

7th Circuit: Mixed-Motive Claims Require Direct or Circumstantial Evidence of Discrimination

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By Michael G. McClory

An employee may not maintain a Title VII mixed-motive claim where he or she produces no direct or circumstantial evidence of discrimination, according to the 7th U.S. Circuit Court of Appeals.

In January 1991, the Federal Aviation Administration (FAA) hired Brian Grigsby, and in 1993 the FAA assigned him to its Indianapolis Center as a developmental air-traffic controller. The Indianapolis Center directs air traffic through much of the airspace around Indianapolis. As a developmental controller, Grigsby was to undergo training with the goal of becoming a certified professional controller at the Indianapolis Center.

Grigsby began but did not complete the training. While also working in the Indianapolis Tower, he became certified in various areas (flight data, arrival data and clearance delivery) and began the lengthy radar controller training for his professional certification. During this same time, Grigsby first learned of his Native American heritage; he took an interest in this heritage and shared his background with co-workers, some of whom allegedly called him insulting names, such as "Chief" and "Running Planes Together." While he did not file a complaint, in 1997 he transferred to an automated service station in Terre Haute, Ind.

Grigsby earned full performance-level certification at the Terre Haute facility and worked there until 2005, when the FAA began a reduction in force after deciding to privatize the Terre Haute and other automated facilities. To try to avoid layoff, Grigsby applied for a number of open positions at the Indianapolis Center. The FAA's human resource department rated Grigsby as "qualified" for each opening, and he was interviewed. However, the FAA did not select him for any of the positions; all candidates selected were certified professional controllers and were familiar with the radar and other technology in use at the Indianapolis Center. (That technology had undergone a significant upgrade in 2003.)

Grigsby sued the U.S. Department of Transportation (DOT), claiming that the FAA did not select him for any of the open positions because of his national origin, in violation of Title VII. The trial court granted summary judgment for the DOT, "holding that Grigsby failed to show that the hiring official was aware of his Native American origin, that he did not meet his burden to establish a prima-facie case, and that he did not offer sufficient evidence to infer discrimination under a mixed-motive theory." Grigsby appealed, and the 7th Circuit affirmed the decision.

Regarding direct evidence, the appellate court noted that Grigsby's only proffer was a claim that an interviewer "changed her demeanor" and ended the interview when he told her of his Native American heritage. The court stated that "unfriendly glances and other subtle indicia of distaste" are not enough to constitute direct evidence of discrimination.

Regarding indirect evidence, the appellate court found that Grigsby could not establish a prima-facie claim (that he is a member of a protected class, he applied for and was qualified for an open position, he was rejected for the position, and the position was filled with a person not in the protected class who had similar or lesser qualifications than the plaintiff). The court found Grigsby not qualified for the vacant positions; for each of them, Grigsby did not meet the requirement to be operationally current at the Indianapolis

Center, which requirement was included either in the FAA job postings or in FAA directives. Moreover, the court also found that all candidates selected had superior qualifications and were familiar with the technology in use at the Indianapolis Center.

Grigsby also asserted a mixed-motive claim. He argued that even if the FAA relied on legitimate reasons for not selecting him, race and national origin “entered into the calculus.” The appellate court disagreed. “To put forth a mixed-motive claim, Grigsby must nevertheless come forth with direct or circumstantial evidence of discrimination.” Because the court already had found no direct or circumstantial evidence, it stated that Grigsby’s “mixed-motive claim fails for this reason alone.” The court also rejected the claim because the evidence showed that the FAA would have made the same decision whether or not national origin had been a part of the decision-making process.

Grigsby v. LaHood, 7th Cir., No. 10-1072 (Dec. 6, 2010).

Professional Pointer: Documentation is an invaluable tool for an employer trying to prove that it acted for legitimate reasons and not for impermissible reasons. All parties agreed that Grigsby was a member of a protected class and had not been selected for any of the open positions he sought. The FAA was able to avoid being found in violation of Title VII because it was able to demonstrate, with documentation, the qualifications for the particular positions and the superior qualifications of the successful candidates.

*Michael G. McClory is an attorney with **Bullard Smith Jernstedt Wilson**, the **Worklaw® Network** member firm in Portland, Ore.*

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Society for Human Resource Management

1800 Duke Street
Alexandria, Virginia
22314 USA

Phone US Only: (800) 283-
SHRM
Phone International: +1 (703)
548-3440

TTY/TDD (703) 548-
6999
Fax (703) 535-6490

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