Heterosexual Discrimination

By Paul Engel

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- What is the proper remedy to past discrimination?
- Is it present discrimination, as Ibriam Kendi says?
- Or is reverse discrimination just as evil as the discrimination it claims to remedy?

Ibriam Kendi is often quoted as saying “The only remedy to past discrimination is present discrimination.” Is that true? Above the main entrance to the Supreme Court is a promise chiseled into the marble façade: “equal justice under law”. How can we have equal justice under law if one side is always discriminating against another?

Enter the case of Ames v. OH Dept. of Youth Services, where Marlean Ames claims she was discriminated in her job because of her sexual orientation. What makes this case uniques is Ms. Ames is heterosexual, and the Sixth Circuit claimed that meant she had a higher burden of proof than a homosexual.

Arguments for Mr. Wang for the Petitioner

We start with oral arguments from Mr. Xiao Wang, attorney for Ms. Ames. Mr. Wang begins by describing the situation that led to the lawsuit.

1. WANG: Mr. Chief Justice, and may it please the Court:

Marlean Ames has worked for the Ohio Department of Youth Services for over two decades, and in 2018, her year-end performance review described her as being very competent in

her – in her role, a pleasure to have on the team, and always willing to assist others.

But, in 2019, she experienced two adverse employment actions. First, she sought a promotion to Bureau Chief for which she was qualified, for which she applied, and for which she interviewed. But neither she nor the two other heterosexual employees who applied and interviewed got the job. Instead, the job was held open for eight months before going to a gay employee who neither applied nor interviewed for the position.

And second, Ms. Ames lost the job that she was in, and she lost it and was replaced by another gay employee who also did not apply or interview for the position.

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The situation described by Mr. Wang certainly does seem to show discrimination. First, three heterosexual applicants for a job are denied, then the job is left open for months until a homosexual employee was given the job, even though they never applied nor interviewed for the position. Then Ms. Ames lost a job for which she had been given excellent performance reviews, only to have the vacancy filled by yet another homosexual person who neither applied nor was interviewed for the position. Seems pretty cut and dried, both to me and the Sixth Circuit Court of Appeals.

Based on these facts, the Sixth Circuit held that Ms. Ames had satisfied the usual requirements for stating a – for stating a prima facie case of discrimination under Title VII, but she could not proceed because of the background circumstances rule, which the Sixth Circuit described as an additional showing unique to majority-group plaintiffs.

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Wait, Ms. Ames stated a prima facie case of discrimination (A fact presumed to be true unless it is disproved. – The Free

Legal Dictionary), but because she wasn't a minority, she needed to prove more?

The narrow question before the Court today is whether this judge-made rule is consistent with Title VII. And we submit that it is not. It's not because this Court has said that Title VII aims to eradicate all discrimination in the workplace.

But the background circumstances rule doesn't do that. It doesn't eradicate discrimination; it instructs courts to practice it by sorting individuals into majority and minority groups based on their race, their sex, or their protected characteristic, and applying a categorical evidentiary presumption not in favor of but against the non-moving party based solely on their being in a majority group, however you define it.

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Title VII was created to get rid of discrimination, yet this "background circumstances rule," something made up by courts and is not law, actually tells the court to discriminate? Again, this is not based on a law passed by Congress, but by a "rule" established by one or more judges, in violation of the law.

But that's not consistent with the statute that tells us that we are supposed to protect all individuals from individual discrimination based on the individual case. And it's not consistent with McDonald versus Santa Fe Trail, where this Court says that all individuals, whether in majority or minority groups, are protected by Title VII under the same terms and the same standards.

For these reasons, we urge the Court to reverse the judgment of the Sixth Circuit.

I welcome the Court's questions.

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Questions for Mr. Wang

It took no time at all for the justices to start their questions. Justice Thomas starts off with a question about precedent.

JUSTICE THOMAS: What do you do with Respondent's argument that this is merely an application of our precedents?

1. WANG: I don't think it is an application of this Court's precedents, Your Honor, and – and, Justice Thomas, it's because this Court's precedents in McDonnell Douglas lays out a framework, and then McDonald versus Santa Fe Trail says they apply to the same terms and same standards.

But the background circumstances rule isn't the same term. It's not the same standard. The Sixth Circuit says it's an additional burden. And in prior cases, it says it's a difficult and more demanding burden on majority-group plaintiffs. So I don't think it's consistent with this Court's precedents.

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So Mr. Wang doesn't think the Sixth Circuit's decision followed Supreme Court precedent by adding the greater burden to majority-group plaintiffs. Next, Chief Justice Roberts puts the question in another context.

CHIEF JUSTICE ROBERTS: What if you have a situation where, say, 60 employees in the company, say, you know, a half dozen African Americans, an African American is – applies for a job, there's an opening, he doesn't get it, it remains open for, you know, a couple of months?

Does that satisfy the prima facie case if he said it was because of discrimination?

1. WANG: Assuming that they are qualified and –

CHIEF JUSTICE ROBERTS: Yeah, yeah. Yeah.

1. WANG: Yes.

CHIEF JUSTICE ROBERTS: Okay. Now – I'm sorry. Is that – that's a yes?

1. WANG: Yes, that – that – that is true.

CHIEF JUSTICE ROBERTS: Okay. Now let's say it's the same thing, but the applicant is white, exactly the same facts, and she says: I was discriminated – I lost the job because of discrimination on the basis of race. Does that start – state a prima facie case?

1. WANG: I think it states a prima facie case, but I think it goes in – perhaps, Your Honor, it goes to the idea of getting employers to come forward with an explanation and then providing sort of a legitimate non-discriminatory reason, which I don't think is a high burden at all. I think, as Reeves, as Burdine, as Furnco have made clear, they just have to provide some sort of legitimate non-discriminatory reason to answer or to rebut the prima facie case.

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So what appears to be an obvious case of discrimination can be stopped if the employer simply shows there was a non-discriminatory reason for the action.

Justice Barrett dealt with a claim that, should the court agree with petitioner, it would open almost any case where someone did not get a job to claims of discrimination.

JUSTICE BARRETT: Counsel, what do you have to say to the Department's contention that this is just going to throw the door wide open to Title VII suits because now everybody can

say, hey, this was discrimination on the basis of race, gender, et cetera?

1. WANG: Well, I don't think that contention is well taken, Justice Barrett, and for two reasons. The first is this is an evidentiary question that arises at summary judgment. So they've already have gotten past a discussion with EEOC, plausibility under Iqbal and Twombly, a motion to dismiss. So I think, if there were a floodgate issue, that would be sort of more – more on the pleading standards.

I think the second point is – is merely sort of an empirical question. And, as we lay out and as Judge Kethledge lays out in his concurrence, about more than half the circuits don't apply the background circumstances rule. We don't see those circuits having some sort of flood of litigation.

And I don't think there's a huge delta between those circuits that apply it and – and those circuits that don't apply it, which I think goes to the narrow question that's before the Court today.

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Other circuits do not use the "background circumstances rule," and they do not have a problem. Neither does the EEOC. So there's no reason to believe removing the rule from all circuits would make much of a difference.

Justice Kavanaugh wanted to know what Mr. Wang wanted from the court.

JUSTICE KAVANAUGH: So – so all you want for this case is a really short opinion that says discrimination on the basis of sexual orientation, whether it's because you're gay or because you're straight, is prohibited, and the rules are the same whichever way that goes?

1. WANG: That – that's right, Your Honor. And I –

JUSTICE KAVANAUGH: That's all we need to say, right?

1. WANG: I – I think that would be something – well, I think you'd also have to say reverse or vacate.

(Laughter.)

1. WANG: I want to look out for my client here a little bit.

But – but, certainly, as to the reasoning, yes, I – I entirely agree. I think that this is a narrow question, and it's a question of is there an added burden.

And – and if the answer, I think, under McDonnell and under Title VII's text is no, then – then this goes back to – to the lower courts to resolve.

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A simple ask of the court: Make sure that every case before the court is treated the same, regardless of whether they are part of some "protected class" or not.

Arguments of Ashley Robertson, as Amicus Curiae

Ms. Robertson, Assistant to the Solicitor General of the United States offered her arguments in support of vacating the lower court decision.

1. ROBERTSON: Mr. Chief Justice, and may it please the Court:

The court of appeals applied a different and more difficult standard to Petitioner because it considered her a member of the majority, but Title VII draws no distinctions between plaintiffs based on their race, religion, sex, or other protected characteristic.

That alone is reason to vacate the decision below, that the Sixth Circuit's test would have been wrong if applied even-handedly.

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Ms. Robertson gets right to the point. While the court of appeals applied a standard, it was not based on the law, but their own apparent desire to discriminate against what they see as the majority. That alone should be enough to vacate their decision.

But Ms. Robertson goes further, claiming that, even if the court had applied their test even-handedly, it would have been wrong.

The Court required evidence, reason to suspect an employer usually discriminates against a group, that the statute does not, and it required more evidence to make out a prima facie case than this Court has held is necessary, including in McDonnell Douglas itself.

That heightened standard risks screening out cases with merit and complicates litigation by focusing on whether to shift a burden of production that Ohio had already met in this case.

The Court should vacate and remand for the court of appeals to apply the proper standards in the first instance, including to consider Ohio's alternative arguments for why summary judgment might still be proper.

I welcome the Court's questions.

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The goal of the court should not be to screen out cases which may have merit, especially because of some "protected class".

In response to a question from Justice Jackson, Ms. Robertson brings up an interesting point. Does a lack of evidence of

discrimination against a group mean there cannot be discrimination against an individual?

So what the Sixth Circuit did here, for instance, by asking for a reason to think that an employer usually discriminates against a group, requires evidence that a plaintiff wouldn't need to establish liability under the statute because, of course, even if an employer generally treats a group well, if a plaintiff has evidence that the employer discriminated against her, she should be able to proceed.

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Later, in response to a question from Justice Alito, Ms. Robertson pointed out how she believes the Sixth Circuit got it wrong.

1. ROBERTSON: I think it's important to distinguish between two ways that a court might take race into account. The first is the way that the Sixth Circuit did, which is tell me your race and I will tell you how much evidence you need to – to produce, or you'll – or I'll apply a different standard. That would be wrong at any stage in the proceeding.

JUSTICE ALITO: Okay.

1. ROBERTSON: That's not to say that race is irrelevant in a race discrimination case or that sex is irrelevant in a sex discrimination place. …

Second, courts can consider a plaintiff's identity to help them draw inferences from the evidence in the record. So comments that look neutral in a vacuum might take on a different valence when directed at a certain group.

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In other words, it's not that race doesn't matter in discrimination cases, but that your burden of proof should not

be based on race, sex, or any other grouping.

1. Elliot Gaiser, Solicitor General of Ohio, for the Respondents

The final attorney to speak was Mr. T. Elliot Gaiser, Solicitor General for the State of Ohio. As you might expect, Ohio sees the facts of the case differently.

1. GAISER: Mr. Chief Justice, and may it please the Court:

Ohio agrees it is wrong to hold some litigants to a higher standard because of their protected characteristics. But that is not what happened in this case.

When Governor DeWine took office in January 2019 and appointed a new cabinet-level director of the Ohio Department of Youth Services, the state's juvenile corrections system, Petitioner was an unclassified civil servant, effectively an at-will political appointee.

She claims the Department took two adverse actions against her in the first five months of the administration, denying her a promotion and demoting her because of her sexual orientation.

But, after discovery, she could not establish that anybody was motivated by sexual orientation or even knew her sexual orientation, nor the orientation of the unclassified political appointees, Ms. Frierson and Mr. Stojsavljevic, that she points to as comparators.

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Wait a second. Doesn't the premise of a "majority group" include the assumption of membership in that group unless there is evidence to the contrary? Wouldn't it be the assumption that Ms. Ames, Ms. Frierson, and Mr. Stojsavlijevic are heterosexual?

In other words, she failed to make out a prima facie case

under the first step of McDonnell Douglas that should apply to every Title VII plaintiff. She didn't provide evidence that, to quote Furnco, "if otherwise unexplained, raises an inference of discrimination."

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I suppose that would be true, if the people who were chosen to fill these two positions had applied for the job like the others, had interviewed for the job like the others, and were at least as qualified as the others. Then again, since neither person applied for the job, why were they chosen? One distinguishing factor is their sexual orientation. And since the fundamental assumption of majority groups is that most people are part of them, that seems to be a prime facia case to me.

Whether that evidentiary standard is framed as background circumstances, as in Parker, or circumstances which give rise to an inference of unlawful discrimination, as in Burdine, this Court has said a prima facie case under Title VII must be complete enough for the court to enter judgment for the plaintiff before the burden shifts to the employer.

Because the best reading of the Sixth Circuit judgment applies that standard, this Court should affirm.

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Remember this statement, because it will become very important during the justices' questioning.

If this Court nevertheless holds Petitioner made out a prima facie case on these facts, then McDonnell Douglas has effectively two prongs, and the Court will have made Title VII that unusual statute that presumes liability for employers and swallows what remains of at-will employment.

I welcome the Court's questions.

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That seems to be the logic of Mr. Gaiser's argument is we got the answer we want, so please don't overturn it. During questioning, I think Mr. Gaiser really stepped in it when he answered a question from Justice Kagan

JUSTICE KAGAN: Mr. Gaiser, I mean, you can say, well, there's language. I mean, I think that that's the absolutely critical language in this opinion. Because Ames is heterosexual, she must make a showing in addition to the usual ones for establishing a prima facie case.

And then it says, you know, Ames's prima facie case would have been easy to make had she belonged to the relevant minority group, here, gay people.

So, I mean, this is what the Court did.

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The Sixth Circuit Court clearly stated that Ms. Ames' case would have been easily made if she were part of the relevant minority class. Meaning, because she was not gay, she had a higher burden to prove her case had merit. This is where Mr. Gaiser had to back-peddle.

1. GAISER: Well, and we can't retreat from what the Court here said, but we think the best way to construe that language is consistent. But, nevertheless, I think that –

JUSTICE KAGAN: Well, the best way to construe that language is, like, as the language says.

1. GAISER: Well, Justice Kagan, yes, the Court said what it said. The important point is the prima facie step this Court has laid out needs to be complete enough before the employer has any burden under Title VII to show an inference of discrimination.

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So according to Mr. Gaiser, the question before the court, if the Sixth Circuit erred, doesn't matter. When the Sixth Circuit denied to review the case, even though they admitted Ms. Ames had made her prima facia case because she was heterosexual, is not the point. So, did she make the prima facia case? The court clearly stated she did.

JUSTICE KAVANAUGH: You – you agree that those passages are wrong?

1. GAISER: We're not defending the exact language there. This – this per curiam, we asked for oral –

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So let me get this right. Ohio is defending the case, but not the language the court used in the case? I've heard this before, from my own lips, but this is a different situation.

JUSTICE KAGAN: I mean, the exact language or you're defending something like that language? I – I mean, it's a little bit of a peculiar situation, isn't it, because this is what the court said. And you're up here, and I don't know exactly what to make of this, that – are – do you think that that's right, or do you think that it's wrong?

1. GAISER: I think the idea that you hold people to different standards because of their protected characteristics is wrong. And if there's any upshot from this case, let reverse discrimination completely fall out of the Federal Reporter.

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If the State of Ohio believes reverse discrimination is wrong, why are they fighting to prevent a case about reverse discrimination from continuing? I agree this argument just doesn't make sense.

JUSTICE KAGAN: – I – I – I guess my reaction to a lot of what you're saying is this: You say you agree with your friends on the question that we took this case to decide. The question presented is whether a majority-group plaintiff has to show something more than a minority-group plaintiff, here, whether a straight person has to show more than a gay person. Everybody over here says no. You say no too. That was the question that we took the case to decide.

And now you're asking us to opine on various other aspects of how the McDonnell Douglas test works, what we should think of the first step as doing, then what we should think of the second and third steps as doing, that are, you know, really not intertwined at all with that question.

Whatever McDonnell Douglas does, it does for majority-group plaintiffs and minority-group plaintiffs alike is all that we have to say. Why shouldn't we approach the case in that way?

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And attorneys wonder why people hate them. Here you have a simple question presented to the court.

Whether, in addition to pleading the other elements of Title VII, a majority-group plaintiff must show "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority."

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A question where all the parties to the case agree the answer should be no, but Mr. Gaiser, representing the State of Ohio, doesn't want reversed? This idea of the ends justifying the means is what so many American find disgusting about the legal profession.

1. GAISER: Well, I think there are two responses to that,

Justice Kagan.

First of all, while we all agree that everyone should be treated equally, we don't agree about what that prima facie step actually looks like when we do that.

JUSTICE KAGAN: Yes, I know. That's exactly what my – my – my point is. But that's – that's – that's orthogonal to the question we took. So, I mean, why would we use this case, which is about the – whether a majority-group plaintiff has an extra burden, to opine on a range of things that have nothing to do with that question?

1. GAISER: Well, so what the Sixth Circuit did here, that's – this is my second reason, Justice Kagan, if the first one doesn't satisfy you – is exactly what we think every court should do: ask for enough evidence to raise an inference of discrimination.

And simply going through those four prongs, copy/pasting McDonnell Douglas with subbing out racial minority for any particular protected group, doesn't do that. It doesn't satisfy what this Court said in Reeves and Burdine in Footnote 6 and 7.

And so our thought is the Court should still affirm because what the Sixth Circuit's judgment did here is what we ask every court to do at the first step of McDonnell Douglas even if we agree that's saying that an additional burden is a mischaracterization of what this Court has said in the past.

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In short, we agree that the Circuit Court should not have dropped the case because it is unfair, but the State of Ohio doesn't want the Supreme Court to reverse, because Ms. Ames hasn't made the case that she has not had a chance to argue yet.

I’m sorry, but I find Mr. Gaiser’s argument disgusting.

Mr. Wang’s Rebuttal

Since Mr. Wang represents the petitioner, and therefore argued first, he gets a chance to rebut the other arguments.

1. WANG: Thank you, Mr. Chief Justice. I’ll be very brief.

I – I just want to conclude, I think, with several members of the Court have talked about this theme, and it’s actually something that – that my co-counsel, Mr. Gilbert, and I talked about when entering the Court this morning, which is, I think, what this case is all about, and those are the four words on the side of this building: equal justice under law, equal justice under law.

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“Equal justice under law.” Is that too much to ask from the Supreme Court? Was it too much to ask the Circuit, or even the District courts? If everyone agrees that should be the goal, then why is the State of Ohio fighting so hard against it?

Now I know that sometimes we don’t fulfill that promise. I understand that. But, at the heart of this case, at bottom, all Ms. Ames is asking for is equal justice under law. Not more justice, not more justice, but certainly not less and certainly not less because of the color of her skin or because of her sex or because of her religion.

We’re simply asking for equal justice under law because I think that’s what Title VII says, and I think that’s consistent with what this Court has held in numerous cases, and it’s consistent with Congress’ intent in passing a civil rights law to protect the civil rights of all Americans.

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Conclusion

As those words on the facade of the Supreme Court state, equal justice under law. Is that too much to ask? Is it too much to be judged on the merits of the case, rather than the color of someone's skin or their sexual preferences?

I know it's the job of an attorney to represent his client to the best of his abilities, which makes me wonder how someone like T. Elliot Gaiser could argue such a case. How can you claim "we all agree that everyone should be treated equally," yet oppose a decision to treat all people equally? If, as Mr. Gaiser claimed in court, Ms. Ames did not present a prima facia case, a claim flatly denied by the Sixth Circuit Court of Appeals, then let her have her day in court and show she is wrong.

Personally, I don't know how someone could look at the facts of the case and not see the strong possibility, even the prima facia case, of discrimination. Then again, I'm not an attorney, I've never played one on TV, and even if I had, I hope I would never sell my soul to argue against such injustice.

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