

Services

Appellate
Employment
Litigation Defense
Labor & Employment
Litigation &
Alternative Dispute
Resolution
Workplace Diversity,
Equity, & Inclusion

Professional

SAMUEL M. MITCHELL
CHICAGO:
312.526.1582
SAMUEL.MITCHELL@
HUSCHBLACKWELL.COM

Supreme Court Poised to Strike Down Reverse Discrimination Standard

On February 26, 2025, the U.S. Supreme Court heard oral arguments in *Ames v. Ohio Department of Youth Services*, a case that challenges the heightened evidentiary burden imposed on majority-group plaintiffs in Title VII employment discrimination cases. A solid majority of the justices appeared skeptical of the Sixth Circuit's ruling, which required Marlean Ames, a heterosexual woman, to demonstrate "background circumstances" in order to proceed with her claim of reverse discrimination.

Case background

Ames, a former employee of the Ohio Department of Youth Services, alleged that she was denied a promotion and later demoted in favor of LGBTQ candidates due to her sexual orientation. The Sixth Circuit dismissed her case, holding that as a member of a majority group, she was required to meet an additional evidentiary burden beyond the traditional *McDonnell Douglas* framework for establishing a *prima facie* case of discrimination.

This "background circumstances" test, which the D.C. Circuit first articulated in 1981, has been applied in at least five federal circuits. It mandates that majority-group plaintiffs (here, a heterosexual female) show additional evidence that their employer is "unusual" in discriminating against the majority, *i.e.*, that a member of the relevant minority group (here, an LGBTQ member) made the employment decision at issue or demonstrating statistical evidence that the employer has a history of discriminating against the majority.

Appellate courts are currently split on whether to apply the background circumstances requirement. The Sixth, Seventh, Eighth, Tenth, and D.C. Circuits all apply the background circumstances requirement in reverse discrimination cases. The Third and Eleventh Circuits have expressly rejected

this requirement. The First, Second, Fourth, Fifth, and Ninth Circuits likewise do not apply this requirement. Critics argue that this higher standard creates unequal treatment under the law by undermining Title VII's principle of protecting all individuals from workplace discrimination, regardless of whether they belong to a majority or minority group.

The question before the court

The central question before the Supreme Court is whether Title VII imposes a heightened evidentiary standard on majority-group plaintiffs.

Ames argued that Title VII guarantees equal protection against workplace discrimination for everyone, regardless of whether they belong to a majority or minority group. She contended that the Sixth Circuit's ruling in Ohio's favor contradicts the statute's text and prior Supreme Court precedent, which mandates equal treatment for all plaintiffs under the law. Ames asserted that Title VII aims to eradicate discrimination and ensure equal opportunity, and that the "background circumstances" test undermines those goals by imposing an arbitrary and unequal burden on majority-group plaintiffs.

Ohio primarily argued that even without the background circumstances rule, plaintiff failed to present sufficient evidence for a *prima facie* case. Ohio contended that Ames failed to demonstrate that decision makers were aware of her sexual orientation or that their actions were motivated by discriminatory intent. Ohio further argued that any perceived disparity in the treatment of majority and minority plaintiffs should be addressed by ensuring that all plaintiffs meet a properly calibrated evidentiary threshold, rather than lowering the standard for majority-group plaintiffs.

Oral argument highlights

During oral argument, the justices largely aligned with Ames' position. Justice Neil Gorsuch described the issue as one of "radical agreement" between the parties; all sides, including Ohio Solicitor General T. Elliot Gaiser, acknowledged that federal law should impose the same evidentiary burden on all Title VII plaintiffs, regardless of majority or minority status.

Justice Amy Coney Barrett likewise observed that the burden of proof should be the same for all individuals, whether they are straight, gay, or otherwise.

Justice Elena Kagan pressed Ohio on whether the Sixth Circuit's ruling effectively penalized Ames for being heterosexual. Kagan read from the opinion, which stated that had Ames been gay, her case "would have been easy to make." Kagan and other justices expressed concern that the decision introduced a category of evidentiary disadvantage for majority-group plaintiffs, an approach seemingly at odds with Title VII's text and precedent.

Justice Brett Kavanaugh noted that the background circumstances rule has been questioned by courts and commentators alike, observing that Title VII does not draw distinctions between majority and minority plaintiffs.

Notably, the justices appeared uninterested in litigating the facts of the case, which Ohio pressed during oral argument, emphasizing that the key issue before them was whether Title VII imposes a stricter standard on majority-group plaintiffs.

Likely outcomes and implications

Given the justices' questioning, it is highly likely that the Court will rule in favor of Ames and formally reject the background circumstances requirement. Such a decision would align with the Court's recent textualist approach to Title VII—as seen in *Bostock v. Clayton County* and *Muldrow v. St. Louis*—and reaffirm that employment discrimination practices apply equally to all individuals, regardless of majority or minority status.

If the background circumstances test is struck down, majority-group plaintiffs in circuits that previously required heightened evidence for “reverse discrimination” claims will face a lower barrier to bringing cases under Title VII. This could lead to an uptick in reverse discrimination litigation, particularly in cases involving diversity, equity, and inclusion (DEI) initiatives, which have faced increasing legal challenges.

Conversely, if the Court upholds the rule, it will reinforce the heightened evidentiary standard for majority-group claims but again, based on the justices' questions and comments at oral arguments, this outcome seems unlikely.

A decision in *Ames v. Ohio Department of Youth Services* is expected by summer 2025.

What this means to you

If the Court rejects the “background circumstances” test, the key takeaways for employers are:

Equal standards for discrimination claims: The Court appears ready to confirm that all Title VII plaintiffs must meet the same evidentiary standard, regardless of whether they belong to a majority or minority group.

Increased litigation risk: If the rule is abolished, it would likely increase the number of reverse discrimination claims, potentially creating a larger burden on employers to defend against these lawsuits.

Contact us

If you have questions regarding *Ames v. Ohio Department of Youth Services* or issues related to reverse discrimination in the workplace, contact Sam Mitchell, Julie Garabedian, or your Husch Blackwell attorney.