

Insight

IN-DEPTH DISCUSSION

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Seventh Circuit to Plaintiffs: Here's Your Burden of Proof

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Most employees who file employment discrimination claims hope for one of two things – a really sympathetic jury or an employer that is willing to generously settle the lawsuit to avoid the risks and uncertainties of trial. Before either is a possibility in federal (and many state) courts, the employee must first clear the hurdle of surviving summary judgment. That is, when the employer files its motion for summary judgment requesting that the court dismiss the employee's discrimination claims on the merits, the employee must instead prove to the court that the employee has enough evidence from which a jury could render a verdict in his or her favor. The Seventh Circuit in *Ortiz v. Werner Enterprises, Inc.*¹ may have simplified – but not eased – the determination of whether employees satisfy their burden of proof at the summary judgment stage.

A Primer on the Employee's Burden of Proof

McDonnell Douglas Corp. v. Green established an evidentiary framework for plaintiffs alleging employment discrimination.² The U.S. Supreme Court reasoned that federal discrimination laws were not intended “to guarantee a job to every person regardless of qualifications.” For that reason, it held that for a plaintiff to survive a summary judgment motion, the plaintiff must first demonstrate a rebuttable presumption of discrimination with evidence that shows the following: (1) the employee belonged to a protected class; (2) the employee was qualified for the position; (3) although qualified, the employee suffered an adverse employment action; and (4) the employer treated more favorably similarly-situated employees

¹ *Ortiz v. Werner Enterprises, Inc.*, No. 13 C 8270, 2016 U.S. App. LEXIS 15284 (7th Cir. Aug. 19, 2016).

² *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). This case focused on discrimination cases under Title VII of the Civil Rights Act of 1964, but has since been expanded to discrimination and retaliation cases asserted under a host of federal and state discrimination statutes.

outside the protected class (or replaced the employee with an individual outside the protected class). If the plaintiff can satisfy this prima facie case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse action. The burden then shifts back to the employee to come forward with evidence that this stated reason is a pretext for an unlawful discriminatory motive. Ultimately, the burden of proof always rests with the employee to “demonstrate by competent evidence that the presumptively valid reasons for [the adverse employment action] were in fact a coverup for [an unlawful] discriminatory decision.”³ Notably, *McDonnell Douglas* does not specify the type of evidence (direct or circumstantial) with which an employee must satisfy these burdens of proof.

If a judge determines that an employee satisfied these burdens of proof, the matter can advance to trial. At that time, the parties present evidence to the fact-finder (generally a jury), and the fact-finder determines the ultimate question – whether an employee’s protected class (e.g., race, age, disability, etc.) caused an adverse action (e.g., termination, failure to hire, etc.).⁴ But the jury does not look at evidence through the McDonnell Douglas burden-shifting framework – that role is reserved for the judge at the summary judgment stage only.⁵

Ortiz v. Werner – The Evidence

The plaintiff in Ortiz was employed as a freight broker from November 28, 2005 until his termination on June 19, 2012.⁶ The company terminated his employment for falsifying business records. Specifically, in order to improve his profit and increase his commission, the plaintiff removed his name as the broker from certain freight loads that were operating at a loss. When the plaintiff’s branch manager – who also hired him – learned what he had done, the manager terminated his employment at the recommendation of the vice president of the division. The plaintiff filed a lawsuit alleging race discrimination (he is Hispanic) and a hostile work environment.

In discovery, the plaintiff admitted to changing the business records, but claimed that other brokers – whom he could not identify – did the same. The company produced records reflecting all of the loads brokered out of the plaintiff’s branch for the relevant time period; of the 16,391 loads, brokers improperly removed their names from loads on six occasions. The plaintiff was responsible for four of those incidents. There was also testimony from “[s]everal brokers” that they and others sometimes removed their names from unprofitable loads (although it is unclear whether the company knew this occurred).

The company’s Employee Handbook and Code of Conduct prohibited falsifying company records. In July 2012, another freight broker – who is not Hispanic – was terminated for falsifying records that resulted in a higher bonus potential. In that case, the broker cut the mileage due to a carrier.

In support of his claims, the plaintiff testified that his branch manager and an assistant manager used racial slurs towards him. The plaintiff maintained that he encountered these insults throughout his seven years of employment, but that the comments increased in frequency and intensity in the months preceding his termination.

Both of the plaintiff’s claims were dismissed by the district court on summary judgment. The court looked at the evidentiary record through two lenses – direct evidence and indirect evidence, explaining that the two had different “methods of proof.” The district court first determined that the plaintiff could not prove his

3 *McDonnell Douglas*, 411 U.S. at 805.

4 *Postal Service v. Aikens*, 460 U.S. 711, 715 (1983); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

5 *Aikens*, 460 U.S. at 715; *Burdine*, 450 U.S. at 256.

6 *Ortiz v. Werner Enterprises, Inc.*, 2015 U.S. Dist. LEXIS 82952, *4 (N.D. Ill. June 25, 2015).

discrimination claim through the direct method of proof because he did not have the required “convincing mosaic” of evidence. In reaching this conclusion, the court disregarded the alleged racial slurs because the comments did not relate to the plaintiff’s termination. Next, following the *McDonnell Douglas* framework, the district court determined that the plaintiff did not satisfy his *prima facie* or pretext burdens and, therefore, could not prove his claims through the indirect method of proof. Specifically, the district court found that the plaintiff did not meet the company’s legitimate expectations, and there was no evidence that similarly-situated employees outside his protected class were treated more favorably.⁷

The Seventh Circuit Simplifies – But Does Not Ease – the Plaintiff’s Burden of Proof

In reversing the lower court, the Seventh Circuit stated that evidence should not be evaluated through dueling direct and indirect legal standards:

Evidence must be considered as a whole, rather than asking whether any particular piece of evidence proves the case by itself – or whether just the “direct” evidence does so, or the “indirect” evidence. Evidence is evidence. Relevant evidence must be considered and irrelevant evidence disregarded, but no evidence should be treated differently from other evidence because it can be labeled “direct” or “indirect.”⁸

To this point, the court overturned the precedent in its jurisdiction that (1) requires plaintiffs to come forward with a “convincing mosaic” of evidence, treating this as an additional legal standard; and/or (2) separates “direct” from “indirect” evidence and subjects the two to different legal standards.⁹

Initial commentators on *Ortiz* speculate that the Seventh Circuit is attempting to abolish the *McDonnell Douglas* framework. But on this point, the appellate court explained:

The burden-shifting framework created by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), sometimes is referred to as an “indirect” means of proving employment discrimination. Today’s decision does not concern *McDonnell Douglas* or any other burden-shifting framework, no matter what it is called as a shorthand. We are instead concerned about the proposition that evidence must be sorted into different piles, labeled “direct” and “indirect,” that are evaluated differently. Instead, all evidence belongs in a single pile and must be evaluated as a whole. That conclusion is consistent with *McDonnell Douglas* and its successors.¹⁰

This makes sense, as *McDonnell Douglas* did not create separate legal standards for “direct” and “indirect” evidence, or even address differences between direct and indirect evidence.

Despite this nod to *McDonnell Douglas*, the Seventh Circuit did not evaluate the *Ortiz* evidentiary record under the burden-shifting framework. There was no discussion of whether the plaintiff proffered sufficient evidence – direct or indirect – to satisfy his *prima facie* or pretext burdens. Rather, the court simply listed what it deemed were disputed issues of fact and remanded the case to the district court for a trial. Even so, *Ortiz* does not state – nor imply – an intention to undo the 30-year precedent of *McDonnell Douglas* or its progeny.

7 *Ortiz*, 2015 U.S. Dist. LEXIS 82952, at *15-16. The hostile work environment claim was dismissed because the plaintiff did not exhaust his administrative remedies – he did not appeal the dismissal of this claim.

8 *Ortiz*, 2016 U.S. App. LEXIS 15284, at *10-11.

9 *Ortiz*, 2016 U.S. App. LEXIS 15284, at *10, 12. The Seventh Circuit was particularly annoyed with the lower court’s reference to a “convincing mosaic” of evidence, explaining that the phrase was “designed as a metaphor to illustrate why courts should not try to differentiate between direct and indirect evidence.” *Id.* at *9.

10 *Ortiz*, 2016 U.S. App. LEXIS 15284, at *12-13.

Does *Ortiz* Affect Employers?

Some members of the plaintiffs' bar in the Seventh Circuit may erroneously champion *Ortiz* as the eradication of a plaintiff's burden of proof under *McDonnell Douglas* – the hurdle between asserting claims in a complaint and presenting them at trial. To that end, employers might see references to this case in summary judgment motions, and should be prepared to refute any overstatement of its holding.

Moreover, *Ortiz* does not affect employment-related decisions – such as hiring, discipline, or terminations – as employees alleging discrimination still bear the burden of proving those claims. To better position themselves to defend against meritless claims, employers should continue to document employment-related decisions, including the decision-making process and investigations; be honest with employees about the reasons for the employment action; and enforce employment policies and practices fairly and consistently.