

The Legal Intelligencer, " US Supreme Court Case Evaluating Reverse Discrimination Claims and Its Potential Workplace Impact," by Katharine W. Fogarty, Esq. and Gabrielle Talvacchia, Esq.

In *Ames v. Ohio Department of Youth Services*, the Supreme Court is poised to clarify the legal standard for evaluating reverse discrimination claims. Put simply, the court will decide how discrimination claims brought by individuals belonging to historically advantaged or "majority" groups (such as white, male or heterosexual individuals) should be assessed under U.S. law.

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Several compelling cases are currently before the U.S. Supreme Court. However, as legal professionals await the court's anticipated rulings next month, one case in particular has garnered significant attention among labor and employment attorneys nationwide. In *Ames v. Ohio Department of Youth Services*, 87 F.4th 822 (6th Cir. 2023), cert. granted, 145 S. Ct. 118 (2024), the Supreme Court is poised to clarify the legal standard for evaluating reverse discrimination claims. Put simply, the court will decide how discrimination claims brought by individuals belonging to historically advantaged or "majority" groups (such as white, male or heterosexual individuals) should be assessed under U.S. law.

In February, the Supreme Court heard oral argument addressing the following question: does a plaintiff who belongs to a majority group need to demonstrate "background circumstances" in order to establish that the defendant is an employer who discriminates against the majority, to establish a prima facie case of discrimination? The circuit courts are split on the appropriate standard to apply. Currently, the Sixth, Seventh, Eighth, Tenth and D.C. Circuits apply the "background circumstances" standard in reverse discrimination claims, requiring a plaintiff to prove the employer has the propensity to discriminate against majority-group members. In applying this standard, the courts reason that because the plaintiff in a reverse discrimination case is not a member of a group that has been historically discriminated against, an inference of discrimination does not arise merely because the employer has taken an action that benefits a member of another group. Accordingly, a plaintiff must raise the inference of intentional discrimination by proof of other circumstances. This is most typically demonstrated through either: evidence that a member of the relevant minority group made the employment decision at issue, with statistical evidence showing a pattern of discrimination by the employer against members of the majority group; or evidence of "organizational preference" for hiring members of a minority group. While critics of the "background circumstances" rule argue that it sets an unfair heightened standard, supporters argue that, to the contrary, it is not an additional or heightened standard. Rather, it is a tool assisting courts in applying the McDonnell Douglas framework to determine whether there is sufficient circumstantial evidence of discrimination in claims brought by individuals who have not historically faced discrimination.

However, the majority of the circuit courts have declined to follow this standard. For example, in *Iadimarco v. Runyon*, 190 F.3d 151, 161 (3d Cir. 1999), the the U.S. Court of Appeals for the Third Circuit rejected the "background circumstances" standard, deeming it "irremediably vague and ill-defined." There, the court held that rather than require "background circumstances" regarding the uniqueness of the defendant employer, a plaintiff alleging reverse discrimination must produce sufficient evidence, under the totality of the circumstances, that the defendant treated the employee less favorably than others because of the individual's protected characteristic. Overall, critics of the "background circumstances" standard argue that it unjustly requires a heightened standard for majority-group plaintiffs, which goes against the purpose of the country's anti-discrimination laws to prevent all forms of workplace discrimination. In *Ames*, plaintiff Marlean Ames, a heterosexual woman, alleged that she was discriminated against on the basis of her sexual orientation in violation of Title VII of the Civil Rights Act of 1964 (Title VII). More specifically, Ames alleged that she was demoted and replaced by a gay man. Further, Ames alleged that she was denied a promotion for a position that was later filled by a nonheterosexual woman.

The district court granted summary judgment for the defendant Ohio Department of Youth Services and found that Ames failed to show "background circumstances" suggesting that her former employer discriminates against majority-group members. The Sixth Circuit affirmed.

However, during recent oral argument, the majority signaled their skepticism of the "background circumstances" standard, with Justice Neil Gorsuch even commenting that there seemed to be "radical agreement" on the issue. Counsel for Ames argued that the standard instructs courts to practice discrimination by sorting plaintiffs into minority and majority groups based on their protected characteristics. Counsel for the Ohio Department of Youth Services even agreed that it is wrong to hold some litigants to a higher standard because of their protected characteristics. In short, the justices seemed agreeable to Ames' argument that all individuals, whether in majority or minority groups, are protected by Title VII under the same terms and the same standards. Accordingly, the U.S. Supreme Court appears to be ready to rule in favor of Ames and remove the "background circumstances" standard.

Given the potential for the U.S. Supreme Court to strike down the "background circumstances" standard, employers should be prepared to address a potential increase in reverse discrimination claims. In order to best protect themselves from such claims, employers should maintain consistent, objective employment policies that apply to all employees, regardless of race, religion, sexual orientation, gender,

disability or any other protected characteristic. Employers should also take steps to ensure all employment decisions are based on consistent, objective criteria. Further, as with any potential workplace discrimination claim, employers should maintain proper documentation of all employment actions and decisions. This includes interviews, performance evaluations, disciplinary methods, promotions, demotions and terminations.

In light of the ever-changing legal landscape of the country, employers should also regularly train management and human resources personnel on the latest employment law developments to ensure full compliance with federal and state law. Further, periodic review of company handbooks, policies, and overall workplace procedures is recommended. More specifically, given the U.S. Supreme Court's likely ruling, employers should confirm that their current EEO and nondiscrimination policies, complaint procedures, anti-retaliation protections, and any related guidelines, apply to all employees. Finally, and most importantly, the best way to minimize litigation risk is for employers to promote a positive and equitable work environment in which all employees, regardless of the existence of any protected characteristic or not, are respected, treated fairly, and afforded equal access to all employment opportunities.

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