rate of speech measured in words or syllables per minute. *Id.* at 791.
47. Lev-Ari & Keysar, *supra* note 41, at 1093.
48. Luana Elayne Cunha de Souza, Cicero Roberto Pereira, Leoncio Camino, Tiago Jessé Souza de Lima & Ana Raquel Rosas Torres, *The Legitimizing Role of Accent on Discrimination Against Immigrants*, 46 EUR. J. SOC. PSYCH. 609, 613 (2016) ("[A]ccent leads to discrimination only in individuals who already have negative attitudes about a target's membership group.").
49. *See* Katarzyna Boduch-Grabka & Shiri Lev-Ari, *Exposing Individuals to Foreign Accent Increases Their Trust in What Nonnative Speakers Say*, 45 COGNITIVE SCI., Nov. 2021, at 1, 11. As an example of these cues, "listeners are able to use cues to differentiate between truth-telling

such, foreign-accented speech may be more difficult for native speakers to process.[50]

Thus, the courts' current approach to accent discrimination—which recognizes that accents can make communication more difficult and thus impede job performance—does have some support in social science research. Yet social science research has also shown that these processing difficulties can be ameliorated by exposure to or instruction on accented speech.[51] Thus, an approach that tries to accommodate accent, such as Matsuda's proposed framework, is also supported by social science research. Fostering the inclusion of speakers with accents in workplaces could not only reduce communication difficulties within workplaces between native speakers and nonnative speakers with accents but also, as Matsuda argues, help create a culturally pluralistic society that celebrates differences.[52]

B. Analyzing Matsuda's Framework

The current framework requires plaintiffs to identify direct evidence of discriminatory intent to successfully establish a claim of accent discrimination. As an alternative to the current approach, Matsuda proposes a four-step framework for courts to use when evaluating accent discrimination cases:

(1) What level of communication is required for the job?
(2) Was the candidate's speech fairly evaluated?

and lying speakers or confident and doubtful speakers when listening to native speakers, but not when listening to nonnative speakers." *Id.*

50. *Id.* at 12.

51. *See* Tracey M. Derwing, Marian J. Rossiter & Murray J. Munro, *Teaching Native Speakers to Listen to Foreign-Accented Speech*, 23 J. MULTILINGUAL & MULTICULTURAL DEV. 245, 245 (2002) ("The group that received explicit instruction regarding the characteristics of Vietnamese-accented English showed significantly greater improvement in confidence that they could interact successfully with individuals who speak English as a second language . . . ."); *see also* Constance M. Clarke & Merrill F. Garrett, *Rapid Adaptation to Foreign-Accented English*, 116 J. ACOUSTICAL SOC'Y AM. 3647, 3647 (2004) (finding that Native English speakers' processing speed for Spanish- and Chinese-accented speech was initially lower, but that this deficit diminishes within one minute of exposure).

52. *See* Matsuda, *supra* note 1, at 1403 ("[T]he antisubordination rationale for accent tolerance suggests a radically pluralistic re-visioning of national identity. The only center, the only glue, that makes us a nation is our many-centered cultural heritage. Just as our use of language is rich, varied, interactive, and changeable, so is our national culture.").

(3) Is the candidate intelligible to the pool of relevant, nonprejudiced listeners, such that job performance is not unreasonably impeded?
(4) What accommodations are reasonable given the job and any limitations in intelligibility?[53]

While Matsuda's ultimate goal is reasonable accommodation, the first three steps of Matsuda's proposed framework actually provide a more rigorous application of disparate treatment that is less deferential to employers and more responsive to research on accent discrimination than the current framework. Unlike the court in *Fragante* that hastily concluded that communication skills were an integral part of the job at issue,[54] the first step of Matsuda's framework requires the court to scrutinize the level of communication required for a given job. More rigorous scrutiny of the communication skills required for a given job can help distinguish truly neutral job qualifications from unconscious xenophobia or stereotyping on the basis of national origin-linked accent.

Furthermore, since social science research shows that accent bias may be motivated by stereotypes rather than actual processing difficulties, Matsuda's second step requires the court to assess whether a plaintiff's accent was fairly evaluated.[55] Motivated by the same stereotyping concern, Matsuda structures her third step around the pool of relevant, nonprejudiced listeners.[56] Structuring the pool around relevant listeners recognizes that not every job is customer-facing, so not every worker needs to be intelligible to the general public. In addition, this step recognizes that in some jobs, having an accent similar to many of the employer's clients is actually an asset.[57] This third step is also consistent with Title VII's prohibition on disparate treatment based on customer preference.[58] Given that

53. *Id.* at 1368.
54. Fragante v. City & County of Honolulu, 888 F.2d 591, 597 (9th Cir. 1989).
55. Matsuda provides an example of fair evaluation in her article: "Rather than assuming an accent would be unintelligible over the phone, for example, a candidate might be asked to complete an actual or simulated phone call to see whether breakdowns in communication occur." Matsuda, *supra* note 1, at 1373.
56. *Id.* at 1373–76.
57. *See id.* at 1374. As an example, Matsuda explains that since a bank teller usually serves clientele from the same community, having the same accent as members of that community improves communication between the teller and their clientele. *Id.*
58. *See, e.g.*, Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 388–89 (5th Cir. 1971) (refusing to recognize customer preference for female flight attendants over male flight attendants as a bona fide occupational qualification (BFOQ)). A BFOQ is an exception to Title VII's prohibition on disparate treatment that allows an employer to restrict a job to a particular sex, religion, or national origin, but only when a person's sex, religion, or national origin "may be reasonably necessary to carrying out a particular job function in the normal operation of an

Title VII does not allow an employer to justify discrimination based on their prejudiced customers, structuring the pool around nonprejudiced listeners is consistent with the current disparate treatment doctrine.

Thus, Matsuda's framework is an extension—rather than a reinvention—of the current Title VII doctrine. Courts should be more willing to reject the current deferential framework in favor of Matsuda's doctrinal framework. The first three steps of Matsuda's framework are a more careful and rigorous application of disparate treatment to accent discrimination cases than the approach courts currently employ, and thus could help plaintiffs succeed in many accent discrimination cases.

In contrast, the fourth step of Matsuda's framework goes beyond a rigorous application of disparate treatment and instead extends to reasonable accommodation. The fourth step of Matsuda's framework proposes that reasonable accommodation of accent[59] can be the means to accomplish the ultimate end of linguistic tolerance and diversity. Research shows that exposure to accented speech improves the listener's ability to comprehend foreign-accented speech[60], which supports Matsuda's approach. Matsuda's approach, by requiring reasonable accommodation of an employee with an accent, would expose the coworkers, supervisors, and customers of that employee to foreign-accented speech and thus improve their ability to comprehend it. By requiring employers to reasonably accommodate employees, Matsuda's framework addresses the current problematic standard of deference afforded to employers in accent discrimination cases on questions such as the level of communication required for a job and the employee's intelligibility.

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employer's business or enterprise." *CM-625 Bona Fide Occupational Qualifications*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Jan. 2, 1982), https://www.eeoc.gov/laws/guidance/cm-625-bona-fide-occupational-qualifications [https://perma.cc/93GK-FR5U]. In *Diaz*, the Fifth Circuit explained why it rejected a sex BFOQ based on customer preference:

> While we recognize that the public's expectation of finding one sex in a particular role may cause some initial difficulty, it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices [Title VII] was meant to overcome.

Diaz, 442 F.2d at 389.

59. Matsuda, *supra* note 1, at 1400. Matsuda argues that reasonable accommodation of accent could include using mediums already employed to convey important messages without oral speech, such as "visual back-ups, writing memos, using pictographs, using sign language, training employees in both speaking and listening skills, and minimizing opportunities for miscommunication by standardizing procedures." *Id.* at 1380.

60. Derwing et al., *supra* note 51.

Matsuda's framework does have some limitations, however. First, within Title VII and federal employment discrimination law, a reasonable accommodation requirement like the one Matsuda proposes in her fourth step is only currently found in the Americans with Disabilities Act (ADA)[61] and religious discrimination contexts.[62] In both cases, unlike the provisions prohibiting national origin discrimination, a reasonable accommodation requirement is explicitly described in the corresponding statute.[63] Thus, for courts to fully adhere to the fourth step of Matsuda's framework, advocates should consider proposing new legislation that adopts a reasonable accommodation requirement for national origin-linked accent. Absent new legislation, however, a stronger statutory or doctrinal hook could also compel courts to move away from their existing problematic framework and interpretation of Title VII. Thus, this approach should also be explored.

As another limitation, the third step of Matsuda's framework is centered on whether an employee with an accent is intelligible to a pool of nonprejudiced listeners. In other words, the third step considers whether there is a genuine job performance issue with the employee's accent. But even if there is a genuine issue with the employee's accent, if an employer is willing to accommodate employees with non-accent communication issues but not accommodate employees with accents, the employer is treating individuals without accents more favorably than individuals with accents.[64] In other words, in this scenario, the failure to accommodate employees with accents still looks like disparate treatment on the basis of national origin. Thus, Matsuda's framework may not reach all the dynamics of accent discrimination, including cases in which there is a genuine communications issue with an employee's accent.

61. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213.
62. Civil Rights Act of 1964, tit. VII, 42 U.S.C. § 2000e(j).
63. Under the ADA, discrimination on the basis of disability includes "not making *reasonable accommodations* to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." 42 U.S.C. § 12112(b)(5)(A) (emphasis added). Under Title VII, "the term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to *reasonably accommodate* to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j) (emphasis added).
64. In this context, accommodation of an employee with a non-accent communication issue may not necessarily mean providing a modification or adjustment to their job duties but instead choosing to overlook the non-accent communication issues and hiring the employee with a non-accent communication issue anyways. *See infra* Part III.B.

III. THE DYNAMICS OF SELECTIVE NONACCOMMODATION

A. Selective Nonaccommodation in Other Contexts

Selective nonaccommodation occurs when an employer refuses to accommodate an employee with a protected trait that inhibits their ability to work, but accommodates other employees similar in work ability but who lack the protected trait.[65] Because the employer is giving preference to employees without the protected trait, the employer is engaging in disparate treatment. Given that selective nonaccommodation emerges as a phenomenon in accent discrimination cases, understanding its dynamics in other contexts can help inform how courts should analyze this phenomenon in the accent discrimination context.

1. Disability

Given its reasonable accommodation requirement, the ADA serves as a starting point for understanding selective nonaccommodation. Disability rights scholar and current general counsel of the U.S. Department of Health and Human Services, Samuel R. Bagenstos, summarizes the logic of the selective nonaccommodation principle in the ADA and disability rights context: "[E]mployers make individualized accommodations for people without disabilities all the time, and . . . the accommodations required by people with disabilities are frequently no more burdensome or costly."[66] By accommodating workers without disabilities, the employer shows that any similar accommodations requested by workers with disabilities do not necessarily place an undue burden on the employer.[67]

As one example, Bagenstos cites[68] *Cehrs v. Northeast Ohio Alzheimer's Research Center*.[69] In *Cehrs*, the plaintiff Katherine R. Cehrs, who had a disability, was able to show that her employer "routinely granted medical leave to employees" yet rejected her request for medical leave.[70] The court ultimately reversed summary judgment for the employer.[71] As another example, Bagenstos

65. *See* Samuel R. Bagenstos, *"Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 867 (2003).
66. *Id.* (footnotes omitted).
67. *See id.*
68. *Id.* at 867 n.135.
69. 155 F.3d 775 (6th Cir. 1998).
70. *Id.* at 783.
71. *Id.* at 785.

cites[72] *Criado v. IBM Corp.*[73] In *Criado*, the plaintiff Elizabeth Criado, who had a disability, did not ask "for more leave than would be granted to a non-disabled, sick employee."[74] Because a jury could find this request to be a reasonable accommodation, the court affirmed the jury verdict in favor of the plaintiff.[75] As these examples illustrate, proof of selective nonaccommodation in the ADA context helps plaintiffs defeat employers' arguments that providing accommodations would cause undue hardship. Still, a comprehensive understanding of the principle of selective nonaccommodation requires exploring other areas of employment discrimination, including pregnancy, breastfeeding, and family responsibilities discrimination.

2. Pregnancy

In the context of the Pregnancy Discrimination Act (PDA),[76] the Supreme Court has already recognized that selective nonaccommodation can give rise to an inference of disparate treatment. For example, in *Young v. United Parcel Service, Inc.*,[77] the plaintiff Peggy Young alleged that UPS accommodated most nonpregnant employees by allowing them to work while under a lifting restriction, yet failed to accommodate pregnant employees by providing the same opportunity to work with the lifting restriction.[78] According to the Court, per the *McDonnell Douglas* framework, a plaintiff under the PDA can make a prima facie case of discrimination by showing that "she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others 'similar in their ability or inability to work.'"[79] An employer can rebut the plaintiff's assertion by offering "legitimate, nondiscriminatory" reasons for denying the accommodation to the pregnant plaintiff but granting the accommodation to nonpregnant workers.[80] The plaintiff can then show the legitimate nondiscriminatory reasons are pretext by proving that "the employer's policies impose a significant burden on pregnant workers," including by showing that "the employer accommodates a large

72. Bagenstos, *supra* note 65, at 867–68 n.135.
73. 145 F.3d 437 (1st Cir. 1998).
74. *Id.* at 444–45.
75. *Id.*
76. Pregnancy Discrimination Act of 1978 (PDA), 42 U.S.C § 2000e(k).
77. 575 U.S. 206 (2015).
78. *Id.* at 230.
79. *Id.* at 229.
80. *Id.*

percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers."[81]

While pregnant workers like Young are functionally limited and genuinely do require an accommodation to work, if the employer accommodates large percentages of nonpregnant workers similar in their ability or inability to work, then this functional limitation does not entirely explain the employer's refusal to accommodate the pregnant workers. To link this dynamic back to disparate treatment and discriminatory intent, as law and inequality scholar Professor Reva B. Siegel explains, "the employer's judgment that pregnant workers are not worth even modest accommodations may reveal hidden judgments about the competence or commitment of new mothers in the workplace."[82] The Court ultimately found that Young created a genuine dispute of material fact as to "whether UPS provided more favorable treatment to at least some employees whose situation cannot be reasonably distinguished from Young's."[83]

3. Breastfeeding

Relatedly, selective nonaccommodation has also been recognized in the context of discrimination against breastfeeding workers. In *Hicks v. City of Tuscaloosa*,[84] the Eleventh Circuit held that selective nonaccommodation can give rise to an inference of disparate treatment of breastfeeding workers under the PDA. In *Hicks*, the plaintiff, police officer and breastfeeding mother Stephanie Hicks, requested alternative duty to a desk job that would not require wearing a ballistic vest.[85] If worn, the vest could cause breast infections that lead to an inability to breastfeed.[86] Hicks's superior denied her request for alternative duty, so Hicks resigned.[87] Hicks argued that other employees with temporary injuries were granted alternative duty, yet her supervisor failed to give her the same treatment.[88] In refusing to overrule the jury's verdict for Hicks, the Eleventh Circuit applied the Court's reasoning from *Young*. It emphasized that while the "City may not have been required to provide Hicks with *special* accommodations

81. *Id.* at 208–09. Thus, an employer can avoid liability either by accommodating both pregnant and similarly situated nonpregnant workers, or by accommodating neither.
82. Reva B. Siegel, *Pregnancy as a Normal Condition of Employment: Comparative and Role-Based Accounts of Discrimination*, 59 WM. & MARY L. REV. 969, 1004 (2018).
83. *Young*, 575 U.S. at 231.
84. 870 F.3d 1253 (11th Cir. 2017).
85. *Id.* at 1256.
86. *Id.*
87. *Id.* at 1256–57.
88. *Id.* at 1261.

for breastfeeding," Hicks was only "asking to be treated the same as 'other persons not so affected but similar in their ability or inability to work' as required by the PDA."[89]

The Eleventh Circuit relied on the Court's decision in *Young* only after finding that breastfeeding was covered as a related medical condition under the PDA.[90] Yet this logic is still appropriate in the accent discrimination context, when employers accommodate workers with other kinds of communication issues but not workers with accents. Similar to the plaintiffs in *Young* and *Hicks*, a worker with an accent is not asking for special accommodations but is instead asking to be treated the same as other workers "similar in their ability or inability to work."[91]

4. Family Responsibilities Discrimination

Family responsibilities discrimination is another area of employment discrimination law in which courts have recognized selective nonaccommodation. According to EEOC guidance, evidence of this type of discrimination includes "[w]hether male workers with caregiving responsibilities received more favorable treatment than female workers."[92] For example, in *Phillips v. Martin Marietta Corp.*, the Supreme Court found that an employer's policy of refusing employment to women with preschool-age children, but not to men with preschool-age children, could constitute sex discrimination under Title VII.[93] While this case is not explicitly about reasonable accommodation, the Court's logic can be understood as an example of selective nonaccommodation. The employer, by choosing to employ men with preschool-age children, chose to accommodate men yet, by refusing to employ women with preschool-age children, refused to accommodate women, which, per the Court, may constitute disparate treatment under Title VII. In other words, the employer overlooked the alleged issue of working while raising preschool-age children and hired men with preschool-age children but did not do the same for women.

89. *Id.* at 1260–61 (quoting Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k)).
90. *Hicks*, 870 F.3d at 1259.
91. 42 U.S.C § 2000e(k).
92. *Enforcement Guidance: Unlawful Disparate Treatment of Workers With Caregiving Responsibilities*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (May 23, 2007), https://www.eeoc.gov/laws/guidance/enforcement-guidance-unlawful-disparate-treatment-workers-caregiving-responsibilities [https://perma.cc/AWL6-EGA9].
93. Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971).

As another example, in *Schafer v. Board of Public Education*, the Third Circuit reversed summary judgment for an employer after a male teacher showed that he was denied an unpaid leave of absence to care for his son.[94] The employer's policy allowed female teachers to take the same kind of leave of absence.[95] In both cases, the courts recognized that choosing to accommodate workers on the basis of gender constitutes disparate treatment under Title VII.

B. Selective Nonaccommodation Under Matsuda's Current Framework

Matsuda's framework does not anticipate the dynamics of selective nonaccommodation. For example, in *EEOC v. West Customer Management Group*, the Jamaican plaintiff Roberts was rejected from a customer service position because his interviewer found him "very difficult to understand" and noted that he "had a 'heavy accent.'"[96] The employer allowed other applicants who were rejected for poor communication skills to reapply but did not extend this invitation to Roberts.[97] Thus, the employer treated the applicant with an accent less favorably than applicants without accents.[98] Assuming that the plaintiff's accent causes a genuine communication issue and would thus interfere with the plaintiff's job performance as a customer service representative, under Matsuda's framework, the plaintiff's claim would fail at the third step since the third step would require a court to consider whether job performance is unreasonably impeded. Matsuda's proposed framework does not fit well with cases like *West Customer Management Group* because, in these kinds of cases, employers would continue to avoid liability even when they treat workers with accents less favorably than those without. Instead, in order to account for selective nonaccommodation, Matsuda's framework should be supplemented by an approach that emphasizes an employer's willingness to accommodate by constructing a presumption of disparate treatment when an employer engages in selective nonaccommodation. Part IV proposes a new framework that directly address this dynamic of selective nonaccomodation in an effort to supplement Matsuda's framework: presuming disparate treatment when a plaintiff can show that their employer engaged in selective nonaccomodation.

94. Schafer v. Bd. of Pub. Educ., 903 F.2d 243, 244 (3d Cir. 1990).
95. *Id.*
96. EEOC v. W. Customer Mgmt. Grp., LLC, 899 F. Supp. 2d 1241, 1248 (N.D. Fla. 2012).
97. *Id.*
98. *See id.* at 1257 ("[T]he facts show that the interviewer expressly commented on Roberts's 'thick accent' without inviting him to reapply or reinterview when others who were soft spoken but did not have accents appear to have been given this courtesy.").

IV. PRESUMPTION OF DISPARATE TREATMENT AS THE SOLUTION

A. Constructing the Presumption

Extending selective nonaccommodation to the accent discrimination context should involve raising a presumption of disparate treatment when the plaintiff can show their employer engaged in selective nonaccommodation. To demonstrate, in accent discrimination cases, an employer may judge that workers with accents are less deserving of accommodations than workers without accents who are similarly situated in the comprehensibility of their English speech. Applying Professor Siegel's analysis of the *Young* decision, this selective nonaccommodation reveals hidden judgments about the competence of workers with accents.[99] Thus, even when the plaintiff may have a genuine communication issue because of their accent, a presumption of disparate treatment provides plaintiffs with a way to make a prima facie case when an employer engages in selective nonaccommodation.

The ultimate inquiry would be: Had there been a non-accent communication issue, would the employer have accommodated the employee? The framework for this selective nonaccommodation presumption of disparate treatment could be constructed like this:

(1) Are other employees similarly situated to the plaintiff in the comprehensibility of their English speech, but for reasons not related to national origin-linked accent?
(2) If so, does the employer accommodate a large percentage of those similarly situated employees?
(3) If so, the employer engaged in selective nonaccommodation, so disparate treatment will be presumed.

This presumption shares the doctrinal hook of disparate treatment with the first three steps of Matsuda's framework, rather than completely displacing her framework. Therefore, this presumption could instead be thought of as another step between Matsuda's third and fourth steps, and as an alternative even when a plaintiff does have a genuine communication issue because of their accent.

Following the Court's understanding of selective nonaccommodation in *Young*, the presumption is structured around comparing workers with accents to similarly situated workers.[100] The "similarly situated" standard draws from the

99. *See supra* Part III.A.2.
100. *See* Young v. United Parcel Serv., Inc., 575 U.S. 206, 229–30 (2015).

PDA, which requires that pregnant workers be treated the same as workers "similar in their ability or inability to work."[101] Thus, under this presumption, a worker is similarly situated to another worker with an accent if they both have a similar level of comprehensibility in speaking English that affects their ability to work. Because this presumption is designed to be embedded into Matsuda's framework, comprehensibility of accented English speech would be judged from the perspective of the relevant pool of nonprejudiced listeners.[102] As such, drawing from social science research, comprehensibility can be measured in terms of the relevant, nonprejudiced listener's processing speed and accuracy.[103]

Drawing from the Court's application of selective nonaccommodation in *Young*, this presumption could be overcome if the employer could show it did not accommodate a large percentage of workers similarly situated to the plaintiff with an accent.[104] Alternatively, an employer could also show that it reasonably distinguished between the plaintiff and the allegedly similarly situated workers without accents.[105] In other words, identical to the *McDonnell Douglas* burden-shifting framework, an employer could rebut this presumption by providing a legitimate, nondiscriminatory reason for denying the accommodation to workers with accents.[106]

B. Applying the Presumption

1. *West Customer Management Group*: The Paradigm Case

West Customer Management Group acts as the paradigm case for how a presumption of disparate treatment would operate in accent discrimination cases. Beginning with the first step of the proposed framework, candidates who were

101. Pregnancy Discrimination Act of 1978, 42 U.S.C § 2000e(k).
102. *See* Matsuda, *supra* note 1, at 1368.
103. *See* Murray J. Munro & Tracey M. Derwing, *Processing Time, Accent, and Comprehensibility in the Perception of Native and Foreign-Accented Speech*, 38 LANGUAGE & SPEECH 289, 289 (1995) (measuring processing time and accuracy based on how quickly native English speakers could ascertain statements by speakers with accents as true or false, and how accurately native English speakers could transcribe statements by speakers with accents).
104. *See Young*, 575 U.S. at 229–30.
105. *See, e.g.*, EEOC v. Wal-Mart Stores E., L.P., 46 F.4th 587 (7th Cir. 2022) (finding that only offering light duty to employees injured on the job but not to pregnant employees did not violate the PDA because the policy also excluded other employees not injured on the job and was designed for the employer to meet its obligations under Wisconsin's worker's compensation laws, under which pregnant workers and other workers not injured on the job are not covered).
106. *See Young*, 575 U.S. at 229.

initially rejected because their low-rated communication skills affecting their ability to work would be those "similarly situated" to the Jamaican plaintiff, Roberts, who speaks English with an accent.[107] Proceeding to the second step, according to the plaintiff's brief opposing summary judgment, "all applicants rejected for failure to 'clearly communicate' who were not of foreign national origin were invited to reapply."[108] Thus, the employer appears to have accommodated not just a large percentage of similarly situated employees, but virtually all of them, so the plaintiff can satisfy the second step.

This would trigger the disparate treatment presumption. The court will presume that the employer engaged in disparate treatment because the employer associated the plaintiff's accent with his national origin, rather than because the plaintiff's accent caused communication difficulties. While this case acts as the paradigm for the presumption, the district court in *West Customer Management Group* denied summary judgment to the employer.[109] A jury, however, ultimately found in favor of the employer, rendering the presumption less applicable for this case.[110]

The following cases are more recent accent discrimination cases in which summary judgment was granted for the defendant employer, which presents an opportunity for courts to apply the presumption.

2. Tseng v. Florida A&M University

In *Tseng v. Florida A&M University*[111], Yili Tseng, a Taiwanese national and visiting professor at Florida A&M University who speaks English with an accent, was denied a tenure-track position when the university instead promoted another visiting professor.[112] The magistrate judge's report in this case illustrates the wide deference given to employers in accent discrimination cases. According to Magistrate Judge William C. Sherril, Jr., "Teaching is the process by which one

107. *See* EEOC v. W. Customer Mgmt. Grp., LLC, 899 F. Supp. 2d 1241, 1248 (N.D. Fla. 2012).
108. Plaintiff's Memorandum Brief in Opposition to Defendant's Motion for Summary Judgment at 15, EEOC v. W. Customer Mgmt. Grp., LLC, 899 F. Supp. 2d. 1241 (N.D. Fla. 2012) (No. 3:10-cv-00378-MCR-MD). The only other applicant rejected for poor communication skills who was not invited to reapply was an applicant from Puerto Rico. *Id.* at 20.
109. *W. Customer Mgmt. Grp.*, 899 F. Supp. 2d at 1258.
110. *See* EEOC v. W. Customer Mgmt. Grp., LLC, 678 F. App'x 836, 837 (11th Cir. 2017).
111. Tseng v. Fla. A&M Univ., No. 4:08-CV-91-SPM-WCS, 2009 WL 3163126 (N.D. Fla. Sept. 30, 2009) at *1, *aff'd sub nom.* 380 F. App'x 908 (11th Cir. 2010). Notably, the plaintiff Tseng brought his case pro se. *See Tseng*, 2009 WL 3163126, at *1.
112. *Tseng*, 2009 WL 3163126, at *1.

human imparts knowledge to others through communication. Communication skills are absolutely essential for a teacher to perform the work of teaching."[113] Because the court decided that English communication skills were essential to teach and the university could show Tseng's accent materially interfered with his ability to communicate in English, the plaintiff's case failed.[114] The barrier for the plaintiff to overcome the defendant employer's assertion that the plaintiff's accent interferes with job performance is high under the current framework when courts do not consider whether similarly situated employees were accommodated.

Discovery in this case was limited only to the selection process during the year Tseng was eligible for a promotion.[115] Had the disparate treatment presumption been available, Tseng would have had a stronger basis for demanding expanded discovery. Tseng potentially could have found similarly situated comparators—such as other visiting professors with accents from different countries or visiting professors with a history of communication difficulties similarly affecting the comprehensibility of their English speech, but who were still promoted. Thus, using that evidence, Tseng could have established selective nonaccommodation and triggered the presumption of disparate treatment.

3. Igwe v. Salvation Army

In *Igwe v. Salvation Army*,[116] the plaintiff Dr. Harrison Igwe, who is of Nigerian origin and speaks English with an accent, worked as a director at a Salvation Army rehabilitation center.[117] Amid a restructuring, Dr. Igwe was required to reapply and reinterview to keep his position, but a Caucasian woman was chosen to fill his role instead.[118] On his application, Dr. Igwe's supervisor Larry Manzella commented that "[Dr. Igwe's] broken speech . . . also made it difficult to communicate with him at times."[119] The employer asserted that Dr. Igwe's poor performance justified choosing another candidate.[120]

113. *Id.* at *19.
114. *Id.* at *4.
115. *Id.* at *3 ("The motion [to allow discovery regarding the selection process before 2006] was denied because the information sought was outside the scope of the EEOC charge, were not 'reasonably related' to the allegations in the EEOC charge, and were irrelevant to the 2006 selection process.").
116. 790 F. App'x 28 (6th Cir. 2019).
117. *Id.* at 30.
118. *Id.* at 31–32.
119. *Id.*
120. *Id.* at 35.

With respect to Dr. Igwe's accent discrimination claim, the Sixth Circuit made no effort to determine what level of communication was required for the job, whether Dr. Igwe's speech was fairly evaluated, or whether he was intelligible to the relevant pool of nonprejudiced listeners. Instead, similar to the court in *Tseng*, the court deferred to the employer and simply concluded "there is no dispute that Manzella viewed Dr. Igwe's communication skills—whether related to his national origin or not—to inhibit his ability to perform the duties of the [director position]."[121] Ultimately, the court affirmed summary judgment for the employer on Dr Igwe's national origin discrimination claim, as well as the rest of his claims.[122]

Dr. Igwe could have benefited from the presumption because he already identified a potential similarly situated comparator: a Caucasian department head with communication issues that similarly affected his ability to work but who "was not disciplined, [whose] leadership was not questioned, and in fact . . . was promoted."[123] If Dr. Igwe could show that this Caucasian department head did not have an accent but that the two were similar in how the comprehensibility of their English speech affected their abilities to work, then Dr. Igwe could trigger the presumption. The presumption would be triggered because this Caucasian comparator appears to have been accommodated while Dr. Igwe was not, allowing the court to presume disparate treatment.

4. Beaver v. McHugh

In *Beaver v. McHugh*,[124] the plaintiff, Dr. Julie Beaver, was employed by Walter Reed Army Medical Center.[125] Dr. Beaver is a doctor of Chinese national origin.[126] The Medical Center argued that various employees reported that Dr. Beaver had "significant difficulties communicating in English," and that it thus had a legitimate nondiscriminatory reason for terminating Dr. Beaver.[127] In

121. *Id.* at 36.
122. *Id.* at 37.
123. Plaintiff-Appellant's Brief on Appeal at 18, Igwe v. Salvation Army, 790 F. App'x 28 (6th Cir. 2019) (No. 19-1082). Unfortunately, the extent of the plaintiff's discussion of this potential comparator is limited to this reference to his communication issues. Similar to *Tseng*, however, had this presumption been available, the plaintiff may have chosen to develop the potential comparator argument further and ask for expanded discovery to develop the factual record regarding the potential comparator's communication issues.
124. 840 F. Supp. 2d 161 (D.D.C. 2012).
125. *Id.* at 164.
126. *Id.*
127. *Id.* at 172.

response, the plaintiff argued that her employer's refusal to "extend her probationary period and failure to train her to speak English at the required level of proficiency" shows that the employer's proffered nondiscriminatory reason was pretext.[128]

The court rejected Dr. Beaver's argument because of a lack of evidence but did not necessarily reject the logic of Dr. Beaver's argument: "Dr. Beaver has failed to demonstrate that the applicable regulations permitted an extension; that, if such an extension were available, she was eligible for it; or that *others similarly situated to her received such an extension*."[129] Thus, this court showed that it was receptive to inferring disparate treatment from this employer's selective nonaccommodation had the plaintiff been able to produce evidence of similarly situated comparators who were accommodated. The court does not explain how it would define "others similarly situated." A reasonable definition of similarly situated, however, would borrow from the Supreme Court's decision in *Young* and the PDA. Thus, "others similarly situated" would mean similar in the comprehensibility of their English speech in terms of the nonprejudiced listener's processing speed and accuracy.[130] Had the proposed presumption been available, Dr. Beaver could have found other employees similarly situated in the comprehensibility of their English speech who did receive an extended probationary period or some other kind of communication-related training. If she found these comparators, Dr. Beaver could have triggered the presumption of disparate treatment. Ultimately, on the case's current record, the court granted the employer's motion for summary judgment.[131]

5. Guimaraes v. SuperValu

In *Guimaraes v. SuperValu, Inc.*,[132] the Brazilian plaintiff Katia Guimaraes was able to produce a significant amount of direct evidence of national origin- and accent-based animus. Guimaraes's supervisor would pretend not to understand her, constantly ask Guimaraes to repeat herself, and require Guimaraes to repeat

128. *Id.* at 178.
129. *Id.* (emphasis added).
130. In *Young*, the Court found that the plaintiff established a genuine issue of material fact as to whether the defendant provided more favorable treatment to nonpregnant, similarly situated workers who requested the same lifting restrictions as the plaintiff did. Young v. United Parcel Serv., Inc., 575 U.S. 206, 230–31 (2015).
131. *Id.* at 179.
132. 674 F.3d 962 (8th Cir. 2012).

the supervisor's directions back to her verbatim.[133] Because of alleged performance issues, the supervisor even unilaterally placed Guimaraes onto a performance improvement plan, despite Guimaraes's previous history of positive performance reviews.[134] Subsequently, Guimaraes was terminated during a company reorganization because she was on that performance improvement plan.[135]

Despite this evidence, the court concluded that "no reasonable jury could find [the supervisor's] alleged behavior raises an inference of national-origin discrimination."[136] In addition, Guimaraes's supervisor told another employee that she was "targeting Katia Guimaraes, and that she was trying to get Katia fired and stop Katia's Green Card process."[137] Yet the court dismissed this statement as "neutral" toward national origin.[138] Thus, despite all the direct evidence of national origin-based animus that Guimaraes was able to produce, the Eighth Circuit still affirmed the district court's grant of summary judgement for the defendant on the grounds that the plaintiff failed to establish circumstances giving rise to an inference of discrimination.[139]

In *Guimaraes*, in which there was clear evidence of animus, the presumption could have helped the plaintiff survive summary judgment and get to a jury, if the plaintiff was able to identify similarly situated comparators without accents who were accommodated. A jury could then decide if the evidence provided, supplemented by evidence of selective nonaccommodation, is enough to establish a claim of disparate treatment.

C. Assessing the Strengths & Weaknesses of the Presumption

In proposing her framework for accent discrimination, Matsuda's ultimate end is a pluralistic society that celebrates linguistic tolerance and diversity.[140] Yet Matsuda's framework, grounded in reasonable accommodation, may not necessarily anticipate all the dynamics of accent discrimination, as illustrated in

133. *Id.* at 974.
134. *Id.* at 970–71.
135. *Id.* at 971.
136. *Id.* at 975.
137. *Id.* at 970.
138. *Id.* at 974.
139. *Id.* at 980.
140. *See* Matsuda, *supra* note 1, at 1403 ("[T]he antisubordination rationale for accent tolerance suggests a radically pluralistic re-visioning of national identity. The only center, the only glue, that makes us a nation is our many-centered cultural heritage. Just as our use of language is rich, varied, interactive, and changeable, so is our national culture.").

cases of selective nonaccommodation. Thus, there may be cases in which a plaintiff loses under Matsuda's framework even when the employer engages in selective nonaccommodation. For example, in areas of employment like teaching, employees like the *Tseng* plaintiff may fail under the fourth step of the framework. Teaching requires a high level of communication both in large, lecture settings and during one-on-one interactions with students. Thus, communicating effectively in English would likely be considered an essential function[141] of the job that the plaintiff is unable to perform. Or, alternatively, accommodations for communication issues would cause an undue burden on the employer.[142] In either case, the employer could defeat the plaintiff's reasonable accommodation claim.

In contrast, the proposed presumption, which can be embedded into Matsuda's framework, directly addresses the dynamic of selective nonaccommodation. In addition, the presumption is grounded in disparate treatment, a doctrinal hook that courts may be more comfortable with than reasonable accommodation. As Justice Stephen Breyer wrote in *Young*, the proposed presumption would be consistent with the Supreme Court's "longstanding rule that a plaintiff can use circumstantial proof to rebut an employer's apparently legitimate, nondiscriminatory reasons for treating individuals within a protected class differently than those outside the protected class."[143]

Furthermore, employees like the plaintiff in *Tseng* may actually succeed with the presumption, even though they may lose if the analysis proceeded to the fourth step of Matsuda's framework. Assuming the plaintiff could show that similarly situated comparators did receive accommodations while the plaintiff did not, then under the presumption, the court will presume disparate treatment. Thus, the

141. *See The ADA: Your Responsibilities as an Employer*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Jan. 1, 1991), https://www.eeoc.gov/laws/guidance/ada-your-responsibilities-employer [https://perma.cc/8CXA-F2YL] (emphasis added) ("Factors to consider in determining if a function is essential include: []*whether the reason the position exists is to perform that function*, []the number of other employees available to perform the function . . . and []the degree of expertise or skill required to perform the function.").

142. *See Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Oct. 17, 2002), https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada [https://perma.cc/SZQ6-AB22] ("Undue hardship refers not only to financial difficulty, but to reasonable accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business.").

143. Young v. United Parcel Serv., Inc., 575 U.S. 206, 230 (2015) (citations omitted).

plaintiff could win, provided that the employer is unable to rebut the presumption. Even absent a formal presumption of disparate treatment, a plaintiff showing an employer engaged in selective nonaccommodation can also succeed on a reasonable accommodation claim: A similarly situated but accommodated comparator demonstrates that the employer can handle the level of communications difficulty that the plaintiff has, and thus the plaintiff's request for an accommodation is not unreasonable.

CONCLUSION

Matsuda calls for an application of reasonable accommodation to all differences that are "historically subject to exploitation" in order to advance a "true antisubordination agenda."[144] Matsuda also asserts that our ultimate end in addressing accent discrimination should be a pluralistic society that celebrates linguistic tolerance and diversity. A presumption of disparate treatment when an employer fails to accommodate workers with accents while accommodating similarly situated workers is another means to that end. This presumption shows how the courts' current approach to disparate treatment under Title VII could be further expanded and applied to achieve Matsuda's ends while also being able to tackle the particular dynamic of selective nonaccommodation.

144. Matsuda, *supra* note 1, at 1400.