Proskauer

U.S. Supreme Court Hears Oral Argument in Reverse Sex Discrimination Case

Law and the Workplace on **February 28, 2025**

On February 26, 2025, the United States Supreme Court entertained oral argument in *Ames v. Ohio Department of Youth Services*, a case that centered on whether a plaintiff who is a member of a majority group must meet a higher burden—namely, showing supporting "background circumstances"—in establishing a *prima facie* case of discrimination under Title VII.

Background

Plaintiff Ames, a heterosexual woman, began working at the Ohio Department of Youth Services (the "Department") in 2004. In 2014, she was promoted to Administrator of the Prison Rape Elimination Act. In April 2019, Plaintiff applied for another promotion, but was not selected. Shortly thereafter, Plaintiff alleges that her supervisor suggested that Plaintiff retire. In May 2019, Plaintiff was demoted, which resulted in a significant pay cut, and the Department hired a 25-year-old gay man for the position. Later that year, a gay woman received the promotion Plaintiff had applied for. Plaintiff sued the Department alleging discrimination based on sexual orientation and sex under Title VII.

The U.S. District Court for the Southern District of Ohio granted summary judgment in favor of the Department, concluding Plaintiff failed to establish a *prima facie* case. The court invoked the "background circumstances" doctrine, which provides that members of a majority group must show "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority" to establish a *prima facie* case. The court also ruled that Plaintiff lacked evidence of pretext for her sex discrimination claim.

The Sixth Circuit affirmed. In his concurrence, Judge Kethledge criticized the background circumstances test, noting a circuit split that should be resolved by the Supreme Court. In addition to the Sixth Circuit, several circuits, including the Seventh, Eighth, and Tenth Circuits, follow the background circumstances test. The Supreme Court agreed to hear the case.

Oral Argument

Unexpectedly, on February 26, 2025, at oral argument, Justice Gorsuch observed that all advocates seemed to be "in radical agreement" with regard to the question presented: that as applied by the Sixth Circuit, the background circumstances doctrine is an improper bar to plaintiffs establishing a *prima facie* case. However, the advocates disagreed as to whether the Court should give guidance as to what is necessary to establish a *prima facie* case.

Justice Barrett asked whether abandoning the background circumstances requirement would "throw open" the door to Title VII cases. Petitioner's counsel responded that the floodgates would not be flung wide open, as that doctrine applies at the summary judgment stage, and plaintiffs will have already needed to have surmounted several barriers, including filing a case with the EEOC and meeting the plausibility standard at the pleading stage.

It is also noteworthy that the Assistant to the EEOC Solicitor General, arguing as *amicus curiae* in support of reversal, added that the EEOC had already rejected the background circumstances rule, and applies the same evidentiary standard to all plaintiffs in discrimination cases under Title VII. Urging the Court to overturn the background circumstances rule, she argued that "any plaintiff that can produce evidence from which a jury could infer discrimination should go to trial."

Last, after conceding that he was not arguing in support of using the background circumstances doctrine, Respondent's counsel argued that the Court should still affirm the Sixth Circuit's ruling because Petitioner had failed to establish that any adverse action against Ames was motivated by her sexual orientation.

Notably, in questioning the Assistant to the EEOC Solicitor General, Justice Alito suggested that the background circumstances test may have been "based on an intuition about the way in which most employers behave." Justice Alito intimated that, while possibly "sound" in 1973, the year that *McDonnell Douglas* was decided, this intuition, presumably that members of a majority group are unlikely to be discriminated against by their employers, may "no longer [be] sound today."

Implications

Justice Gorsuch's statement that the advocates were in "radical agreement" that a heightened burden should not be applied to majority group plaintiffs is telling indeed. If this heightened burden is abandoned, there is meaningful potential for an increase in the filing of Title VII "reverse discrimination" cases. Notably, a number of reverse discrimination cases are already pending.

View Original

Related Professionals

- **Steven J. Pearlman**
  Partner
- **Evandro C. Gigante**
  Partner
- **Melanie M. Speight**
  Special Employment Law Counsel
- **Justin Chuang**
  Associate