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Gavel to Gavel: SCOTUS cert. grant augurs further changes for discrimination lawsuits

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Currently, five circuits—including the Tenth Circuit—require a heightened showing by members of “majority groups” to allege discrimination. While plaintiffs who are, say, black or female might advance a claim simply by establishing their membership in a protected category, their qualifications, and an adverse action, plaintiffs who are majority members—like white or male plaintiffs—must **additionally** show “background circumstances” suggesting they worked for employers that discriminate against the majority. This heightened burden has been the law in the Tenth Circuit for over 30 years.

But that could soon change, as the Supreme Court prepares to consider a challenge this term to the Sixth Circuit’s disposition in *Ames v. Ohio Department of Youth Services*. Marlean Ames, the plaintiff and a heterosexual woman, started working for the state in 2004, and was promoted in 2014. In 2017, Ames was assigned a new supervisor—a gay woman. Two years later, Ames interviewed for a promotion, but didn’t get it. Instead, she was demoted four days later. Subsequently, the state hired a gay man to fill her prior position and a gay woman for the promotion Ames sought. Ames contended she didn’t get promoted and was demoted because of her sexual orientation.

The Sixth Circuit disagreed. The court conceded that, were Ames gay, she could state a *prima facie* case of sex discrimination and thereby force the state to proffer non-discriminatory reasons for its decisions. But Ames is straight, so she had to show additionally that gay people made the employment decisions **or** a pattern of discrimination by the state against majority-group members (here, straight people). But the people who ultimately didn’t promote and subsequently demoted Ames were straight (though her direct supervisor was gay), and Ames’ only “evidence” of a pattern of discrimination against gay people was her own experience—which isn’t evidence at all under circuit precedent. Thus, Ames couldn’t advance her sexual orientation claim past the first step because she didn’t show “background circumstances” suggesting the state discriminates against the majority.

As the concurrence in *Ames* explains, five circuits apply this “background circumstances” principle, two have rejected it, and another five just don’t apply it. Where the appeals courts are split, the Supreme Court often weighs in. But the Court’s decision to hear this challenge suggests the “background circumstances” principle may not last much longer. While a decision likely won’t come next year, employers should prepare for more lawsuits from “non-minority” plaintiffs.

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