CLIENT ALERTS & INSIGHTS

# Sixth Circuit Requires Additional "Background Circumstances" Evidence for Heterosexual Plaintiffs Seeking to Prove Reverse Sexual Orientation Discrimination

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Earlier this month, the U.S. Court of Appeals for the Sixth Circuit upheld the dismissal of a sexual orientation discrimination claim brought by a heterosexual woman who was removed from her position and denied a promotion in favor of two gay employees. The Sixth Circuit concluded that a plaintiff in this position must prove additional "background circumstances" establishing that their employer is the "unusual" one who discriminates against the majority to sustain a claim.

The plaintiff in *Ames v. Ohio Dep't of Youth Services*, No. 23-3341 (6th Cir. 2023) was a heterosexual woman with 30 years of public service. She had been employed by the Ohio Department of Youth Services ("Department") since 2004 and had served as the Administrator of the Prison Rape Elimination Act ("PREA") since 2014.

In 2017, the Plaintiff was assigned to a new supervisor, who was gay. In 2019, the Plaintiff applied to be the Department's Bureau Chief of Quality. She did not receive that position and, a few days later, learned that she was being removed from her Administrator position. The decision to remove Plaintiff from the Administrator position was made by her second-level supervisor and the Department's Director, who were both straight. The Plaintiff accepted a demotion to her prior position, resulting in a significant ($47.22/hour to $28.40/hour) pay cut. The Department awarded Plaintiff's former Administrator position to a 25-year old gay man. The Department then selected a gay woman to serve as its Bureau Chief of Quality.

The Plaintiff filed claims of discrimination based on her sexual orientation and gender against the Department. The U.S. District Court for the Southern District of Ohio granted summary judgment to the Department and dismissed the case. In an opinion issued on December 4, 2023, the Sixth Circuit agreed and affirmed the dismissal. Most relevant here, the Sixth Circuit concluded the Plaintiff had not established the necessary "background circumstances" to sustain her claim of sexual orientation discrimination.

To maintain a discrimination claim under Title VII (the federal statute which forbids employment discrimination), plaintiffs must satisfy certain elements, typically meaning that they belonged to a protected class; did well in their position but were terminated, demoted, or suffered some other adverse action; and were replaced by, or treated worse than, someone outside of their protected class. However, plaintiffs who are a member of the traditional "majority" (i.e. a white employee bringing a race discrimination claim or a male employee bringing a sex discrimination claim) must

satisfy an additional element in the Sixth Circuit. These plaintiffs must demonstrate "background circumstances" which prove that their employer is the "unusual" one "who discriminates against the majority" to sustain their claims.

In this case, the Sixth Circuit expanded the "background circumstances" requirement to heterosexual plaintiffs alleging sexual orientation discrimination. The Sixth Circuit determined that while the Plaintiff's claim was otherwise "easy to make," she could not make this showing. The court noted that, while Plaintiff's former Administrator position and the Bureau Chief position went to gay employees, the decisionmakers for those positions were heterosexual. The Plaintiff also could not provide statistical evidence that the Department had a pattern of treating gay employees more favorably than heterosexual employees, and the Plaintiff relying on her own experiences was insufficient. Without this evidence, the Sixth Circuit concluded that her sexual orientation claim failed. Her gender discrimination claim was separately dismissed.

Despite the Sixth Circuit's expansion of the "background circumstances" rule, it faces considerable criticism. Sixth Circuit Judge Raymond Kethledge concurred with the *Ames* opinion but wrote separately to opine that the "background circumstances" requirement for majority-plaintiffs is "a deep scratch across [the] surface" of Title VII. While five federal circuits apply the "background circumstances, seven do not, with the Third and Eleventh Circuits expressly rejecting it. The Eleventh Circuit stated in 2001 that "[o]ur Constitution does not distinguish between races and neither do we," subjecting all discrimination claims to the same standard because "[d]iscrimination is discrimination no matter what the race, color, religion, sex, or national origin of the victim" (*Bass v. Bd. of County Comm'rs*, 256 F.3d 1095 (11th Cir. 2001).

Judge Kethledge expressed a hope that "the Supreme Court will soon" address the circuit split in the use of the "background circumstances" rule. But until then, "majority" plaintiffs in most circuits will continue to face an uphill battle in bringing reverse discrimination claims.

**To learn how these developments can affect your business, contact a member of Benesch's Labor & Employment Practice Group.**

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