

LABOR AND EMPLOYMENT LAW

INFORMATION MEMO

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U.S. Supreme Court Clarifies Standard in a “Reverse Discrimination” Case under Title VII

The McDonnell Douglas standard, established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), is a burden shifting framework used to evaluate claims of employment discrimination. This standard applies to claims under Title VII of the Civil Rights Act of 1964, the New York State Human Rights Law (NYSHRL) and other related statutes.

Under the McDonnell Douglas framework, a plaintiff must first establish a *prima facie* case of discrimination by demonstrating: (1) they are a member of a protected class; (2) they were qualified for their position; (3) they suffered an adverse employment action; and (4) the adverse action occurred under circumstances giving rise to an inference of discrimination. The burden to establish a *prima facie* case is generally described as minimal or “de minimis.”

Once the plaintiff establishes a *prima facie* case, a presumption of discrimination arises and the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action. If the employer provides such a reason, the presumption of discrimination disappears, and the burden shifts back to the plaintiff to demonstrate that the employer’s stated reason is a pretext for discrimination. The ultimate burden of proving intentional discrimination remains with the plaintiff throughout the process.

In *Ames v. Dept of Youth Services*, the plaintiff, a heterosexual woman, was denied a promotion and demoted. She alleged sexual orientation discrimination under Title VII claiming that the promotion was awarded to a lesbian, and the position from which she was demoted was reassigned to a gay man.

The trial court and the Sixth Circuit Court of Appeals rejected her claims. They applied a heightened standard of proof to her *prima facie* case under the McDonnell Douglas rubric. Specifically, they applied a rule, the background circumstances rule, which requires certain Title VII plaintiffs—those who are members of majority groups—to satisfy a heightened evidentiary standard in order to carry their burden under the first step of the McDonnell Douglas framework.

The “background circumstances” rule in the context of the McDonnell Douglas standard for employment discrimination claims refers to an additional requirement applied in certain “reverse discrimination” cases. Specifically, when a plaintiff alleging reverse discrimination (discrimination against a majority group) seeks to establish a *prima facie* case under the McDonnell Douglas framework, courts may require the plaintiff to demonstrate “background circumstances” that support the suspicion that the employer is one of the unusual entities that discriminates against the majority. Such evidence may include, for example, that a member of the minority group made the employment decision or statistical evidence of a pattern of discrimination against members of the majority group.

In *Ames*, a unanimous Supreme Court rejected the principle that there is a higher standard of proof in reverse discrimination cases. *Ames* holds that as a textual matter, Title VII’s disparate treatment provision draws no distinctions between majority group plaintiffs and minority group plaintiffs. Rather,

the provision makes it unlawful “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any *individual*... The court highlighting the term individual as opposed to protected class or group.

By establishing the same protections for every “individual”—without regard to that individual’s membership in a minority or majority group—Congress left no room for courts to impose special requirements on majority-group plaintiffs alone.

Note there is a subtle difference in how the Ames Court describes the McDonnell Douglas prima facie case, and the standard description of that framework. In her opinion, Justice Jackson describes the McDonnell Douglas *prima facie* case as: “that she applied for an available position for which she was qualified but was rejected under circumstances which give rise to an inference of unlawful discrimination.” The first element of the prima facie case (member of a minority group) is absent.

Also of note, Justice Thomas (with Justice Gorsuch joining) wrote a concurrence that criticized both the background circumstances rule and the McDonnell Douglas framework as “judge made” rules that are not based in the text of the statute. Justice Thomas was particularly critical of the application of the McDonnell Douglas framework in the summary judgment context, because in his view it does not align with the applicable requirements of FRCP Rule 56 which governs summary judgment.

The courts in New York, including the federal courts, had not applied the background circumstances rule. So, *Ames* does not change the law in New York. However, given that this was a unanimous Supreme Court decision supporting a “reverse discrimination” claim in an environment that has turned critical of diversity actions, it is likely to lead potential plaintiffs and plaintiffs’ attorneys to pursue such claims across the spectrum. Trained decision-makers applying policies that support legitimate business objectives are critical to employers’ defense of any discrimination claims. In light of the *Ames* decision, that fundamental principle remains more important than ever.

For more information, please contact [Thomas Eron](#) or any attorney in Bond’s [labor and employment practice](#) or the Bond attorney with whom you are regularly in contact.

