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**U.S. Supreme Court Holds Disparate Treatment is Disparate Treatment, Even if
“Majority”-Class Plaintiff is Disadvantaged**

[A few months ago](#), I wrote about the Supreme Court case of *Ames v. Ohio Department of Youth Services*. As a quick refresher, the case involved Plaintiff Marlean Ames, a heterosexual, who was denied a promotion and later demoted, with both the position she wanted and the position she was removed from being awarded to homosexual employees, and the employee who filled the position she'd been demoted from was far less experienced. The Sixth Circuit held that Ames couldn't state a *prima facie* case for discrimination because, as a member of the majority class (heterosexuals), she had an additional burden to prove background circumstances suggesting that she had in fact experienced discrimination. While *The Washington Post* had written that the case could “upend discrimination law,” I opined that the case was more about pulling “a stray calf [the Sixth Circuit Court of Appeals] back to the herd [of anti-discrimination law],” and predicted a 9-0 decision doing just that.

The Supreme Court delivered its decision on the matter on June 5, and it was indeed a 9-0 decision,¹ with a concurring opinion from Justices Clarence Thomas and Neil Gorsuch. Justice Kentaji Brown Jackson wrote for the Court to make clear that “Title VII’s disparate-treatment provision draws no distinctions between majority-group plaintiffs and minority-group plaintiffs” and that “the standard for proving disparate treatment under Title VII does not vary based on whether or not the plaintiff is a member of the majority group.” The majority opinion itself is a very slim eight pages (not including the syllabus).

The concurrence bears some further discussion, as it attacks, broadly, “judge-made rules.” The Sixth Circuit’s “background circumstances” rule was one, but, the concurring justices contended, so is the *McDonnell-Douglas* burden-shifting framework itself. Indeed, the Eleventh Circuit Court of Appeals (Alabama, Florida, Georgia) has followed several others in applying an alternative simplified framework, in which the employment discrimination plaintiff merely needs to assemble “tiles” of evidence into a “convincing mosaic” of discrimination. Under such a rubric, one can even do away distinguishing between direct and circumstantial evidence. The concurrence cites heavily to Justices Thomas’ and Gorsuch’s dissent from the denial of *certiorari* to an appeal from the Ninth Circuit which would have put the burden-shifting framework squarely before the Supreme Court.

¹ To be fair, this wasn’t a bold prediction: the Sixth Circuit’s position represented such an outlier that the prevailing party, the Ohio Department of Youth Services, didn’t even fully defend it, but rather argued that it was a different way of avoiding strict adherence to a burden-shifting framework. Justice Jackson was having none of it, arguing that “Ohio’s attempt to recast the ‘background circumstances’ rules as an application of the ordinary *prima facie* standard thus misses the mark by a mile.” Oof.

Take Away: The convincing mosaic standard has enabled plaintiffs to leverage, among other things, supervisor and decisionmaker personal social media posts as evidence of professional bias. Employers must train supervisors and managers that even personal social media activity may be viewed as a reflection of the employer's business values and that they may be disciplined or terminated for content that is discriminatory or otherwise potentially harmful to the employer.

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