



## Revisiting "Reverse Discrimination"

The recently decided case of [\*Ames v. Ohio Department of Youth Services\*](#) presents a watershed moment for reverse discrimination claims. While its immediate effect is limited to employers within the jurisdictions of the federal appellate courts that previously used the “background circumstances test,” it is indicative of the Supreme Court’s attention to behavior that could be construed as discriminatory to majority-group members.

### Background

In *Ames*, the Supreme Court heard the case of Marlean Ames, a heterosexual woman who alleged that she was denied promotion and later demoted in favor of a lesbian woman and a gay man. Ames claimed that this was discrimination due to her sexual orientation that violated Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, religion, sex, and national origin. The Southern District of Ohio and the Sixth Circuit Court of Appeals granted and affirmed, respectively, summary judgment to the defendant Ohio Department of Youth Services because Ames failed to provide sufficient evidence that she was the victim of “reverse discrimination,” where “the defendant [was] that unusual employer who discriminates against the majority.”

The resolution of the case turned on the *McDonnell Douglas Corp. v. Green* framework, which courts use to determine whether a plaintiff who relies on circumstantial evidence of employment discrimination has satisfied Title VII. In *McDonnell Douglas*, the Supreme Court stated that a prima facie case could be made by “showing . . . [the plaintiff] belongs to a racial minority . . . applied and was qualified for a job for which the employer was seeking applicants . . . was rejected; and . . . the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.” In reverse discrimination cases, however, a minority of the circuit courts of appeal—including the Sixth Circuit—imposed a further requirement: the plaintiff must show “background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority.” A majority-group plaintiff would therefore have to show statistical evidence confirming the pattern of reverse discrimination she alleged, or show that a member of the relevant minority group made the employment decision in question. Because Ames failed to do either, the Sixth Circuit granted summary judgment to the Department.

The Supreme Court resolved this circuit split in *Ames*, holding unanimously that the background circumstances rule is incompatible with Title VII’s identical protections for majority

and minority plaintiffs. Further, the Court opined that the *McDonnell Douglas* test was intended to be flexible and satisfiable by a variety of evidence, yet “[t]he “background circumstances” rule disregards this admonition by uniformly subjecting all majority-group plaintiffs to the same, highly specific evidentiary standard in every case.” As a result, the Court vacated the judgment of the Sixth Circuit, rejected the background circumstances test, and remanded the case back to the lower courts.

## Impact

*Ames* is directly relevant to employers in the Sixth, Seventh, Eighth, Tenth, and District of Columbia circuits, which formerly applied the background circumstances test. Organizations in those circuits should be prepared for an increase in reverse discrimination claims, as majority group members may be more incentivized to bring employment discrimination claims, and those claims are more likely to survive summary judgement.

Even outside of those circuits, *Ames* is relevant to all employers as the latest in a line of Supreme Court opinions responding favorably to reverse discrimination claims, most notably *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, and broadening the applicability of Title VII, notably in *Muldrow v. City of St. Louis*. While nothing in *Ames* prevents employers from striving for diversity in their workplaces, employers must be careful to avoid behavior that could be construed as discriminatory to majority-group members. Employers should:

- Articulate and record their reasoning for hiring and advancement decisions, and be sure that such decisions do not rely on an applicant’s race, color, religion, sex, national origin, or any other protected classification.
- Be prepared for a higher volume of discrimination claims from majority-group members, especially in circuits that previously implemented the background circumstances test.
- Continue to monitor the application of the *McDonnell Douglas* framework, which Justice Clarence Thomas suggested is an inappropriate lens through which to evaluate summary judgement motions. If the Supreme Court abolishes or modifies the *McDonnell Douglas* framework in a later case, it could make it easier for employees to assert viable employment discrimination claims.

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## What's Next?

We would be happy to assist you in addressing any questions. Please reach out to:

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