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# *SCOTUS to Review Standard for Pursuit of Title VII Reverse Discrimination Cases*

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Following the U.S. Supreme Court's 2023 decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina*, reverse discrimination claims against employers have drawn more attention, and corporate diversity, equity, and inclusion ("DEI") programs have faced increased legal challenges. In its new Term, the U.S. Supreme Court already agreed to decide a case that will affect reverse discrimination suits against employers, potentially making it easier for plaintiffs to pursue such claims.

## **I. The Current Legal Climate for Reverse Discrimination in the Workplace**

There currently is a divide among the lower federal courts over the elements of a *prima facie* case of reverse discrimination under Title VII—i.e. when the plaintiff is a member of the majority group. In the Sixth, Seventh, Eighth, Tenth, and D.C. Circuits, majority-group plaintiffs in reverse discrimination cases must show "additional background circumstances" that support the suspicion that the defendant is the unusual employer discriminating against the majority. In the First, Second, Third, Fourth, Fifth, Ninth, and Eleventh Circuits, the courts require nothing more of reverse discrimination plaintiffs than is required of traditionally disadvantaged "minority-group" plaintiffs—i.e. that the plaintiff is a member of a protected class; the plaintiff was performing according to the employer's legitimate expectations; the plaintiff was subject to an adverse employment action; and other employees with similar qualifications were treated more favorably.

## **II. The Instant Case**

On October 4, 2024, the Supreme Court granted a petition for writ of certiorari in *Ames v. Ohio Department of Youth Services*, to address what evidence a majority-group plaintiff must show to bring a Title VII discrimination case. The Supreme Court will now decide whether a majority-group plaintiff must show background circumstances to demonstrate unlawful employment discrimination.

In *Ames*, Marlean Ames—a heterosexual woman and former Ohio Department of Youth Services employee—alleged sexual orientation discrimination by her employer in violation of Title VII. She claims she was passed over for a promotion to be the department's bureau chief of quality, a role that was ultimately given to a gay woman. She also claims she was then demoted from her position as Prison Rape Elimination Act administrator and replaced by a gay man.

Her Title VII claims were dismissed by an Ohio federal court in a decision that the U.S. Court of Appeals for the Sixth Circuit affirmed in December 2023. The Sixth Circuit found that Ms. Ames had not shown

*background circumstances* and could not merely point to her own experiences to establish a pattern of alleged discrimination. Ms. Ames now argues that majority-group plaintiffs should not be required to put forward additional background circumstances evidence for discrimination cases and the same analysis should apply, regardless of whether she is a member of a majority- or minority-group.

### III. Next Steps

If the Supreme Court overturns the Sixth Circuit’s ruling, the ruling would have a direct impact on employers with employees in the twenty-one states with federal courts that have adopted the “background circumstances” test (Arkansas, Colorado, the District of Columbia, Indiana, Illinois, Iowa, Kansas, Kentucky, Michigan, Minnesota, Missouri, Nebraska, New Mexico, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Utah, Wisconsin, and Wyoming). Given the increasing legal challenges to DEI initiatives, we can anticipate such a Supreme Court ruling would also be used as additional grounds to support such claims.

We at Paul Hastings are continuing to watch this space as employers, investors, and regulators continue to scrutinize workforce compliance, DEI, and ESG efforts. We will provide an update as this case proceeds forward. In the interim, please contact us to continue the discussion.

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