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Supreme Court Appears Poised to Do Away With Additional Burdens on Reverse-Discrimination Plaintiffs

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On February 26, 2025, the U.S. Supreme Court heard oral arguments in Ames v. OH Dept. of Youth Services, which questioned whether the Sixth Circuit Court of Appeals correctly decided that a heterosexual plaintiff should have to produce more evidence than a plaintiff with a different sexual orientation to make an initial showing of discrimination. Based upon the Supreme Court's questions during oral argument, the Justices seem poised to overwhelmingly answer the question presented in the negative.

In *Ames*, the plaintiff was a straight employee who applied and interviewed for, but did not receive, a promotion that went to a gay employee who did not apply or interview for the job. The plaintiff then lost the job she held and was replaced by another gay employee who similarly did not apply or interview for the position. We previously covered the Sixth Circuit's opinion, which concluded that while the plaintiff's claim of sexual orientation discrimination under Title VII was otherwise "easy to make," she could not establish additional background circumstances to support her claim.

For employees who belong to a traditional "majority" class, certain courts, like the Sixth Circuit, have imposed an additional burden before their case can proceed. In addition to establishing the standard elements of their claim that a plaintiff of any class must satisfy, these employees must also demonstrate "background circumstances" which prove that their employer is the "unusual" one "who discriminates against the majority" before their case may proceed.

During oral argument for *Ames*, the Supreme Court signaled it is ready to do away with that burden. Justice Jackson and Justice Sotomayor each suggested that the background circumstances test is the equivalent of requiring an employee to have evidence sufficient to win their case, just to be able to establish an initial claim. Justice Kagan pointed out that the Sixth Circuit directly acknowledged that it placed an additional burden on Ames that it would not have placed on a plaintiff of another protected class, while Justice Barrett emphasized that even the U.S. Equal Employment Opportunity Commission has rejected the background circumstances test. In addition to explaining that the text of Title VII makes no requirement that a plaintiff prove background circumstances, Justice Gorsuch also noted the background circumstances are not even an ultimate requirement for a plaintiff to prove discrimination.

Overall, the members of the Supreme Court appeared in full agreement that the burdens placed by Title VII should be the same for all plaintiffs and signaled that it would do away with the background circumstances test.

Notably, several justices also questioned the traditional test used to analyze claims under Title VII, as established in its seminal 1973 case *McDonnell Douglas v. Green*. In *McDonnell Douglas*

, the Supreme Court established a three-part test to prove discrimination claims until Title VII, in which a plaintiff must make an initial showing of potential discrimination, the employer is given an opportunity to address why it took the actions it did, and then burden finally shifts back to the plaintiff to discredit the employer's reason as pretext. While *McDonnell Douglas* is used in the vast majority discrimination cases, Justice Gorsuch repeatedly emphasized that the Supreme Court has never held that it even applies during the summary judgment phase. Justice Gorsuch also suggested that *McDonnell Douglas*'s requirement that a plaintiff prove pretext has become an "absolute condition" to prevail, but the Court has never so held.

That issue could be resolved in another case currently pending before the Supreme Court, *Hittle v. City of Stockton*. The Supreme Court has not yet granted a writ of certiorari and accepted the case but based on the Justice's positions in the *Ames* oral argument, the Court appears at least interested in accepting the *Hittle* petitioner's request and considering whether *McDonnell Douglas*, and the decades of employment law judicial opinions relying upon its decision, should be upended.

For now, the background circumstances test remains valid law in the Sixth Circuit. But by the end of the Supreme Court's term this summer, we expect it will be officially overruled.

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