FP SCOTUS Predictions: Court Will Make It Easier for Majority-Group Plaintiffs to Assert Title VII Claims, No More "Reverse" Discrimination

Insights
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The Supreme Court is likely to soon rule that majority-group plaintiffs must meet the same pre-trial evidentiary burden applicable to minority-group plaintiffs – and nothing more – in workplace discrimination claims under Title VII of the Civil Rights Act. SCOTUS recently heard arguments in *Ames v. Ohio Department of Youth Services*, a case involving a heterosexual woman who claims her former employer discriminated against her because she is straight. In a surprising twist, the government's counsel agreed with the plaintiff during oral argument that she should not have been required to provide proof of the alleged discrimination beyond the amount that would have been required if she were gay and had brought the same claim. We predict that the Court will unanimously agree on this point when it renders its ruling in the near future. The upshot for employers? Get familiar with this case, as the upcoming decision will probably lead to more so-called "reverse" discrimination claims making it to jury trials, particularly within the 6th, 7th, 8th, 10th, and D.C. Circuits for the U.S. Court of Appeals where courts currently consider the extra requirement of "background circumstances" at issue here. Read on for an analysis of the issues and our specific predictions on how SCOTUS will decide the case.

What's the Issue?

The Supreme Court will decide in *Ames v. Ohio Department of Youth Services* whether a majority-group plaintiff must, beyond proving the other elements of Title VII, show "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority." Federal appeals courts are currently divided over this issue.

How Did We Get Here?

Here's the key background information on the *Ames* case.

Quick Background

It's important to note that the following recitation is comprised generally of allegations advanced by the plaintiff. The employer will have an opportunity to rebut these claims should the case advance to trial, but at this stage of the litigation, the allegations below are presented in a light most favorable

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to the plaintiff whenever there is a disagreement about what actually happened. In other words, take the summary below with a grain of salt as it only tells one side of the story.

- **Employment Relationship**. Marlean Ames, a heterosexual woman, was employed for roughly 15 years by the Ohio Department of Youth Services (DYS), the state's juvenile corrections system. For roughly five years before DYS terminated her, Ames had been working as its Administrator of the Prison Rape Elimination Act, an "unclassified" position that made her an at-will employee who could be dismissed without cause. During that time, she was assigned a new supervisor, who is gay.
- **Employee Performance.** In December 2018, that same supervisor evaluated Ames' performance as "meeting expectations" in 10 competencies and "exceeding" them in one.
- **Denied Promotion and Demoted.** In April 2019, Ames applied and interviewed internally to be the Bureau Chief of Quality, but DYS chose not to hire her for that position. Four days later, the department demoted her to her pre-2014 position, reducing her wages by nearly $20 per hour.
- **Gay Employees Chosen Instead.** DYS swiftly installed a new Administrator – a 25-year-old gay man. And, after holding the position open for eight months after Ames had been denied the role, it hired a gay woman as its Bureau Chief of Quality. Both of these decisions were made by heterosexual individuals.
- **EEOC Charge + Lawsuit.** After filing a discrimination charge with the U.S. Equal Employment Opportunity Commission, Ames filed a lawsuit against the Ohio DYS, alleging discrimination based on sexual orientation (as well as discrimination based on sex, a claim not before the Supreme Court).

Legal Background

- **Title VII.** As the flagship workplace antidiscrimination law, Title VII bars discrimination against workers because of race, color, religion, national origin, and sex. The Supreme Court's 2020 decision in *Bostock v. Clayton County* held that "because of . . . sex" includes discrimination based on an individual's sexual orientation or gender identity.
- **Proving Title VII Discrimination.** The Supreme Court's landmark *McDonnell Douglas Corp. v. Green* decision in 1973 established a multi-part test for courts to analyze Title VII discrimination claims based on indirect evidence (since most plaintiffs are unable to provide direct evidence of discrimination). Under this standard, the plaintiff must first assert a prima facie claim of discrimination (more on this below). Next, the burden shifts to the employer to assert legitimate, non-discriminatory reasons for the adverse employment action. Finally, the burden shifts backto the plaintiff to show the employer's stated reasons for termination are "pretextual" and not the real reasons.
- **Asserting a *Prima Facie Case*.** According to the 6th U.S. Circuit Court of Appeals, the first step of the *McDonnell Douglas* test requires a plaintiff to show that: (1) they are a member of a **protected class**, (2) they were subject to an **adverse employment decision**, (3) they were

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qualified for the relevant position, and (4) their employer **treated more favorably a similarly qualified person who was not a member of the same protected class**.

- **Heightened Burden for Majority-Group Plaintiffs.** Some circuits require majority-group plaintiffs – those advancing what some call "reverse" discrimination claims – to make an additional showing in order to satisfy step one of the McDonnell Douglas In those circuits, such plaintiffs must also show, as the 6th Circuit has put it, "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority." However, other circuits have expressly rejected this rule or otherwise do not apply it.

Lower Court Rulings

The district court granted summary judgment in favor of the Ohio DYS, and the 6th Circuit affirmed. The appeals court held that:

- **because she is heterosexual, Ames must show "background circumstances"** to satisfy the first step of the multi-part test under *McDonnell Douglas*; and
- **her claim failed *solely* because she lacked evidence to make that additional showing** ("For otherwise," the court noted, "Ames' prima-facie case was easy to make").

In reaching this conclusion, the court said that said that Ames did not present the type of evidence that majority-group plaintiffs show to establish "background circumstances," such as "evidence that a member of the relevant minority group (here, gay people) made the employment decision at issue, or with statistical evidence showing a pattern of discrimination by the employer against members of the majority group." Rather, the court reasoned, the two individuals who terminated Ames were heterosexual, and Ames only used her own experience in alleging Ohio's pattern of discrimination against heterosexuals.

How Did the SCOTUS Oral Arguments Go?

The Supreme Court heard arguments on February 26.

Plaintiff's Argument

The attorney for Ames argued that the judge-made "background circumstances" rule, which requires an additional showing unique to majority-group plaintiffs, is inconsistent with Title VII because the federal civil rights law aims to end *all* discrimination in the workplace. "At the heart of this case, at bottom," he said, "all Ms. Ames is asking for is equal justice under law. Not more justice, not more justice, but certainly not less and certainly not less because of the color of her skin or because of her sex or because of her religion."

Employer's Argument

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In a stunning admission, the attorney arguing on behalf of Ohio DYS agreed: "I think the idea that you hold people to different standards because of their protected characteristics is wrong. And if there's any upshot from this case, let reverse discrimination completely fall out of the Federal Reporter." However, Ohio Solicitor General T. Elliot Gaiser didn't stop there – instead, he asked the Justices to consider using the *Ames* case to rule on a broader issue.

Essentially, Gainer argued that the Court should still affirm the 6th Circuit's decision, not because Ames failed to show "background circumstances" (the requirement unique to majority-group plaintiffs), but because she failed to establish a *prima facie* case (a requirement for all plaintiffs under *McDonnell Douglas*) due to her lack of evidence that anybody at the state's DYS was motivated by sexual orientation or *even knew* Ames' sexual orientation. He said to hold otherwise would make Title VII "that unusual statute that presumes liability for employers and swallows what remains of at-will employment."

Justices' Responses

The Justices, in addition to both parties, seemed to clearly agree that that all plaintiffs, regardless of majority- or minority-group status, should have an equal burden for asserting a *prima facie* discrimination claim under Title VII. But several Justices seemed reluctant to rule on anything beyond that point. Gainer faced skepticism from Justice Kagan, who asked why the Court should use this case to opine on a range of things that have nothing do with the issue it agreed to review. Justice Gorsuch similarly questioned why Ohio couldn't sort out its newly raised issue in a lower court once the case is remanded and reminded Gainer that SCOTUS is a "court of review, not first views."

However, the fact that the Justices spent so much time probing counsel on the proper application of the *McDonnell Douglas* framework suggests that the Court may be primed to make a big pronouncement clarifying the burden of production for discrimination plaintiffs at the summary judgment stage.

What's at Stake for Employers?

The Court's ultimate decision in *Ames* could make it easier for so-called "majority-group" plaintiffs to assert a Title VII claim (and survive the employer's motion for summary judgment), potentially leading to not only more claims making it to jury trials but also more claims filed overall – so you should be prepared to adjust to this new reality. However, the attorney for Ames noted at oral arguments that while "more than half the circuits don't apply the background circumstances rule," those circuits have not experienced a flood of litigation.

Further, nothing would stop your organization from using the same defenses that have always been available to employers. A Department of Justice attorney, who argued as a "friend of the court" in support of Ames, emphasized that, in the federal government's experience "as an employer who regularly litigates these cases as a defendant, we don't need a higher *prima facie* case to weed out

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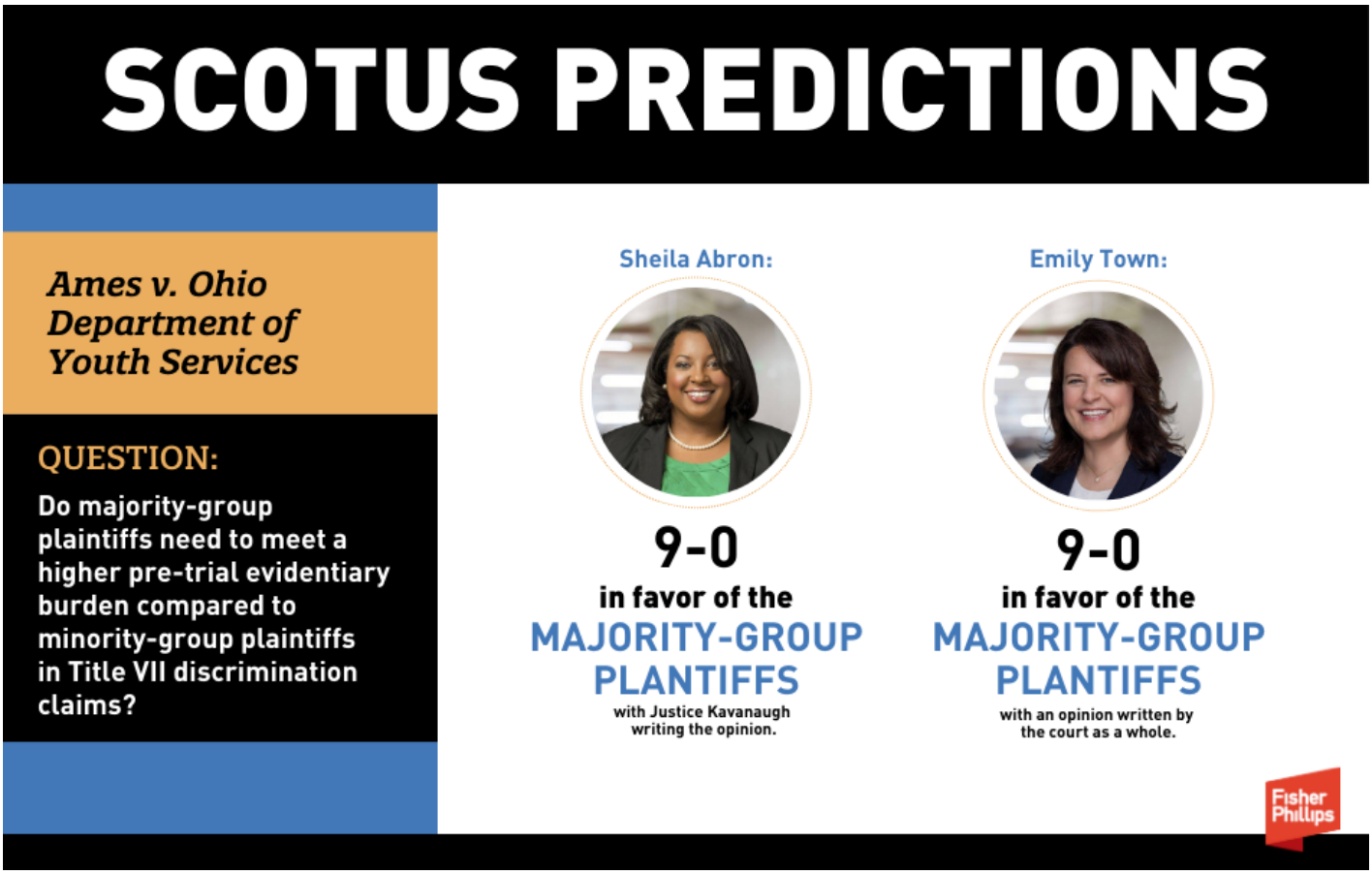
cases without merit. That's because, in every case, the government can provide a non-discriminatory reason for its action."

In addition, if the Court decides to rule on the broader question regarding the *McDonnell Douglas* framework, the *Ames* decision could also impact how employers defend against Title VII claims and stop them from making it to trial.

FP SCOTUS Prediction: Easy Win for Majority-Group Plaintiffs



Our authors both believe that the Court will unanimously rule to put majority-group plaintiffs on equal footing when it comes to satisfying the first step of the *McDonnell Douglas* test.

- **Sheila Abron:** The Court will unanimously decide the "additional step" is not required for majority-group plaintiffs, both because there is not a requirement in Title VII for it, and because it was conceded at the hearing. The opinion will be authored by Justice Kavanaugh.

- **Emily Town:** If the Court rules only on the narrower issue (as Justice Kavanaugh put it, "a really short opinion that says discrimination on the basis of sexual orientation, whether it's because you're gay or because you're straight, is prohibited, and the rules are the same whichever way that goes"), it will be a unanimous decision, perhaps even a *per curiam* decision without significant discussion, striking down the "additional burdens" applied in some Circuits as contrary to Title VII as well as the Court's prior precedents.

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FP Deep Dive: Justices Will Be Divided Over the Broader Issue Ohio Raised at Oral Arguments

If the Court also rules on the broader issue of how the multi-part test should work, we will see some division among the Justices.

- **Sheila Abron**: Given that this was not the "question presented," under traditional notions, the Court should not address the *McDonnell Douglas* burden-shifting framework. However, given the Court's interest and extensive discussion on the matter during oral argument, and the current climate, the Court may welcome the opportunity to weigh in on this issue. This is especially true if it gives the Court the opportunity to revisit the Court's decades-old *Price Waterhouse Coopers v. Hopkins* decision, which held that sex stereotyping is a means of proving sex discrimination and underpins its *Bostock* ruling in 2020.

- **Emily Town**: I think the Court could issue a decision that both rejects the notion that "reverse discrimination" is a claim and clarifies the appropriate standard that should be applied to all discrimination claims. (This outcome could also operate to dispose of a pending case seeking SCOTUS review of the 9th Circuit's requirement that a plaintiff "disprove" an employer's proffered legitimate, non-discriminatory reason rather than simply point to some evidence that a jury could believe shows pretext or an inference that discrimination was also a motivating factor). If the Court issues a more sweeping re-tooling of the burden of production standards, there is a chance for some dissention. I think Justice Thomas, in particular, may see an opportunity to try to overrule *Price Waterhouse* on the "mixed motive" standard. Ultimately, I think Justice Gorsuch is going to write the opinion if it tackles *McDonnell Douglas*, and it will fall in line with *Bostock* and also reject any standard that tries to define "but-for" causation as "sole-cause" causation. In any event, either this year or next I believe we'll have a new case to cite in the "Standard of Review" section of all our summary judgment briefs.

Conclusion

We expect the court to issue an opinion sometime during the next few months. We will continue to monitor developments related to this case and provide an update when SCOTUS issues an opinion, so make sure you subscribe to Fisher Phillips' Insight System to get the most up-to-date information. If you have questions, contact your Fisher Phillips attorney or the authors of this Insight.

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