

# Paint a Picture or Play Ping Pong? – The Seventh Circuit Provides Clarity on the Summary Judgment Standard for Discrimination Cases

AUTHOR: SANDBERG PHOENIX

On August 1, 2013, the Seventh Circuit did a great service to employment law practitioners in its jurisdiction when it provided a clear path for future summary judgment decisions. For decades, attorneys, plaintiffs, and employers have wrestled with the standard that they must overcome to have their Title VII discrimination cases decided without going to trial. *Morgan v. SVT, LLC*, 724 F.3d 990 (7th Cir. 2013).

Marcus Morgan was a supermarket loss prevention employee who was terminated for insufficient theft stops. Morgan, who is African American, filed a Title VII race discrimination suit against the supermarket, alleging that he was fired for (ironically) reporting a white manager for theft. The supermarket moved for summary judgment, requesting that the court dismiss the case without a trial because Morgan did not have sufficient factual support that could convince a jury to rule in his favor. The district court granted the supermarket's motion because Morgan had not shown that there were comparable white employees who were treated better than he was for committing similar infractions and there was no evidence of suspicious timing of his termination considering the termination decision was consistent with Morgan's documented failure to perform theft stops, prior warnings about his lack of theft stops, and the supermarket's stringent enforcement of its anti-shoplifting policies. Morgan appealed the decision to the Seventh Circuit.

The Seventh Circuit agreed with the district court's decision to dismiss Morgan's case and took the opportunity to provide clarity on the standard for overcoming a motion for summary judgment regarding the type of proof that must be presented by the plaintiff to succeed to trial.

In order to succeed on a Title VII discrimination suit, a plaintiff must show that he is a member of a class protected by Title VII (race, color, religion, sex, or national origin), that he has been the subject of some form of adverse employment action (or that he has been subjected to a hostile work environment) and that the employer took the adverse employment action on account of the plaintiff's membership in the protected class. Plaintiffs can prove their cases under two methods of proof: direct or indirect.

The direct method of proof does not mean that the plaintiff must show an admission of discriminatory animus by the defendant or other so-called direct evidence. Rather, the plaintiff can show any combination of direct or circumstantial evidence that makes it more probable than not that discrimination motivated the adverse decision. To illustrate this idea, in a 1994 case<sup>1</sup>, the Seventh Circuit referred to this idea as “a mosaic whose individual tiles add up to a complete picture.”

The indirect method of proof refers to a particular way of using circumstantial evidence at the summary judgment stage known as the “burden-shifting” approach, which was pioneered by the U.S. Supreme Court in a case 40 years ago.<sup>2</sup> Under the burden-shifting approach, a plaintiff must initially show that (1) he is a member of a protected class, (2) he met his employer's legitimate job expectations, (3) he suffered an adverse employment action, and (4) similarly situated employees outside of the protected class received more favorable treatment. If the plaintiff can meet these four criteria, the burden then shifts to the employer to offer a non-discriminatory reason for the adverse employment action. If the employer offers a reason, the burden shifts back to the plaintiff to present evidence that the reason offered by the employer is a pretext for discrimination.

The Seventh Circuit pointed out that, at times, litigants and judges get lost in the technical nuances of the direct and indirect methods when much of the evidence they have may be relevant under either method. This can cause plaintiffs to fall into a trap, believing that they have to specifically choose an approach and being insufficiently attentive to the demands of the two methods.

The Seventh Circuit has now made it clear that plaintiffs do not have to choose an approach; courts should have no difficulty assessing the case under either method. However, the direct method has been declared the default standard. By using the direct method as the default rule, no one is prevented from using the indirect approach.

To provide additional clarity on the “mosaic” metaphor, the Seventh Circuit explained that a plaintiff's evidence under the direct method does not have to come together to form a tidy, coherent image in order for a plaintiff to survive summary judgment. The plaintiff is only required to produce enough evidence, whether direct or circumstantial, to permit the trier of fact to find that the employer took an adverse employment action because of the persons protected class.

Even with the leniency the Seventh Circuit has granted plaintiffs at the summary judgment phase, Morgan still did not present enough evidence under either approach to avoid having his case dismissed. Ultimately, Morgan lacked sufficient evidence to advance to trial because he had no evidence that similarly situated white loss prevention employees were treated better or that there was suspicious timing of his termination, or any reasons to shift the burden back to the supermarket to explain why Morgan was fired. The clarified standard does not foreclose the plaintiff's burden to provide the proof necessary to advance his case to trial.

By Raven J. Akram

<sup>1</sup> *Troupe v. May Dept. Stores Co.*, 20 F.3d 634, 737 (7th Cir. 1994)

<sup>2</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)