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U.S. Supreme Court to Review Reverse Discrimination Standard

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Should an employee's burden to plead and prove workplace discrimination differ depending upon whether they are considered in a "majority" or "minority" group? The U.S. Supreme Court is now set to decide whether an arguably "heightened" standard of proof should apply in such "reverse discrimination" cases. If the Supreme Court strikes down what has come to be known as the "background circumstances" test, employers in jurisdictions where that analysis is currently applied might expect an increase in claims from members of such majority groups, or an increase in the success of claims brought by such "majority" plaintiffs.

The "Background Circumstances" Test for Reverse Discrimination Cases

The case that brought the reverse discrimination standard into the spotlight is *Ames v. Ohio Department of Youth Services* — involving a heterosexual plaintiff who claimed that she was demoted and replaced by a gay man, and denied promotion in favor of a gay woman. When evaluating the plaintiff's Title VII sexual orientation and sex discrimination claims, the Sixth Circuit Court of Appeals explained that in the absence of direct evidence of discrimination, a plaintiff in a "majority" group must meet a higher bar known as the "background circumstances" test to plead and prove reverse discrimination.

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Specifically, the Sixth Circuit required that the plaintiff in *Ames* make a showing of "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority." According to the court, merely establishing the formulaic elements of a primafacie case under the *McDonnell Douglas* standard was insufficient. While the court noted that such circumstances *could* include evidence that a member outside of the plaintiff's "majority" class made the employment decision at issue, that fact — existent in *Ames* — was *not enough,* standing alone, to convince the Sixth Circuit in that instance. On the contrary, the Sixth Circuit concluded that the plaintiff failed to demonstrate such additional background circumstances, such as statistical evidence beyond the plaintiff's own experience, to show a pattern of discrimination against heterosexuals.

The Question Before the Supreme Court and Anticipated Arguments

In agreeing to hear the *Ames* case, the Supreme Court will consider whether, in addition to pleading the other *prima facie* elements of Title VII discrimination claims, a majority-group plaintiff must show such "background circumstances."

The Ohio Department of Youth Services' brief in opposition to the plaintiff's petition offers a glimpse of its anticipated defense of the background circumstances test. It argued that the Supreme Court's familiar *McDonnell Douglas* test for analyzing Title VII discrimination claims was intended to be flexible, and as a result, lower courts have adopted modified versions of the test. The "background circumstances" test, it argued, was merely one such modification, and not indicative of a meaningful circuit split. In short, the defense argued that a review of the varying tests across circuits indicates a "focus on the same basic legal question: are there facts from which one can infer, if such actions remain unexplained, that it is more likely

than not that [an employers'] actions were based on a discriminatory criterion illegal under Title VII."

Conversely, Ames' petition to the Supreme Court sought to magnify the differences between the circuit courts' varying *prima facie* tests. She argued that the "background circumstances" test reflected a heightened standard for claims brought by majority-group plaintiffs, and proceeded through a circuit-by-circuit analysis of which jurisdictions explicitly apply the test, which explicitly reject it, and which courts simply did not apply it without otherwise reaching any conclusions about whether the test is lawful. After detailing this alleged circuit split, Ames concluded that the Sixth Circuit's application of the rule improperly: (1) conflicted with the plain terms of Title VII, which do not distinguish between plaintiffs of different demographic groups; (2) contrasted with precedent interpreting *McDonnell Douglas*; and (3) was "irredeemably vague and ill-defined" in how a plaintiff is meant to gather evidence, or indeed what that evidence should be. Ames also argued that it is not necessarily clear whether certain groups are in fact majority groups.

Striking Down the Background Circumstances Test Could Lead to Increased Claims from Members of Majority Groups

The background circumstances test has already been explicitly rejected in the Third and Eleventh Circuits, and has not been applied in the First, Second, Fourth, Fifth, and Ninth Circuits. Thus, even if the Supreme Court strikes down the test, the law will remain unchanged in those jurisdictions.

On the other hand, employers operating in the remaining circuits (the Sixth, Seventh, Eighth, Tenth, and D.C. Circuits) will no longer be able to rely on this additional prong to the *prima facie* test in reverse discrimination cases.

Should the Supreme Court strike down the background circumstances test, members of

majority groups (for instance, Caucasians or heterosexuals) may be emboldened to bring such reverse discrimination claims.

How Will the Supreme Court Rule?

Of course, it is not yet known how the Supreme Court will ultimately rule on *Ames*. However, last year's decision on affirmative action, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, may offer some insight. There, the Supreme Court analyzed the Equal Protection Clause of the Fourteenth Amendment, commenting that "[e]liminating racial discrimination means eliminating all of it," and accordingly, that provision applies "without regard to any differences of race, of color, or of nationality — it is universal in [its] application. For [t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." Though *Students for Fair Admissions* addressed discrimination in the context of the Equal Protection Clause rather than Title VII, the foregoing language appears to hint at the Court's attitude toward discrimination, that no one group should be subjected to differing standards than another. We think it to be a distinct possibility, therefore, that the Supreme Court may reverse *Ames* and strike down the background circumstances test.

Takeaway for Employers

As noted above, even if the Supreme Court strikes down the background circumstances test, the test for proving reverse discrimination will remain the same in those jurisdictions where the test had never been applied. However, employers in the remaining jurisdictions that have applied the test (i.e., the Sixth, Seventh, Eighth, Tenth, and D.C. Circuits) might expect an uptick in such reverse discrimination cases as plaintiffs in a majority protected class have one less barrier against proving their claims.

For guidance on the developing legal landscape and other workplace issues, consult your Akerman Labor and Employment attorney.
