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The Washington Post Claimed "Her Claim of Anti-Straight Bias Could Upend Discrimination Law." Was It Really Sensational News, or a Sensationalized Headline?

First, a bit about the "Her" of the headline: Marlean Ames, a heterosexual woman, worked for the Ohio Department of Youth Services. During her employment, she was denied a promotion and shortly thereafter demoted from her existing role. Two gay employees were selected to fill the position she wanted and the one she was forcibly removed from. The individual selected to fill the position she'd held was far less experienced, as he was just 25 years old, while Ames had been working for the State for 30 years at that point.

Ames sued, alleging, among other things, sexual orientation discrimination. A three judge panel of the Sixth Circuit (covering Kentucky, Michigan, Ohio, and Tennessee) held that Ames couldn't even meet the standard of showing a *prima facie* case, because, in addition to the usual *prima facie* elements--(1) member of protected class; (2) adverse employment action; (3) qualified for the position; (4) treated less favorably than a similarly situated person outside the protected class—she also had to show " 'background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority.' " In other words, even though Ames had articulated the most classical definition of a *prima facie* case, the Sixth Circuit said that because she was a member of the "majority" group, she still needed something more for the employer to even have to articulate a legitimate non-discriminatory reason for her non-selection and demotion: something like proving that the decisionmakers were gay or that there was a pattern of preferring homosexuals, beyond the two employment decisions she'd been a part of.

Dear reader, this "background circumstances" rule is so antithetical to non-discrimination law that no one, not even the prevailing defendant-employer Ohio Department of Youth Services, would defend it when Ames appealed the Sixth Circuit's decision to the U.S. Supreme Court. (The Department argued instead that the "background circumstances" rule was a way of getting away from strict adherence to the burden-shifting framework and focusing on the plaintiff's obligation to raise sufficient evidence for there to be an inference of discriminatory employment decisionmaking. Justice Gorsuch made no effort to conceal his desire for the Court to review, and presumably dismantle, this atextual framework; the Court is deciding whether or not to review a Ninth Circuit case where this issue is presented directly).

My verdict: The *Post*'s headline was more sensationalized than a reflection of sensational news. Fortunately, the Sixth Circuit's decision presented an outlier of judicial reasoning, and the Supreme Court's eventual reckoning is more about pulling a stray calf back to the herd than setting a new course. Expect a 9-0 decision eliminating any judicial inclination to impose a heightened standard of proof in "reverse discrimination" cases.

If you have any questions or would like additional information, please contact Whitney Brown at 205-323-9274 or wbrown@lehrmiddlebrooks.com.