Boston College Law Review

Volume 53
Issue 6 *Electronic Supplement*

Article 2

2-16-2012

Proof of Discrimination at Summary Judgment: The Eighth Circuit's Focus on Categories of Evidence in *Torgerson v. City of Rochester*

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PROOF OF DISCRIMINATION AT SUMMARY JUDGMENT: THE EIGHTH CIRCUIT'S FOCUS ON CATEGORIES OF EVIDENCE IN *TORGERSON v. CITY OF ROCHESTER*

Abstract: On June 1, 2011, the U.S. Court of Appeals for the Eighth Circuit, in *Torgerson v. City of Rochester,* granted summary judgment for the employer, the City of Rochester, by holding that the plaintiffs had failed to produce sufficient direct or indirect evidence of discrimination. On appeal, the en banc Eighth Circuit categorized plaintiffs' evidence and asked whether each piece, on its own, created a genuine issue of material fact. This Comment argues that the court's preoccupation with categorizing evidence distracted it from determining whether discrimination occurred. Therefore, courts should adopt the dissent's totality of the evidence approach, in which all of the evidence is considered in context when making a summary judgment determination.

Introduction

On June 1, 2011, the U.S. Court of Appeals for the Eighth Circuit, sitting en banc, in *Torgerson v. City of Rochester* affirmed summary judgment in favor of the City of Rochester, the employer in an employment discrimination case.[1] The dispute arose in 2005 when the plaintiffs, a Native American man and a woman, applied for vacant firefighter positions but were not selected from the pool of candidates.[2] The plaintiffs argued that summary judgment should not be granted in "very close" employment discrimination cases.[3] Nonetheless, the Eighth Circuit held that summary judgment is always appropriate in employment discrimination disputes and concluded that the plaintiffs failed to produce sufficient evidence to create a genuine issue of material fact as to whether discrimination occurred.[4]

The court focused on the types of evidence the plaintiffs produced; first it determined whether there was direct evidence of discrimination, and then it reviewed the proffered indirect evidence.[5]

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[1] 643 F.3d 1031, 1036 (8th Cir. 2011) (en banc).

[2] *Id.* at 1036, 1038.

[3] *Id.* at 1043.

[4] *Id.* at 1043, 1046, 1052.

[5] *See id.* at 1043–44.

This Comment argues that the majority focused too much on labeling the types of evidence presented and, instead, should have performed a substantive review of the totality of the evidence.[6] In the first part of the court's analysis, it dismissed alleged discriminatory remarks because the remarks did not meet the court's definition of direct evidence.[7] Even though the remarks were not facially discriminatory, the court should have considered them in the second part of its analysis when determining whether the plaintiffs created an inference of unlawful discrimination.[8] Accordingly, this Comment contends that the court should adopt the dissent's totality of the evidence approach at summary judgment to determine whether discrimination occurred.[9]

Part I of this Comment presents the relevant procedural history and facts of the *Torgerson* dispute.[10] Part II discusses the Eighth Circuit's categorization of direct and indirect evidence at summary judgment in employment discrimination cases, describing various approaches to making those categorizations.[11] Finally, Part III argues that the Eighth Circuit should adopt a more holistic review of the evidence to determine whether plaintiffs present a genuine issue of material fact sufficient to reach a jury.[12]

I. The Facts of the *Torgerson* Dispute

In 2005, David Torgerson, a Native American job applicant, and Jami Kay Mundell, a female job applicant, each applied for positions with the fire department of the City of Rochester (the "City").[13] The City hired applicants in accordance with a statutory, civil service process.[14] To earn appointment as a firefighter, applicants proceeded through three qualification "Phases."[15] At Phase I and II, applicants took written

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[6] *See id.* at 1055–56 (Smith, J., dissenting); *see also* Timothy M. Tymkovich, *The Problem with Pretext,* 85 Denv. U. L. Rev. 503, 519–22 (2008) (arguing that when courts compartmentalize evidence they become distracted from determining whether the totality of the evidence supports a finding of discrimination).

[7] *See Torgerson,* 643 F.3d at 1044–46.

[8] *See id.* at 1055–56 (Smith, J., dissenting); *see also* Michael J. Zimmer, *A Chain of Inferences Proving Discrimination,* 79 U. Colo. L. Rev. 1243, 1255 (2008) (discussing the Supreme Court's use of non-direct evidence as proof of pretext).

[9] *Torgerson,* 643 F.3d at 1056 (Smith, J., dissenting).

[10] *See infra* notes 13–36 and accompanying text.

[11] *See infra* notes 37–87 and accompanying text.

[12] *See infra* notes 88–128 and accompanying text.

[13] *See Torgerson,* 643 F.3d at 1038.

[14] *Id.* at 1036.

[15] *Id.* at 1036–37.

and physical examinations.[16] If applicants passed the first two Phases, they proceeded to Phase III in which they interviewed with a three-person panel.[17] The City scored applicants based on the three stages and created a numerically ranked eligibility list.[18] Forty-eight applicants were certified on the 2005 eligibility list; Torgerson ranked forty-fifth and Mundell ranked fortieth.[19]

In late 2005 and early 2006, Fire Chief David Kapler requested that the City send candidates for interviews to fill seven vacant firefighter positions.[20] Three of the positions were funded by Staffing Adequate Fire and Emergency Response (SAFER) grants that required the City, to the extent possible, to recruit and hire minority and female firefighter applicants.[21] The top nine ranked candidates were certified for the Phase III interview.[22] Additionally, the City certified three protected-group applicants, including the plaintiffs, in accordance with SAFER grant requirements.[23]

Each applicant met with Fire Chief Kapler for the final interview.[24] Kapler stated that he was looking for "something that might have been missed" when interviewing the plaintiffs—attributes that showed they were strong candidates regardless of their test scores.[25] Despite reaching the final stage, however, neither Torgerson nor Mundell were selected for firefighter positions.[26] Kapler explained that both candidates were less qualified than their scores indicated; he deemed Torgerson an awkward communicator and Mundell not a "standout."[27]

Concerns arose after the City appointed seven non-protected class candidates to firefighter positions.[28] A City Council Member investigated the hiring process and asked Kapler why he failed to select pro-

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[16] *Id.* at 1036.

[17] *Id.* at 1037.

[18] *Id.*

[19] *Torgerson,* 643 F.3d at 1038–39.

[20] *Id.* at 1039.

[21] *Id.* at 1038. SAFER grant's "Grantee Responsibilities" section stated: "Grantees, to the extent possible, will seek, recruit, and appoint members of racial and ethnic minority groups and women to increase their ranks within the applicant's department." *Id.*

[22] *Id.* at 1037.

[23] *Id.* at 1039–40.

[24] *Id.* at 1040.

[25] *Torgerson,* 643 F.3d at 1040.

[26] *Id.* at 1041.

[27] *Id.* at 1040.

[28] *Id.* at 1041.

tected-group applicants.[29] In response, Kapler stated that he found the plaintiffs "unfit."[30]

After the inquiry, Torgerson and Mundell asserted disparate treatment claims against the City for discrimination in violation of Title VII of the Civil Rights Act and the Minnesota Human Rights Act.[31] Torgerson claimed discrimination based on national origin and Mundell claimed discrimination based on gender.[32] Each alleged that impermissible discrimination motivated their unfavorable reviews in Phase III of the hiring process.[33] The U.S. District Court for the District of Minnesota granted summary judgment in favor of the City.[34] The plaintiffs then appealed to a panel of the Eighth Circuit that reversed the decision.[35] Yet, on rehearing en banc, the Eighth Circuit vacated the panel decision and entered judgment in favor of the City.[36]

II. The Eighth Circuit's Attention to Categories of Evidence

Since the passage of Title VII of the Civil Rights Act of 1964, the landscape of disparate treatment litigation has evolved significantly.[37] In particular, a dynamic area of employment discrimination law concerns summary judgment standards.[38] Because discrimination in the workplace is rarely documented, plaintiffs face significant challenges to proving that they were treated differently than similarly situated co-

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[29] *Id.* at 1041–42.

[30] *Id.* at 1042.

[31] *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000-e to -17 (2006); Minnesota Human Rights Act, Minn. Stat. §§ 363A.01 to .41 (2006); *Torgerson,* 643 F.3d at 1031, 1036, 1042. Initially, Torgerson and Mundell filed discrimination charges at the Minnesota Department of Human Rights (MDHR) and the federal Equal Employment Opportunity Commission (EEOC). *Torgerson,* 643 F.3d at 1042. The MDHR and the EEOC dismissed the claims, and Torgerson and Mundell filed suit in the U.S. District Court for the District of Minnesota. *Id.*

[32] *Torgerson,* 643 F.3d at 1036.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *See* Leland Ware, *Inferring Intent from Proof of Pretext: Resolving the Summary Judgment Confusion in Employment Discrimination Cases Alleging Disparate Treatment,* 4 Emp. Rts. & Emp. Pol'y J. 37, 37–38 (2000) (observing that employment discrimination disputes constitute a large portion of federal district courts' dockets because employment rights affect most individuals, and explaining that requirements necessary to prove discrimination have changed several times since the passage of Title VII).

[38] *See id.* at 38–39.

workers due to their membership in protected classes.[39] As such, *Torgerson* demonstrates how evidentiary challenges affect whether plaintiffs survive summary judgment in disparate treatment litigation.[40]

In *Torgerson,* the district court granted summary judgment and the circuit court panel reversed; then, the en banc circuit court reversed the panel's judgment.[41] These inconsistent outcomes reflect the confusion among district and circuit courts considering disparate treatment allegations at summary judgment.[42] The threshold question is whether there is a separate standard of review at summary judgment for employment discrimination cases.[43] Then, assuming discrimination cases are treated like other cases, courts must determine the types and strength of evidence required for the case to reach a jury.[44]

The plaintiffs in *Torgerson* argued that summary judgment should be used sparingly in employment discrimination cases because evidence of discriminatory animus often remains with the defendant.[45] Nonetheless, the en banc court abrogated prior Eighth Circuit case law and firmly stated that summary judgment is appropriate for all actions, including discrimination actions.[46]

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[39] *See* U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1982); Ware, *supra* note 37, at 39; Tristin K. Green, Comment, *Making Sense of the McDonnell Douglas Framework: Circumstantial Evidence and Proof of Disparate Treatment Under Title VII,* 87 Calif. L. Rev. 983, 1005 (1999).

[40] *See* Torgerson v. City of Rochester, 643 F.3d 1031, 1046, 1052 (8th Cir. 2011) (en banc); Ware, *supra* note 37, at 39; *see also* Phyllis T. Baumann et al., *Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases,* 33 B.C. L. Rev. 211, 232 (1992) (noting that a plaintiff's inability to access a defendant's subjective state of mind "makes it virtually impossible for plaintiffs to prevail").

[41] *Torgerson,* 643 F.3d at 1036.

[42] *See* Green, *supra* note 39, at 985; *see also* Thomas F. Kondro, Comment, *Mixed Motives and Motivating Factors: Choosing a Realistic Summary Judgment Framework for § 2000e-2(m) of Title VII,* 54 St. Louis U. L.J. 1439, 1439–40, 1449 (2010) (discussing the circuit split concerning the types of evidence required for § 2000e-2(m), or mixed-motive discrimination, claims).

[43] *See Torgerson,* 643 F.3d at 1043.

[44] *See id.* at 1043–44.

[45] *See id.* at 1043; *see also* Smith v. Fairview Ridges Hosp., 625 F.3d 1076, 1082 (8th Cir. 2010) (holding that summary judgment should be used sparingly in employment discrimination cases as it is an improper remedy in "very close" cases).

[46] *See Torgerson,* 643 F.3d at 1043 (explaining that prior Eighth Circuit panel statements asserting higher summary judgment standards in employment discrimination cases nonetheless resulted in the affirmation of summary judgment, and that, in several instances, panels granted summary judgment for the employers); Ware, *supra* note 37, at 43; *see also Aikens,* 460 U.S. at 716 (holding that Title VII disputes should be treated just as any other question of fact).

A. *Evaluating Disparate Treatment Claims at Summary Judgment*

Although in *Torgerson* the Eighth Circuit held that summary judgment was procedurally proper, courts in disparate treatment employment claims apply a specific framework established by two seminal Supreme Court cases.[47] First, in 1973, the Supreme Court, in *McDonnell Douglas Corp. v. Green,* devised the first summary judgment framework unique to Title VII disputes.[48] Under this framework, plaintiffs may rely solely on circumstantial evidence to create an inference of discriminatory motive.[49] The Court reasoned that facially biased remarks in the workplace rarely occur, recognizing that circumstantial evidence ensures plaintiffs of their day in court.[50] Second, in 1985, the Supreme Court in *Trans World Airlines, Inc. v. Thurston* clarified its prior holding, stating that if plaintiffs prove intent with direct evidence then the *McDonnell Douglas* test does not apply.[51]

An important dichotomy emerged from the *Trans World Airlines* clarification: the framework applied at summary judgment differs depending on whether plaintiffs produce circumstantial or direct evidence of discrimination.[52] Direct evidence proves discrimination on its face, prompting the court to move on to review any asserted affirmative defenses.[53] But, in the absence of direct evidence, a plaintiff must unpack the employer's adverse decision to reveal a discriminatory motive.[54] In effect, by creating different frameworks for summary judgment, the Court predicated a plaintiff's success on a court's categorization of the plaintiff's evidence as direct or indirect.[55]

B. *Direct Evidence v. Indirect Evidence*

Three definitions of "direct evidence" emerged from the circuit courts in disparate treatment cases.[56] The differences, however, may

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[47] *See* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804–05 (1973); *Torgerson,* 643 F.3d at 1043–44.

[48] *See* 411 U.S. at 804–05; *see also* Tymkovich, *supra* note 6, at 503 (discussing the *McDonnell Douglas* framework).

[49] *See McDonnell Douglas,* 411 U.S. at 804–05; *see also* Green, *supra* note 39, at 985 (explaining that the *McDonnell Douglas* framework relies on circumstantial evidence).

[50] *See Trans World Airlines,* 469 U.S. at 121 (explaining its reasoning in *McDonnell*).

[51] *See id.*

[52] *See id.*

[53] *See id.* at 121–22.

[54] *See* Tymkovich, *supra* note 6, at 505.

[55] *See infra* notes 56–77 and accompanying text.

[56] *See* Fernandes v. Costa Bros. Masonry, 199 F.3d 572, 581–82 (1st Cir. 1999) (stating that circuit courts apply three different definitions of direct evidence); Kenneth R. Davis,

continue to shift as the Supreme Court's 2003 decision in *Desert Palace, Inc. v. Costa* is interpreted by the lower courts.[57] In *Costa,* the Court held that the jury was entitled to an instruction that *any* evidence may be used to show that discrimination was a motivating factor in an adverse employment action.[58] At its narrowest, *Costa* applies only to jury instructions in cases in which a plaintiff claims discrimination was one of several motivations underlying the employment decision.[59] Yet, creating a circuit split, some courts have suggested that *Costa*'s holding may apply at summary judgment as well, effectively replacing the *McDonnell Douglas* framework.[60]

In the midst of this confusion, the circuit courts continue to analyze the distinctions between the three types of direct evidence.[61] The first, traditional approach describes direct evidence as "evidence that proves a fact at issue without the need to draw any inference."[62] Here, the evidence *must be* a statement by a decision-maker made at the time

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Price-Fixing: Refining the Price Waterhouse *Standard and Individual Disparate Treatment Law,* 31 Fla. St. U. L. Rev. 859, 878–81 & n.98 (2004).

[57] *See* 539 U.S. 90, 91 (2003); Michael Heise & David Sherwyn, *The Gross Beast of Burden of Proof: Experimental Evidence on How the Burden of Proof Influences Employment Discrimination Outcomes,* 42 Ariz. St. L.J. 901, 916 (2010). For example, some commentators have noted:

> The relevance of *McDonnell Douglas* after *Costa* has been hotly debated in courts and numerous law review articles. The debate is heated and complex because the schemes are not the result of any thoughtful coherent policy. Instead, they arise out of layered case law analyzing Title VII, the [Civil Rights Act] of 1991, and the other discrimination statutes. There has never been Congressional action addressing the issue or a Supreme Court opinion deciding whether the two systems can still co-exist.

Heise & Sherwyn, *supra,* at 916–17.

[58] *See Costa,* 539 U.S. at 91.

[59] *See* Griffith v. City of Des Moines, 387 F.3d 733, 735 (8th Cir. 2004) (holding that the *Costa* decision refers to jury instructions and does not extend to summary judgment in employment discrimination cases); *see also* Heise & Sherwyn, *supra* note 57, at 916–17.

[60] *See* Heise & Sherwyn, *supra* note 57, at 918–19. The Sixth Circuit no longer applies *McDonnell Douglas* to mixed-motive cases at summary judgment; instead, it asks whether the adverse action was motivated by discrimination. *Id.* at 918. The Fifth and Second Circuits adopted a modified-*McDonnell Douglas* test that allows plaintiffs to present either evidence of pretext or motivating-factors. *Id.* The Eighth and Eleventh Circuits strictly apply *McDonnell Douglas* at summary judgment. *Id.* The Fourth, Ninth, and D.C. Circuits allow plaintiffs to argue their case using either the *McDonnell Douglas* or *Costa* framework. *Id.* at 919. As of 2010, the remaining circuits have no clear rule on the matter. *Id.* at 919; *see also* Kondro, *supra* note 42, at 1447–55, 1458–59 (discussing the circuit split after *Costa*).

[61] *See* Heise & Sherwyn, *supra* note 57, at 916 (explaining that in 2008–2009, every federal circuit applied the *McDonnell Douglas* framework).

[62] *See* 1 Charles A. Sullivan & Lauren M. Walter, Employment Discrimination Law and Practice 93 (4th ed. 2009) (discussing the traditional definition of direct evidence as applied in the circuits); Davis, *supra* note 56, at 878–79.

of or with regard to the adverse employment action.[63] Thus, a remark by someone with hiring authority, such as "I did not promote [the candidate] because [the candidate is] black," would constitute direct evidence.[64]

Under the second approach, direct evidence includes remarks that reflect a discriminatory attitude, even if those remarks are not proximately tied to the adverse employment action.[65] For example, in 2004, in *DiCarlo v. Potter,* the U.S. Court of Appeals for the Sixth Circuit held that a decision-maker's derogatory statements about a postal worker's national origin made three weeks prior to the worker's termination sufficed as direct evidence.[66]

Finally, the most liberal approach defines direct evidence based on the quality or strength of the proof.[67] The Eighth Circuit adopted this liberal definition, holding in *Torgerson* that direct evidence refers to evidence that shows a strong causal link between an adverse employment decision and impermissible discriminatory motives.[68] Under this approach, direct evidence and circumstantial evidence are not opposing terms.[69] Instead, direct evidence of a discriminatory motive can include "strong" circumstantial evidence that is not subject to a *McDonnell Douglas* analysis.[70] The remaining circumstantial evidence that does not point "clearly" to discrimination is categorized as indirect evidence that can only be used to create an inference of discriminatory motive.[71]

Applying its liberal, direct evidence definition, the en banc court in *Torgerson* analyzed two pieces of evidence to determine whether they

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[63] Sullivan & Walter, *supra* note 62, at 93. In some instances, non-statements, such as a head nod, in affirmation of a remark may constitute direct evidence. *See id.* at 93 n.170.

[64] Davis, *supra* note 56, at 879.

[65] Sullivan & Walter, *supra* note 62, at 95 & n.175.

[66] *See* 358 F.3d 408, 417 (6th Cir. 2004).

[67] *See Torgerson,* 643 F.3d at 1044; *see also* Sullivan & Walter, *supra* note 62, at 95 (explaining that direct evidence relates to "the quality of the proof rather than the kind").

[68] *Torgerson,* 643 F.3d at 1044 (holding that "direct evidence is evidence 'showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated' the adverse employment action" (quoting Thomas v. First Nat'l Bank of Wynne, 111 F.3d 64, 66 (8th Cir. 1997))).

[69] *Id.*

[70] *Id.* The court explained: "A plaintiff with strong (direct) evidence that illegal discrimination motivated the employer's adverse action does not need the three-part *McDonnell Douglas* analysis to get to the jury, regardless of whether his strong evidence is circumstantial." *Id.*

[71] *Id.*

constituted direct evidence.[72] First, the plaintiffs established that City Commissioner Roger Field said he would not have taken the SAFER grants had he known that it required hiring protected-class applicants.[73] Although the Eighth Circuit used the broadest definition of direct evidence, the court was doubtful that the Commissioner was a "decision-maker," and held that, even if he were, the remark did not demonstrate discriminatory animus because the law does not require preferential treatment for minority applicants.[74] Second, the plaintiffs showed that City Commissioner John Withers, a hiring decision-maker, selected an applicant because he was a "big guy and that he'd make a good firefighter."[75] Again, the panel rejected the remark as direct evidence because the statement was not made with regard to Mundell; rather, the remark was made in reference to another applicant.[76] In sum, the proffered evidence failed to meet the threshold of direct evidence, and, importantly, the panel disregarded this evidence throughout the remainder of its analysis.[77]

Without direct evidence, the plaintiffs turned to the *McDonald Douglas* three-part test that, if satisfied, permits an inference of unlawful discrimination sufficient to survive summary judgment.[78] Under this test, if the plaintiffs state a prima facie case, then the defendant must proffer a legitimate, non-discriminatory reason for the adverse action.[79] The burden then reverts to the plaintiffs, who must then demonstrate a genuine issue of material fact that the defendant's stated reason is mere pretext for unlawful discrimination.[80] In *Torgerson,* the parties satisfied the first two elements.[81] Therefore, the plaintiffs had to meet their stage three burden of proving that the City's proffered reason for not hiring them was pretextual.[82]

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[72] *Id.*

[73] *Id.*

[74] *Torgerson,* 643 F.3d at 1044–45.

[75] *Id.* at 1045.

[76] *Id.* at 1046.

[77] *See id.*; *id.* at 1056, 1058 (Smith, J., dissenting).

[78] *See id.* at 1044 (majority opinion) (explaining that all indirect evidence is subject to the *McDonnell Douglas* test).

[79] *Id.* at 1046. A plaintiff can establish a prima facie case of discrimination in the hiring process if the applicant can show that the applicant was (1) in a protected class; (2) qualified for the open position; (3) denied that position; and that (4) the employer filled that position with a person who was not in the protected class. *Id.*

[80] *Torgerson,* 643 F.3d at 1046.

[81] *See id.* at 1047.

[82] *Id.*

Pretextual evidence refers to indirect, circumstantial evidence that shows, through inferential reasoning, that a discriminatory reason rather than the proffered "legitimate" reason actually motivated the employment decision.[83] Examples of pretextual evidence are statistics on hiring practices, comparisons of applicants' qualifications, or prior treatment of an employee.[84] To prove pretext in *Torgerson,* the plaintiffs pointed to (1) their qualifications as applicants, (2) the subjectivity of the hiring process, (3) the different standards used by the Fire Chief in interviewing the protected-class applicants, (4) the Fire Chief's reference to the plaintiffs as "unfit," and (5) the hiring of five males the year after the challenged hirings.[85] The panel rejected the evidence as insufficient proof of pretext, indicating that the plaintiffs were not similarly situated to the hired firefighters because they ranked below the selected applicants on the eligibility list.[86] Therefore, without a showing of direct or indirect evidence, the plaintiffs failed to create a genuine issue of material fact sufficient to survive summary judgment.[87]

III. Courts Should Adopt the Totality of the Evidence Approach

The majority opinion in *Torgerson* shows that plaintiffs' success at summary judgment depends on whether they can accurately identify the strength of their circumstantial evidence and not whether discrimination occurred.[88] The Eighth Circuit applies the broadest test for direct evidence, indicating that even circumstantial evidence can be direct evidence if it is "strong."[89] Plaintiffs benefit from such a liberal test because outright discriminatory remarks are uncommon and direct

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[83] *See id.*

[84] *See McDonnell Douglas,* 411 U.S. at 804–05; *see also* Sullivan & Walter, *supra* note 62, at 122–25 (analyzing methods used in Supreme Court cases of proving pretext); Tymkovich, *supra* note 6, at 512–15 (discussing types of pretext evidence in disparate treatment litigation).

[85] *See Torgerson,* 643 F.3d at 1047. Plaintiffs can establish pretext in a variety of ways, such as by showing (1) that an employer's justification lacks credibility because it has no factual basis or (2) that an illegal reason, as compared to the stated reason, more likely motivated the adverse employment action. *Id.*

[86] *See id.* at 1049–52.

[87] *See id.* at 1052.

[88] *See* Torgerson v. City of Rochester, 643 F.3d 1031, 1055–56 (8th Cir. 2011) (en banc) (Smith, J., dissenting); Tymkovich, *supra* note 6, at 519–22 (arguing that courts, by compartmentalizing evidence, focus on categorizing evidence even while ignoring the evidence in its totality).

[89] *See Torgerson,* 643 F.3d at 1044. *Compare Torgerson,* 643 F.3d at 1038 (Shephard, J., concurring) (arguing that the Eighth Circuit should not incorporate circumstantial evidence within its definition of direct evidence), *with* Bakhtiari v. Lutz, 507 F.3d 1132, 1135–36 & n.3 (8th Cir. 2007) (holding that circumstantial evidence may constitute direct evidence).

evidence, on its own, creates a genuine issue of material fact.[90] Yet, this benefit backfires when plaintiffs overestimate the strength of their circumstantial evidence.[91] If an alleged discriminatory remark, offered as direct evidence, does not clearly reflect discriminatory motive, then that evidence is not considered again in the *McDonnell Douglas* analysis.[92] This Comment argues that such an approach is unfair to plaintiffs; therefore, courts should adopt the totality of the evidence approach.[93]

In *Torgerson,* Judge Lavenski Smith, dissenting, argued that all circumstantial evidence, regardless of strength, should be analyzed as evidence of pretext, and that the majority's fixation on categories of evidence diverted the court's attention away from the ultimate issue: whether there was sufficient evidence of discrimination.[94] The remarks pertaining to the SAFER grants' requirements and the hiring of a "big guy" may not expressly reveal discriminatory intent.[95] Yet, even if the statements were not direct evidence, the remarks should inform the pretext analysis.[96] As Judge Smith noted, a reasonable person could infer that Commissioner Field was "opposed to hiring women and minorities under any circumstance, mandatory or otherwise"; in contrast, the majority assumed that the Commissioner disagreed generally with mandatory hiring requirements.[97] Further, Commissioner Wither's "big guy" comment expressly referenced gender; this might be interpreted at trial as his favoring male over female firefighters.[98]

The Supreme Court has cautioned against a compartmentalized analysis like that used by the Eighth Circuit in *Torgerson.*[99] For example, in 2000, in *Reeves v. Sanderson Plumbing Products, Inc.*, the Court empha-

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[90] *See* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985); U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1982) (noting that a plaintiff rarely has eyewitness testimony as proof of an employer's mindset).

[91] *See Torgerson,* 643 F.3d at 1056–58 (Smith, J., dissenting) (arguing that the direct evidence offered created disputed issues of material fact as to whether the City's proffered reason for not hiring Torgerson and Mundell was pretextual).

[92] *See id.* at 1055.

[93] *See infra* notes 94–128 and accompanying text.

[94] *See Torgerson,* 643 F.3d at 1055–56 (Smith, J., dissenting).

[95] *See id.* at 1056–58.

[96] *See id.* at 1055, 1058; Zimmer, *supra* note 8, at 1255 (arguing that "direct, direct-lite, or circumstantial evidence, or a combination of the three" can be used to prove pretext).

[97] *Torgerson,* 643 F.3d at 1056 (Smith, J., dissenting).

[98] *See id.* at 1058.

[99] *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 152–53 (2000); Tymkovich, *supra* note 6, at 519–20; Zimmer, *supra* note 8, at 1254–55; *see also* Michael Zimmer, *The New Discrimination Law:* Price Waterhouse *Is Dead, Whither* McDonnell Douglas?, 53 Emory L.J. 1887, 1907–08 (2004) (noting that, in *Reeves,* the Court held that nondirect evidence should still be considered as proof of pretext).

sized that judges should consider all of the evidence when making a summary judgment determination and should not treat the evidence in isolated categories.[100] In *Reeves,* the Supreme Court found that the Fifth Circuit erroneously discredited ageist remarks that did not meet its definition of direct evidence.[101] The Supreme Court reasoned, however, that non-direct evidence may still be persuasive evidence that shows that the employer's stated reason for termination was pretextual.[102] Further, by not considering the ageist remarks for the *McDonnell Douglas* analysis, the Fifth Circuit supplanted its judgment for that of the jury.[103] Thus, to prevent judges from usurping jury functions, the *Reeves* Court instructed lower courts to analyze plaintiffs' evidence in its entirety.[104] Such an instruction seems particularly relevant in the Eighth Circuit because of the vague distinction separating direct-circumstantial from indirect-circumstantial evidence.[105]

The Eighth Circuit's focus on types of evidence should be set aside in exchange for what Judge Smith termed the "*totality* of the evidence" approach.[106] Under this test, which is consistent with *Reeves,* direct and indirect evidence can be used as proof of pretext.[107] For example, if the court reconsidered Commissioner Field's remarks regarding the SAFER grants as indirect evidence, the focus would shift away from his status as a decision-maker.[108] Instead, the court would consider whether a jury could reasonably infer from his statement that Field harbored discriminatory animus.[109] The totality approach shifts the court's attention away from a strength test and allows unfettered analysis on the ultimate question of whether discrimination occurred.[110]

To persuade courts to send questions of discrimination to the jury, practitioners should argue that their circumstantial evidence is relevant as direct and indirect proof of discrimination.[111] In *Torgerson,* the plaintiffs' attorney attempted to avoid the direct-indirect divide by arguing

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[100] *See* 530 U.S. at 152–53.

[101] *See id.* (holding that the ageist remarks were not made in relation to the plaintiff's termination).

[102] *See id.* at 153.

[103] *See id.*

[104] *See id.* at 152–53.

[105] *See id.*; *Torgerson,* 643 F.3d at 1044.

[106] *See Torgerson,* 643 F.3d at 1056 (Smith, J., dissenting).

[107] *See Reeves,* 530 U.S. at 153; *Torgerson,* 643 F.3d at 1055–56 (Smith, J., dissenting); Tykomovich, *supra* note 6, at 519; Zimmer, *supra* note 8, at 1254–55.

[108] *See Reeves,* 530 U.S. at 152–53; *Torgerson,* 643 F.3d at 1056 (Smith, J., dissenting).

[109] *See Reeves,* 530 U.S. at 152–53; *Torgerson,* 643 F.3d at 1056 (Smith, J., dissenting).

[110] *See Torgerson,* 643 F.3d at 1055 (Smith, J., dissenting).

[111] *See id.* at 1055–56.

that summary judgment should be used sparingly in employment discrimination disputes.[112] The court firmly rejected this position.[113] Therefore, rather than trying to dispose of summary judgment generally, practitioners should rethink the pretext prong of the *McDonnell Douglas* analysis.[114] Specifically, after the employer proffers a reason for its adverse action, a plaintiff's attorney should argue that the evidence should be considered in its entirety.[115] Accordingly, the most egregious remarks and more nuanced statements would be analyzed together as evidence of pretext.[116] By framing the evidence in its totality and placing it in context, a plaintiff's attorney can more effectively establish a genuine issue of material fact.[117]

Finally, the totality approach is fairer to plaintiffs than the approach adopted by the Eighth Circuit.[118] The *McDonnell Douglas* Court recognized the limitations faced by plaintiffs who lack clear proof of discrimination.[119] Allowing procedure to overshadow the substance of the evidence diminishes the benefits of *McDonnell Douglas.*[120] Furthermore, the procedural approach taken by the Eighth Circuit majority in *Torgerson* leads to two disadvantages: losing relevant evidence to classification schemes and losing control over the big picture.[121] Under a compartmentalized approach, not only must plaintiffs produce incriminating evidence, but they must also accurately predict the proce-

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[112] Plaintiffs-Appellants Reply Brief with Supplemental Addendum at 15, *Torgerson,* 643 F.3d 1031 (No. 09-1131).

[113] *See Torgerson,* 643 F.3d at 1043.

[114] *See* Tymkovich, *supra* note 6, at 521 (arguing that courts should consider the evidence in its totality rather than divide the presentation of evidence into stages under the *McDonnell Douglas* analysis).

[115] *See* Laina R. Reinsmith, *Proving an Employer's Intent: Disparate Treatment Discrimination and the Stray Remarks Doctrine After* Reeves v. Sanderson Plumbing Products, 55 VAND. L. REV. 219, 255 (2002).

[116] *See id.*

[117] *See id.* at 255–56.

[118] *See Torgerson,* 643 F.3d at 1055–56 (Smith, J., dissenting).

[119] *See* Reinsmith, *supra* note 115, at 229 & n.63.

[120] *See* Natasha T. Martin, *Pretext in Peril,* 75 MO. L. REV. 313, 344 (2010). "It is precisely courts' misuses of procedure in conjunction with their treatment of Title VII's substantive requirements that have endangered the pretext element of McDonnell Douglas, reducing it to be nearly meaningless in the totality of plaintiffs' proof." *Id.*

[121] *See id.* (noting that it is unclear what types of evidence are sufficient to survive summary judgment); *see also* Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229, 2324 (1995) (maintaining that "evidence takes its meaning from context").

dural preferences of the judges.[122] *Torgerson* shows that judges will disregard evidence in its entirety if categorized improperly.[123] By focusing on evidentiary procedure rather than the substance of the evidence, judges can manipulate genuine issues of material fact and take cases away from the jury.[124] In contrast, under the totality approach, any relevant evidence of discrimination must go to the fact finder.[125] At trial, plaintiffs can present the sum of their evidence with live testimony.[126] Then, after hearing the evidence in context, jurors can determine whether the employer's decision not to hire a protected-class applicant was motivated by discriminatory animus.[127] This is what Title VII intended.[128]

Conclusion

The ultimate question in *Torgerson* is whether impermissible discrimination motivated the hiring process. The majority answers this question by compartmentalizing the plaintiffs' evidence and asking if each piece on its own created a genuine issue of material fact. If the plaintiffs' categorized a remark as direct evidence and it failed as proof of discrimination on its face, then that evidence was not reconsidered. Under this approach, plaintiffs are forced into a guessing game: they must determine if their circumstantial evidence is strong enough to survive as direct evidence. In *Torgerson,* the plaintiffs guessed wrong and, as a result, their case was dismissed. The mechanics of the summary judgment framework distracted the Eighth Circuit court from determining whether discrimination motivated the hiring process. Therefore, courts should adopt the totality of the evidence approach. Under this approach, all of the plaintiffs' evidence would be analyzed

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[122] *See* Wells v. Colo. Dep't of Transp., 325 F.3d 1205, 1225 (10th Cir. 2003) (Hartz, J., concurring) (questioning why failed "direct evidence" is abandoned prior to the *McDonnell Douglas* analysis); Martin, *supra* note 120, at 344.

[123] *See Torgerson,* 643 F.3d at 1046.

[124] *See* Martin, *supra* note 120, at 334. The *Reeves* Court warns lower court judges that they are not to, "(i) [M]ake credibility determinations, (ii) weigh the evidence, or (iii) draw inferences from the facts." *Id.* (interpreting *Reeves*); *see* Reinsmith, *supra* note 115, at 255.

[125] *See* Reinsmith, *supra* note 115, at 255. One author argues that judges should not engage in credibility determinations; rather, they should consider whether proffered evidence is relevant to and probative of discrimination. *Id.* If so, the evidence should be submitted to the jury, so long as its probative value outweighs any concerns of prejudice. *Id.*

[126] *See* Martin, *supra* note 120, at 400.

[127] *See* Reinsmith, *supra* note 115, at 255.

[128] *See id.* at 255–56.

to determine if the defendant's proffered, nondiscriminatory reason for not hiring them was pretextual.

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Preferred citation: Allison Berman, Comment, *Proof of Discrimination at Summary Judgment: The Eighth Circuit's Focus on Categories of Evidence in* Torgerson v. City of Rochester, 53 B.C. L. Rev. E. Supp. 1 (2012), http://bclawreview.org/e-supp/2012/01_berman.pdf.