

Navigating Claims of Discrimination by Majority Group Members

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Agenda

1. Title VII of the Civil Rights Act of 1964
 - a. Litigating Title VII Claims
 - b. Burden-Shifting Framework
2. What Are “Reverse Discrimination” Claims
 - a. Proving Reverse Discrimination Claims
 - b. Examples
 - c. Circuit Split on Reverse Discrimination Evidentiary Framework
3. Supreme Court’s Decision in *Ames v. Ohio Dep't of Youth Servs.*
4. Best Practices Post-*Ames*.

Federal and Wisconsin Law

- Title VII of the Civil Rights Act of 1964 makes it unlawful for covered employers “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . , because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1).
- The Wisconsin Fair Employment Act prohibits discrimination against employees “on the basis of age, race, creed, color, disability, marital status, sex, national origin, ancestry, arrest record, conviction record, military service, use or nonuse of lawful products off the employer’s premises during nonworking hours, or declining to attend a meeting or to participate in any communication about religious matters or political matters.”

Litigating Title VII claims

- Employee must establish that “evidence would permit a reasonable factfinder to conclude that the plaintiff's race, ethnicity, sex, religion, or other proscribed factor caused the discharge or other adverse employment action.” *Ortiz v. Werner Enters., Inc.*, 834 F.3d 760, 765 (7th Cir. 2016)
- Evidence “must be considered as a whole, rather than asking whether any particular piece of evidence proves the case by itself-or whether just the "direct" evidence does so, or the ‘indirect’ evidence. Evidence is evidence. Relevant evidence must be considered and irrelevant evidence disregarded, but no evidence should be treated differently from other evidence because it can be labeled ‘direct’ or ‘indirect.’” *Id.*

Burden-Shifting Framework in Discrimination Claims

- Employee must first establish a *prima facie* case of discrimination by showing that: 1) they are a member of a protected class, 2) they were meeting their employer's legitimate expectations, 3) they suffered an adverse employment action, and 4) similarly situated employees who were not members of his protected class were treated more favorably. *Reives v. Illinois State Police*, 29 F.4th 887, 891 (7th Cir. 2022).
- Once an employee meets that burden, "the burden shift[s] to the [employer] to 'articulate a legitimate, nondiscriminatory reason for the adverse employment action, at which point the burden shifts back to the [employee] to submit evidence that the employer's explanation is pretextual.'" *Simpson v. Franciscan All., Inc.*, 827 F.3d 656, 661 (7th Cir. 2016)

What Are “Reverse Discrimination” Claims?

- Claims of discrimination brought by employees who are members of “majority groups.” Examples include:
 - White employees bringing claims of discrimination on the basis of race.
 - Male employees bringing claims of discrimination on the basis of sex.

Proving “Reverse Discrimination” Claims

- Some courts required employees bringing reverse discrimination claims to make additional evidentiary showings.
- This is because it is the “... unusual employer who discriminates against majority employees.” *Mills v. Health Care Serv. Corp.*, 171 F.3d 450, 456-57 (7th Cir. 1999).
- Thus, “additional steps are needed before an inference of reverse-discrimination can be drawn.” *Gore v. Ind. Univ.*, 416 F.3d 590, 592-93 (7th Cir. 2005).

Changes to an Employee's *Prima Facie* Case

- Employees bringing reverse discrimination claims must show “background circumstances that demonstrate that a particular employer has reason or inclination to discriminate invidiously against [men] or evidence that there is something 'fishy' about the facts at hand.” *Gore v. Ind. Univ.*, 416 F.3d 590, 592 (7th Cir. 2005).
- The Seventh Circuit has identified two situations in which it is plausible to expect that men might discriminate against men and in favor of women.
 - 1) Where decision makers running a company are under pressure from affirmative action plans, customers, public opinion, the EEOC, a judicial decree, or corporate superiors imbued with belief in “diversity” to increase the proportion of women in the company's workforce...
 - 2) Where decision makers running a company are fixated on a stereotype for jobs that are traditional “women’s work.”
 - *Preston v. Wis. Health Fund*, 397 F.3d 539, 542 (7th Cir. 2005).

Example: Financial Specialist

- Male employee hired as financial specialist at local University.
- Employee applied for a higher-level position as an accountant, but the position went to a female candidate.
- Employee sued the University alleging sex discrimination.
- Employee claimed that the successful female candidate was less qualified.
- Employee had more formal education than the selected female candidate and a professional certification, a CPA, that the selected female candidate lacked.
- Employee alleged that the University had a pattern of hiring women into the accounting position.

Murphy v. Bd. of Regents of the Univ. of Wis. Sys., 73 F. Supp. 3d 1042 (W.D. Wis. 2014)

- Western District of Wisconsin granted summary judgment to the employer the Board of Regents.
- Despite employee alleging a “pattern of hiring women” into the accounting position, the Western District stated that “hiring two women... is not a pattern” and that the record showed that “men were involved in the decision-making process to fill the PHS accountant position.”
- Thus, employee could not show sufficient background circumstances evidencing an inference of discrimination and therefore could not establish his *prima facie* case of discrimination.

Example: Interim Vice Director

- Employee served as interim Vice Director for Equity, Diversity, and Inclusion at local University. Employee is a white woman.
- At a university event relating to equity, diversity, and inclusion, a student asked, “You hired a white women as an interim director?” Another student asked, “Do you personally feel white staff can do as effective a job as a person of color, within a space for people of color?”
- The University’s student senate adopted a resolution which identified, “concerns over placing white identifying individuals in positions of interim leadership for major EDI offices.”
- A student filed an anonymous complaint against the employee stating that employee’s presence made the complainant uncomfortable.
- Employee alleges that they were subject to a hostile work environment based on their race (White) and that she was demoted because of her race.

Hoffman v. Bd. Regents of the Uni. Wis. Sys.

- In 2022, Rochelle Hoffman filed complaints with the University of Eau Claire and the Wisconsin Department of Workforce Development's Equal Rights Division.
- She alleged students attending open houses said they didn't want any "white identifying" individuals holding leadership positions in the newly created office, and some faculty raised concerns about the "optics" of a white woman replacing former DEI leaders who were Asian and Black.
- The University of Wisconsin System Board of Regents agreed to pay a settlement of \$265,000 to settle the lawsuit.
 - *UW Board of Regents settles racial discrimination lawsuit for \$265,000*, Wis. Pub. Radio (Aug. 8, 2025)

Circuit Split on How Reverse Discrimination Claims are Proven

- Federal judges disagree as to whether employees bringing reverse discrimination claims should be subject to a different evidentiary burden.
 - The Sixth, Seventh, Eighth, Tenth and D.C. Circuits had adopted the additional “background circumstances” requirement
 - The Third and Eleventh Circuit expressly rejected the requirement, and the remaining circuits simply applied the *McDonnell Douglas* framework

Supreme Court Resolves Circuit Split: *Ames v. Ohio Dep't of Youth Servs.*, 605 U.S. 303 (2025)

- Marlean Ames filed a Title VII suit against her employer, the Ohio Department of Youth Services, after she was denied a promotion and subsequently demoted.
- Ames, who is heterosexual, alleged that the promotion she sought was awarded to a less-qualified lesbian woman who had not applied for the role and that, after Ames was demoted, her former position was given to a less-qualified gay man who had also not applied for her job.

Supreme Court Resolves Circuit Split: *Ames v. Ohio Dep't of Youth Servs.*, 605 U.S. 303 (2025)

- Applying circuit court precedent, the Sixth Circuit held that Ames had failed to establish a *prima facie* case of sex discrimination because she failed to show “background circumstances” to “support the suspicion that the defendant is that unusual employer who discriminates against the majority.”
- The Supreme Court granted review of the Sixth Circuit’s ruling to resolve the circuit split and decide whether Title VII imposes an additional “background circumstances” requirement on majority-group plaintiffs.

Supreme Court Resolves Circuit Split:

Ames v. Ohio Dep't of Youth Servs., 605 U.S. 303 (2025)

- In a unanimous decision, the Supreme Court held that Title VII imposes the same evidentiary requirements on majority-group and minority-group plaintiffs.
- The Court pointed out that the text of Title VII “draws no distinctions between majority-group and minority-group plaintiffs” and reasoned that Congress left no room for courts to impose special requirements on majority-group plaintiffs alone.
- Because Title VII does not impose a heightened evidentiary standard on members of majority groups in order to carry out their burden under the first step of the *McDonnell Douglas* framework, the Court deemed the “background circumstances” requirement on majority-group plaintiffs unlawful.

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Implications of *Ames v. Ohio Dep't of Youth Servs.*, 605 U.S. 303 (2025)

- The Court's decision makes it easier for majority group employees to bring discrimination claims. Majority employees have to prove the same elements as minority employees.
- Employers can expect to see an increase in reverse discrimination suits in connection with the recent backlash against public- and private-sector initiatives to promote diversity, equity and inclusion in the workforce.
- Majority employees still have the burden to prove discrimination, and will run into persuasive evidentiary challenges that minority employees do not have.
- It is unclear what impact the Supreme Court's Decision will have on Wisconsin Fair Employment Act claims.

U.S. Equal Employment Opportunity Commission (EEOC)

Recent Scrutiny of DEI Programs

- Following executive orders from President Trump, the EEOC has scrutinized Diversity, Equity, and Inclusion programs maintained by employers.
- The EEOC is focusing on employer practices that could be interpreted as “reverse discrimination” against majority groups.
- The EEOC is focusing on programs like:
 - Employer supported diversity fellowship and internship programs.
 - Affinity groups limited to certain protected groups of employees.
 - Programs that directly or indirectly exclude certain employees from mentoring or advancement opportunities.
- Employers can expect the EEOC to continue to ramp up enforcement efforts aimed at eliminating DEI initiatives, programs, and affinity groups that exclude majority individuals.

Next Steps for Employers

- Employers subject to the requirements of Title VII should review their policies on equal employment opportunity and revise them as needed to ensure that they clearly prohibit discrimination against any group, including majority groups.
- Employers should also continue to apply all workplace policies uniformly, regardless of employee background, and apply neutral and objective criteria for all employment decisions—which cannot be based on an individual’s protected characteristics, regardless of who that employee is.
- Employers appear most vulnerable in “failure to hire” cases, so it is important to have articulable reasons as to why a selected candidate was the most qualified candidate.

Questions?

Thank you!



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