

Seventh Circuit Allows Supervisor to be Comparator of Plaintiff in Discriminatory Discharge Case

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In [Rodgers v. White](#) (No. 10-3916), decided on September 2nd, the Seventh Circuit reached the unusual result of allowing a plaintiff to use his supervisor as a comparator in a comparative discipline case alleging race discrimination. The result is important because the Seventh Circuit had previously indicated in several cases that supervisors are typically poor comparators, but this case illustrated a justified exception.

Mr. Rodgers, the plaintiff, was the only Black employee among a lawn-maintenance crew of 27 that worked for the Illinois Secretary of State. He was fired purportedly because he had been involved in a practice of allowing crew members to borrow State maintenance equipment and because he had been involved in improper timekeeping practices, and also supposedly had not been forthcoming or helpful in the investigations of such improper practices. However, Rodgers' supervisor, who was White, was involved in the same practices but was merely demoted, not fired. The kicker was that the person who fired Rodgers was the same person that merely demoted his supervisor. The State tried to claim that Rodgers' evasiveness in the investigations made him more culpable, but the Court noted that the supervisor had lied as well and even had more responsibility than Rodgers for the improper timekeeping practices. These facts alone were enough to preclude summary judgment for the State, even where there was no evidence of disparaging comments about Rodgers' race or other direct evidence of discrimination.

The takeaway lesson from this case is that, any time an employer is going to fire or discipline an individual in a protected category, the decision maker should look carefully at whether any other employees -- not just those with the same job title -- have engaged in similar conduct and how they have been treated in the past, particularly by that decision maker. If the employer is going to discipline an employee in a protected category more harshly for conduct that is arguably similar to conduct engaged in by other employees, even supervisors, the company better have a very good and documented reason for the difference. Otherwise they too may be facing an unpredictable jury to try to explain the varying treatment.

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