

# SCOTUS' Review of Title VII Reverse Discrimination Pleading Standard Will Likely Impact Employers' Employment Decisions

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## Takeaways

- In *Ames v. Ohio Department of Youth Services*, the U.S. Supreme Court will decide the pleading standard that must be met for workplace discrimination suits brought by a member of a majority group.
- Five federal circuit courts of appeal hold that majority plaintiffs who allege Title VII discrimination must show “background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority.”
- If the U.S. Supreme Court invalidates the background circumstances rule, majority plaintiffs suing in the five circuits will have an easier path to proving “reverse discrimination” under Title VII.

## Article

The U.S. Supreme Court will review a requirement in five federal circuit courts of appeals that members of a majority group, such as Whites, males, or heterosexuals, who allege discrimination under Title VII of the Civil Rights Act meet a higher pleading standard than traditional minority plaintiffs in *Ames v. Ohio Department of Youth Services*, No. 23-1039.

The Court granted review to address a split in the circuits on what, if any, additional proof majority plaintiffs must present to make their *prima facie* case. The U.S. Courts of Appeals for the Sixth, Seventh, Eighth, Tenth, and D.C. Circuits require that majority plaintiffs alleging “reverse discrimination” by indirect or circumstantial evidence show “background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority.” This is in addition to the four elements the remaining circuits require that all Title VII plaintiffs demonstrate:

1. They were members of a protected class;
2. They were subject to an adverse employment decision;
3. They were qualified for the relevant position; and
4. Their employers treated people who were not members of the same protected class more favorably.

## Facts of the Case

Marlean Ames, who identifies as a straight woman, began working for the Ohio Department of Youth Services (DYS) in 2004. Ames accepted a promotion to the position of program administrator in 2014. In 2017, she began reporting to a new



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deputy director, who identifies as a gay woman.

The governor of Ohio appointed a new department director (a straight man) in January 2019. In furtherance of the governor's policy initiatives, the director expressed a need for strong leadership and personnel who could fulfill his vision. He created a new bureau chief position. Ames applied for the position in April 2019. Citing concerns over Ames' lack of vision or leadership experience, the director passed Ames over for the promotion in favor of another candidate, a gay woman.

In May 2019, the director and deputy director informed Ames she would no longer serve as a program administrator because of concerns over her ability to manage grant funds and feedback from community partners that Ames was "abrasive." The director offered Ames the opportunity to return to her previous role as an administrative professional, effectively a demotion. Later that month, the director filled the vacant role of program administrator with an agency employee who identifies as a gay man.

### Lower Courts' Analysis

Ames sued in the U.S. District Court for the Southern District of Ohio, alleging DYS discriminated against her on the basis of sexual orientation when it denied her a promotion to bureau chief and removed her from her position as program administrator. Ames is a majority group plaintiff who identifies as heterosexual. Because she sued in a district court covered by the Sixth Circuit, she bears the additional burden of showing "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority" to prove her case using circumstantial evidence. The district court concluded Ames failed to meet that additional burden of proof.

On appeal, a unanimous three-judge panel of the Sixth Circuit applied the background circumstances rule and affirmed the district court's summary judgment in favor of DYS. The panel determined that if Ames were a member of a minority group, she would have presented the elements required to show a sufficient *prima facie* case. However, because the director, a straight man, made the decision to deny Ames' promotion and then remove her from the program administrator role, Ames failed to show that "a member of the relevant minority group (here, gay people) made the employment decision at issue." Further, Ames failed to present "statistical evidence showing a pattern of discrimination by the employer against members of the majority group."

In a concurrence, one judge anticipated the U.S. Supreme Court would weigh in on the background circumstances rule. Explaining that application of the rule obligated him to find in favor of DYS, he criticized the rule as inconsistent with Title VII, writing that it "is not a gloss upon [Title VII], but a deep scratch across its surface."

### Arguments

In her petition for review, Ames points out the circuit split on whether to impose the additional "background circumstances" rule on majority discrimination plaintiffs, noting that the Third and Eleventh Circuits have expressly rejected it. She also argues that the rule is administratively unwieldy and vague, making it difficult for plaintiffs to meet this burden. She emphasizes that Title VII's protection against

discrimination applies equally to all individuals, regardless of their demographic group, and that imposing different burdens based on group membership departs from the statute's purpose.

In its response in opposition to Ames' petition, DYS argues that the case is a poor vehicle for Supreme Court review due to procedural shortcomings, specifically that Ames did not challenge the Sixth Circuit's *prima facie* test at the lower court. DYS also contends that even if the Supreme Court were to address the background circumstances rule, the outcome would remain unchanged because DYS had legitimate, nondiscriminatory reasons for Ames' non-promotion and demotion. Contrary to Ames' arguments, DYS denies the circuit split is meaningful, characterizing the differences between circuits as linguistic rather than substantive.

### Potential Impact on Employers

If the U.S. Supreme Court invalidates the background circumstances rule, majority plaintiffs suing in the five circuits that applied the rule will have an easier path to proving reverse discrimination under Title VII. Whatever the outcome, employers should train managers and supervisors to make all employment decisions based on factors other than protected characteristics. Decision makers should take care to document the nondiscriminatory reasons for their employment decisions.

Jackson Lewis attorneys are available to answer questions about the potential impact of the Court's decision and help develop effective nondiscrimination policies.

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