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Death to the "Convincing Mosaic" Test in the Seventh Circuit

Courts in the Court of Appeals for the Seventh Circuit may no longer use "convincing mosaic" as a legal test or standard to determine whether there is sufficient evidence in an employment discrimination test. *Ortiz v. Werner Enters., Inc.*, No. 15-2574, 2016 WL 4411434, at *3-4 (7th Cir. Aug. 19, 2016). Courts are also precluded from separating "direct" and "indirect" evidence when analyzing summary judgment motions. *Ortiz*, 2016 WL 4411434, at *5. In *Ortiz v. Werner Enterprises, Inc.*, a Mexican freight broker, Henry Ortiz, was fired after seven years of employment for falsifying business records. *Id.* at *1. Ortiz sued Werner Enterprises under 42 U.S.C. § 1981 and the Illinois Human Rights Act, 775 ILCS 5/1-101 to 5/10-104, claiming that he was fired because of his Mexican ethnicity and that he was subjected to a hostile work environment under state law.

Freight brokers at Werner Enterprises were assigned to regions and were responsible for matching customers in need of transportation for loads with available carriers. *Ortiz*, 2016 WL 4411434, at *1. Freight brokers were eligible to earn commissions based on the difference between what Werner charged the customers and what the carriers charged to transport the load. *Id.* Ortiz claimed that in the months prior to his termination, Werner assigned him to a less lucrative region and that an assistant manager directed another broker to book six unprofitable loads in Ortiz's name. *Id.*

Werner terminated Ortiz after discovering that he changed records to reflect that he had not booked the loads or to show lower rates that he thought the carriers had agreed to charge. *Id.* Ortiz defended his conduct by claiming that brokers and managers always notify one another when booking an unprofitable load in some else's name and that it was atypical from someone else to book so many unprofitable loads without a courtesy email or phone call. *Id.* at *2. Ortiz claimed that he repeatedly questioned the assistant manager about the unprofitable load and, rather than answering, the manager responded: "Why won't you just quit already?" *Id.*

Ortiz asserted that he removed his name from three loads based on past practice in which branch managers permitted brokers to delete their names from unprofitable loads. *Id.* He also testified that the reason why he changed the other records to show lower rates charged by the carrier was because it is standard practice in the industry for freight brokers to negotiate a lower rate after a late delivery and he did so in this instance after three carriers had not picked up the load on time. *Id.* Ortiz claimed that he tried to provide this information to the branch manager at the time of his termination, but the manager showed no interest in verifying his allegations. *Id.* Ortiz also claimed that both the branch manager and assistant had frequently referred to him using a host of derogatory ethnic slurs, including "beaner," "taco eater," "dumb Mexican," "stupid Puerto Rican," and "dumb Jew," and that the frequency and intensity of these slurs increased in the months leading up to his discharge. *Id.*

Werner denied Ortiz's claims and moved for summary judgment, arguing that the claim of hostile work environment should be dismissed for failure to exhaust administrative remedies. *Id.* The district court granted summary judgment in favor of Werner on Ortiz's hostile work environment claim, which Ortiz did not appeal. *Id.* Werner also moved for summary judgment on the termination claim which the district court granted as well. *Id.* The district court analyzed the

evidence through the "direct" and "indirect" methods of proof without aggregating the possibilities to find an overall likelihood of discrimination. Ultimately, the district court concluded that Ortiz had failed to present a "convincing mosaic" under either method of proof. *Id.*

On appeal, the Seventh Circuit put a death knell to the "use of disparate methods and the search for elusive mosaics [which] has complicated and sidetracked employment-discrimination litigation for many years." *Id.* at *3. The court reversed eleven prior Seventh Circuit decisions (including one as recent as July 14, 2016) to the extent such opinions rely on "convincing mosaic" as a governing legal standard. *Id.* Practitioners be warned, the court further stated that "[f]rom now on, any decision of a district court that treats this phrase as a legal requirement in an employment discrimination case is subject to summary reversal, so that the district court can evaluate the evidence under the correct standard." *Id.* at *4.

The proper legal standard in discrimination cases is "whether the evidence would permit a reasonable factfinder to conclude that the plaintiff's race, ethnicity, sex, religion, or other proscribed factor caused the discharge or other adverse employment action." *Id.* All relevant evidence must be considered as a whole without regard to whether the evidence is direct or indirect. *Id.* The court then went on to reverse ten prior Seventh Circuit decisions which separated "direct" from "indirect" evidence and proceeded as if they were subject to different legal standards. *Id.* at *5. In making this ruling, the court clarified that its opinion had no effect on the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), which is sometimes referred to as an "indirect" means of proving employment discrimination. *Ortiz*, 2016 WL 4411434, at *5.

Following this proper standard, the court found that in light of anti-Hispanic comments by management and Ortiz's evidence that others engaged in similar practices without being terminated, a reasonable juror could infer that the supervisors did not like Hispanics and tried to pin heavy losses on Ortiz to force him out the door, and when that didn't work, they fired him for using techniques that were tolerated when practiced by non-Hispanic freight brokers. *Id.* In light of conflicting evidence on material facts, the Seventh Circuit reversed summary judgment on the discriminatory termination claim and remanded the case for a jury trial. *Id.* at *6.

In light of the *Ortiz* decision, attorneys drafting motions for summary judgment in employment discrimination cases based on federal law must be careful to avoid using the term "convincing mosaic" or analyzing the evidence by separating direct and indirect evidence. Attorneys should also use caution when citing any of the reversed Seventh Circuit decisions and should avoid referencing the now improper analyses employed in those decisions. Rather, each piece of evidence should be looked at in terms of whether such evidence would permit a reasonable factfinder to conclude that the plaintiff's protected status caused the adverse action.

About the Author

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