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## *"SUE ME, SUE YOU BLUES"*

## Defending Reverse Discrimination Claims


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# Introduction

## Explaining reverse discrimination

The term reverse discrimination is often used in our society today. The truth is, that term is a misnomer. Title VII of the Civil Rights act of 1964 prohibits discrimination against individuals on the basis of race, color, religion, sex, sexual orientation and gender identity and national origin. Nothing in the law discusses protecting only certain races. All races are protected under the law. The term reverse discrimination is a gross distortion of the Title VII concept of protected classes. How we got here is through a complex set of facts and changing demographics.

## Historical background and context

Title VII of the Civil Rights Act of 1964 became law sixty years ago on July 2, 1964. The law finally offered working people protection from discrimination on the basis of protected traits. At the time the law was adopted, racial unrest and protests for equal rights for people of color were in full swing with none other than Dr. Martin Luther King leading the charge. The previous August more than a quarter million people gathered at the Lincoln Memorial to her Dr. King's, "I have a Dream" speech. It was easily the largest march for racial justice of its time.[1] Similarly, the fight in congress to pass the civil rights act was one of the most hotly contested of its time. The senate debated for more the 534 hours and entertained 500 amendments before passing in a 73 to 27 vote. The new law created the Equal Employment Opportunity Commission and vested it with the ability to investigate complaints. In its first year in existence the agency expected to process about 2000 claims, instead, it received 8852. The number of claims filed with the EEOC continued to rise year over year. Chart 1 at the end of this article shows that the total volume of all charges filed with EEOC from 2016 to 2022 shows the total volume of charges filed falling steadily from 2016 to 2021, before rising slightly in 2022. Some of this may have been reflected of the EEOC's funding increase in 2022 which would have allowed for more investigators to process claims. The second chart shows that the number one claim in 2022 was sex discrimination. EEOC does not report reverse discrimination claims separately so in would be difficult to determine how many of those gender-based claims were filed by men. Men and women do have differing views on discrimination in the workplace, however, as can be seen in the third chart. That may well constrain some potential plaintiffs from filing reverse discrimination claims based on gender. Reverse discrimination claims have not historically constituted a large portion of the claims filed with the EEOC so it would be difficult to make a comparison on which protected class is the basis for most claims. That may be about to change since the Supreme Court granted certiorari in the case of *Ames v. Ohio Department of Youth Service*.[2] In that case a majority employee asked the supreme court to review the heightened standard of reviewed applied to discrimination cases brought by majority plaintiffs, which requires "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority." Should the court rule for the Plaintiffs, the landscape of the reverse discrimination claim may see a rise in the number of claims filed.

## Importance of the topic in current legal and social discourse

Employment Attorneys when confronted with an employer seeking advice on a difficult personnel decision will ask about the demographics of the individual who will be subject of the personnel decision. When the decision involves actions being taken against a white male, for example, both the employer and the Attorney will sometimes breathe a collective sigh of relief. That relief may be misplaced however because of the specter of the reverse discrimination claim. These types of cases have resulted in some

staggering verdicts for single plaintiff claims.

Meanwhile, in the corporate world, Diversity Equity and Inclusion (DEI) initiatives are commonplace and the initiatives support the goal of increasing minority and female representation within businesses. These programs have been the source of some consternation among non-minority employees who may feel that they are being unfairly overlooked for advancement because the employer is seeking to advance minorities without regard to merit. On the other hand, one could reasonably surmise that minorities and women might take the view that DEI has given them an opportunity to be considered where no such chance would have existed in the past.

## Understanding Discrimination and Affirmative Action

Affirmative action programs have of course been challenged in the courts and the recent Supreme Court decision in *Students for Fair Admissions v. Harvard* and *Students for Fair Admissions v. UNC,*[3] overturning the practice of race conscious admissions as a violation of the constitution's equal protection clause, was met with anticipation about the effect the decision would have on Affirmative Action programs in the business world. The decision was surprisingly popular among members of the public A poll from the *New York Times*, showed surprisingly sharp consensus among the three political voting blocs, Republicans, democrats and independents. As it pertains to private colleges and universities, 78 percent of Republicans, 72 percent of independents and 58 percent of Democrats opposed affirmative action.[4] Ultimately, the Court's determination in the Students for Fair Admissions case would have no effect on business related affirmative action programs which apply only the federal government contractors and exist by virtue of executive order.

### Defining discrimination (traditional vs. reverse)

Discrimination can be defined as using the fact that a person is a member of a protected class as a basis for making a decision or taking action. Protected classes recognized by the Equal Employment Opportunity Commission include race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, disability, age (age 40 or older), or genetic information. In the case of reverse discrimination, the protected class in question is often race. As I stated before however there is no different definition of "reverse discrimination" than the general definition of discrimination, both are situations where a protected class is being used as a basis for decision making. The only real difference is that the term reverse discrimination is often used when the adverse action affects a member of a majority group, rather than a minority group.

### Key principles of affirmative action and its goals

The purpose of affirmative action is to ensure equal employment opportunities for applicants and employees. It is based on the premise that, absent discrimination, over time a contractor's workforce generally will reflect the demographics of the qualified available workforce in the relevant job market. Affirmative action requirements are intended to ensure that applicants and employees of federal contractors have equal opportunity for recruitment, selection, advancement, and every other term and privilege associated with employment, without regard to their race, color, religion, sex, sexual orientation, gender identity, national origin, disability, or status as a protected veteran.

Affirmative action plans use statistical analysis to review the employer's workforce and personnel actions taken over the course of a plan year by demographic. Differences between majority and minority groups of more than two standard deviations are considered statistically significant and require an explanation for the difference. The analysis breaks down the workforce into groups with similar jobs and pay rates

called job groups and in doing so attempts to account for some of the natural differences that might occur between employees. For example, employers should avoid comparing managers with rank-and-file employees in job groups. Written affirmative action plans are only required of government contractors with 50 or more employees and a government contract of at least $50,000.00.[5] Covered contractors will need a separate plan for each establishment the operate with 50 or more people.

### Legal foundations of affirmative action programs

The equal protection clause of the 14th Amendment to the United States Constitution provides that states cannot, "deny to any person within [their] jurisdiction the equal protection of [their] laws." This clause is designed to prevent the passage of discriminatory state laws that deny equal rights to people who are in similar circumstances, but of different classes. It was passed in 1868, in the immediate wake of the Civil War. Nearly a hundred years later during the civil rights efforts of the 1960's the Civil Rights Act of 1964 was passed, prohibiting discrimination on the basis of protected classes including race.

In 1965, President Johnson signed Executive Order 11246 into law. The Executive Order required government contractors to commit to a policy of non-discrimination and to take affirmative action to ensure non-discrimination in employment practices. Shortly after that the Office of Federal Contracts Compliance Programs was created.

## Legal Framework of Reverse Discrimination Claims

In *United Steelworkers of America v. Weber*[6], the US Supreme court addressed the question of whether the employer violated Title VII by adopting a voluntary affirmative action plan designed to "eliminate manifest racial imbalances in traditionally segregated job categories."...

The Court upheld the employer's decision to select less senior black applicants over the white respondent, because it found that taking race into account was consistent with Title VII's objective of "break[ing] down old patterns of racial segregation and hierarchy."...

The Court noted that the plan did not "unnecessarily trammel the interests of white employees," since it did not require "the discharge of white workers and their replacement with new black hires." Nor did the plan create "an absolute bar to the advancement of white employees," since half of those trained in the new program were to be white.... Finally, the Court observed that the plan was a temporary measure, not designed to maintain racial balance, but to "eliminate a manifest racial imbalance."... The Court's decision was grounded in the recognition that voluntary employer action can play a crucial role in furthering Title VII's purpose of eliminating the effects of discrimination in the workplace, and that Title VII should not be read to thwart such efforts.

### Important Legal Cases

In *Phillips v. Starbucks*[7] the court considered an employment decisions made by a company after a store employee called the police to remove two African American men from the premises which caused their wrongful arrest. This incident occurred on April 12, 2018. Plaintiff Shannon Phillips ("Plaintiff" or "Ms. Phillips") brought suit against her former employer, Defendant Starbucks Corporation, doing business as Starbucks Coffee Company ("Defendant" or "Starbucks"), alleging that she was terminated because of her Caucasian race in the aftermath of the incident. Prior to her termination, Plaintiff oversaw the Philadelphia market as the Regional Director of Operations. Video of the arrest of the two African American men went viral. According to Plaintiff, Starbucks was concerned enough about the incident to close 8000 stores for the day to undergo racial bias training. Plaintiff alleged that Starbucks was virtue

signaling by terminating white employees and punishing white employees who were unrelated to the arrests in order to help improve community relations. A jury awarded Plaintiff $300,000 on her federal race discrimination claim, 300,000 on her state race discrimination case and $25 Million in Punitive damages.

## *Ames v. Ohio Department of Youth Services.*

By the time you read this article oral argument will have just taken place in this case of alleged reverse discrimination based on sexual orientation. Marlean Ames was hired in 2004 as an employee at a youth services agency, where she was promoted to an administrator position in 2014. Ames applied for a promotion to become a Bureau Chief in 2019. She did not receive that job and was instead demoted. Her employer promoted a gay man to fill her former administrator position. Her employer later selected a gay woman for the Bureau Chief job. Ames sued her employer alleging that it discriminated against her on the basis of her sexual orientation as a heterosexual female in violation of the Civil Rights Act of 1964. The Supreme court is set to hear oral argument in the case in February of 2025. At the heart of the matter is the issue of whether an employee must show the additional element of background circumstances to indicate that the employer had a bias against heterosexuals. On it's face, with the nature of the court and the fact that creating two different standards for plaintiff's bringing claims under the same protected class, the case seems unlikely to be affirmed.

## *Duvall v. Novant Health, Inc.*[8]

Duvall, a white man, began working for Novant Health in 2013, when Executive Vice President and Chief Consumer Officer Jesse Cureton, a black man, hired him as Senior Vice President of Marketing and Communications. Based in North Carolina, Duvall reported directly to Cureton and held the same position throughout his employment with Novant Health. Evidence presented at trial demonstrated that Duvall performed exceptionally in his role, receiving strong performance reviews and gaining national recognition for himself and the marketing program he developed for Novant Health. Despite all that, Cureton fired Duvall in July 2018, a decision that came as a shock to both Duvall and his colleagues. Moreover, Novant Health—a multibillion-dollar company with tens of thousands of employees and an extensive human resources department—had no record of any documented criticism of Duvall's performance or reasons for his termination. Immediately after firing Duvall, Novant Health elevated two of Duvall's deputies, a white woman and a black woman, to take over his duties. It then later hired another black woman to permanently replace Duvall. Believing Novant Health fired him merely to achieve racial and gender diversity— or more specifically, to hit certain diversity "targets," Duvall took issue with the decision. In 2015, Novant Health President and Chief Executive Officer ("CEO") Carl Armato appointed Tanya Blackmon as Senior Vice President of Diversity and Inclusion ("D&I") to develop a "Diversity and Inclusion Strategic Plan" for Novant Health. That D&I Plan, which Novant Health's Executive Team approved, consisted of three phases: Phase 1 ("Learn and Engage") would assess Novant Health's D&I culture, benchmark its D&I levels, and seek to get Novant Health's Board and leadership to commit to using D&I in decision-making. Phase 2 ("Develop and Influence") would set goals to "embed diversity and inclusion" in three to five years, with a commitment to "adding additional dimensions of diversity to the executive and senior leadership teams" and establishing "a system wide decision-making process that includes a diversity and inclusion lens." After hearing all the evidence, the jury returned a verdict for Duval which included a $10 million punitive damages award. The fourth circuit court of appeals later struck the punitive damages award, but Duval is still set to receive about $4 million in damages.

## Defending Reverse Discrimination: Key Legal Arguments

To date, 5 circuits have adopted a modified burden of persuasion on reverse discrimination plaintiffs. To establish a *prima facie* case of reverse discrimination according to these courts, a plaintiff must demonstrate that: (1) background circumstances exist to raise an inference that the employer has reason or inclination to discriminate invidiously against whites, or evidence that there is something "fishy" about the facts at hand; (2) she was meeting her employer's legitimate performance expectations; (3) she suffered an adverse employment action; and (4) she was treated less favorably than similarly situated individuals who are not members of her protected class. The 7th Circuit explained that the first element may be satisfied by evidence that: (1) members of one race were fired and replaced by members of another race; (2) employers are under pressure from affirmative action plans, customers, public opinion, the EEOC, a judicial decree, or corporate superiors imbued with a belief in "diversity;" or (3) a gross disparity in qualifications. [9] This Case involved a white deputy who was fired for alleged misconduct who claimed the real reason for his discharge was that he was a white male. The Plaintiff also alleged that he suffered retaliation based on his political affiliation as a republican. Plaintiff was ultimately unsuccessful in his claims because the court determined he failed to proffer evidence sufficient for a jury to determine that "background circumstances" existed, sufficient to establish the first element of his claim.

The D.C. Circuit originated the background circumstances requirement in *Parker v. Baltimore & Ohio Railroad Co*.[10] The employer in Parker attempted to justify its employment actions based on an affirmative action plan agreed to by a multiemployer bargaining unit.[11] Although the district court had granted summary judgment for the defendant employer, the appellate court found the dismissal premature.[12] The employer had conceded reliance on the affirmative action plan for one employment action at issue, but it had not so conceded for another. Thus, on remand, the plaintiff would be required to prove racial discrimination. The court stated that he could avail himself of the McDonnell Douglas framework but with a modification—the background circumstances requirement to establish a prima facie case.[13] The court explained that the McDonnell Douglas framework is not "an arbitrary lightening of the plaintiff's burden, but rather a procedural embodiment of the recognition that our nation has not yet freed itself from a legacy of hostile discrimination."[14] The court illustrated the point by providing the Supreme Court's explanation from *Furnco*[15] regarding why the prima facie case raises an inference of discrimination.[16] The court clarified that "[m]embership in a socially disfavored group was the assumption on which" the framework was built.[17] Thus, the court reasoned, "[I]t defies common sense to suggest that the promotion of a black employee justifies an inference of prejudice against white coworkers in our present society."[18] The Parker decision was rendered by the D.C. Circuit in 1981. The court, in a subsequent case, would state that the requirement "is not an additional hurdle for white plaintiffs" but rather "a faithful transposition" of the McDonnell Douglas framework "into the reverse discrimination context."[19] From its origin in the D.C. Circuit, the background circumstances requirement has been adopted by some courts and rejected by others.[20] The concurring opinion in Ames encapsulated the mixed reception the background circumstances requirement has received among the circuits, stating that five adhere to it, two have expressly rejected it, and five do not apply it. In *Ladimarco v. Runyon*,[21] the Third Circuit rejected the background circumstances requirement, noting several problems. First, the court stated that the D.C. Circuit went too far in modifying the prima facie case for reverse discrimination.[22] The court went on to say that, regardless, the additional requirement is "irremediably vague and ill-defined." Next, the Third Circuit said the most problematic aspect is that it confounds the steps of the McDonnell Douglas analysis because it seems to require "cramming" evidence that is relevant to pretext, the third stage of the analysis, into the prima facie case, the first stage. Thus, the Third Circuit rejected the background circumstances requirement for reverse discrimination cases and instead held that a plaintiff is required to produce sufficient evidence, under the totality of the

circumstances, that the defendant treated him less favorably than others because of his protected characteristic.

# The Impact of Reverse Discrimination Claims on Society

The rise of reverse discrimination claim with their corresponding large verdicts may indeed be reflective of changing social values. Depending on the Supreme Court's ruling on this issue we are likely to see more reverse discrimination claims from non-minority employees who believe they have been treated unfairly as opposed to their minority co-workers. Most employees are unable to look at themselves and admit their wrongdoing. As a result, these claims may well add another rationale to employees seeking to blame others for their wrongdoing.

Ultimately, will these types of claims serve to drive an even deeper wedge into the issue of race relations? Will minority employees be less inclined to interact with their non-minority colleagues? Will these lawsuits create a fundamental "trust gap" with society at large resulting in minorities believing our society is sliding backwards instead of advancing the DEI ball? Only time will tell.

## The effect on racial and ethnic relations

In the aftermath of the killing of George Floyd, many Americans were horrified by what they saw on TV. There for all to see was a young black man killed in broad daylight by the police. Many businesses felt compelled to issue some sort of statement decrying the murder. Even some of our ALFA colleagues contacted me to say that their firms were going to issue a statement and asking if my firm would be doing the same.

Subsequent race related protests that arose were in some cases allowed to go unchecked and perceptions among some members of the public were that the protests were allowed to become violent and were unchecked because the protests were race related. Some people took the view that the social unrest that was occurring had been allowed to go too far too far. Others saw unchecked protests as a tip of the cap to those who would engage in violence to advance an agenda.

DEI efforts can be traced back to the 1960's specifically to the Civil rights act and the inception of affirmative action. Affirmative action plans were specifically designed to increase representation of minorities and women in the workplace. There can be no question that the Floyd murder ushered in a new era of diversity efforts among businesses. Many employers rushed to implement DEI programs with the specific goal of increasing representation of diverse employees in the workplace.

As DEI became the norm, it was talked about in the news and some employers saw having a plan as a mandate. This all seemed innocent enough, even altruistic some would say. Soon, DEI begat an entire cottage industry dedicated to providing planning, advice and training to employers. The problem was that there were no set standards regarding what a plan would entail. Some programs became extreme in their application. Consequently, some non-minority employees began to see these programs as attempting to achieve diversity at their expense. As we said at the outset Title VII prohibits discrimination based on race, all races are protected, and it did not take the Plaintiffs' bar long to figure out that the reverse discrimination claim might meet with much success in the DEI environment. With white employees feeling victimized and minority employees feeling such programs were long overdue, It did not take long for DEI initiatives to create an uneasy racial relationship in the workplace.

Isaac Newton said, "every action has an equal and opposite reaction", and DEI is no exception. That is

certainly not to say that DEI initiatives are a bad thing. To the contrary, When done right these programs can have a dramatic effect on increasing effectiveness in the workplace. As with everything, employers should guard against the extremes.

### Public opinion and political influence

The recent us election seems to show that the American public largely dislikes the direction the country was taking under the outgoing Democratic administration. Under that regime the talking point against those that would question DEI initiatives was that they were racists. The President elect, Donald Trump and his supporters were loudly touted as racists. The idea was that no voting block would want to be associated with a group that supported such hate.

The public as a whole has seemingly rejected that notion and the backlash against identity politics is literally palpable, in the same vein, companies are significant scaling back their DEI programs. With Courts literally opining that having a DEI program may be sufficient to establish the "background circumstances" element of a reverse discrimination claim, it's not hard to understand the corporate about face on DEI issues.

## The Role of the Courts in Adjudicating Reverse Discrimination Cases

In his excellent law review article on reverse discrimination, William Corbett opines that the tried-and-true *McDonnel Douglas* burden shifting analysis is insufficient to address reverse discrimination claims. Corbett's opinion on the issue is set forth below.[23] In 1973, when the Court created the *McDonnell Douglas* framework, discrimination law was in its infancy. Creating a rebuttable presumption of discrimination based on a weak production of evidence by a plaintiff was appropriate and probably necessary to facilitate the development of the law. The proxy questions of the *prima facie* case and pretext, which were intended to sharpen the focus on the difficult and "elusive" ultimate issue—whether the employer discriminated—were helpful in adjusting the perspectives of judges and members of society under the new law. But society is not static, nor should law be. Six decades after Title VII was enacted and five decades after the Court fashioned the pretext analysis, discrimination as a phenomenon in the workplace is different. While discrimination against African American and female applicants and employees still occurs frequently, discrimination against Caucasians and men probably occurs more often than it did in 1964 when Title VII was enacted and in 1973 when McDonnell Douglas was decided. With a changing phenomenon such as discrimination, we should not cling to the same law that we had fifty years ago. *McDonnell Douglas* has done its service and has taught us much about what kinds of evidence are relevant and probative in employment discrimination cases. A non-exhaustive list includes comparative evidence, evidence of employers' adherence to or divergence from standard procedures, shifting statements of reasons for the adverse action, general and comparative treatment of employees, statistical information about the employer's workforce, and statements made by co-employees and supervisors. It is time to let courts evaluate such evidence under the sufficiency standard on motions for summary judgment and judgment as a matter of law150 and courts and juries to evaluate the evidence at the end of trials under the preponderance standard. [24] [25] [26] [27] [28] The idea that consideration of all relevant evidence is what judges and juries should be doing to evaluate discrimination is not far-fetched. It probably is what some courts have in mind when they discuss proving discrimination by presenting a "convincing mosaic" of discrimination.[29] At least one commentator's admonition in a 1995 article rings truer today than it did then: "Perhaps it is better to let the cold winds of litigation blow. At least the cold air will be clear." [30]

## Challenges to Affirmative Action and Reverse Discrimination

While some courts have opined that the existence of an affirmative action plan may be enough to be considered evidence of the "background circumstances" needed for a plaintiff to establish a prima facie case, this author feels that such an assertion is unwarranted. Much of the problem with the view of some courts regarding affirmative action programs stems from the Supreme Court's ruling on the use of race in college admissions. That practice is in no way similar to a true Affirmative Action Plan, (AAP). As explained earlier true AAPs are legally required of government contractors and subcontractors that meet certain criteria. There is an entire federal government agency designed to administer and monitor affirmative action planning. Contractors who fail to comply can face significant consequences, including loss of government contracts and permanent debarment from even bidding on government contracts. For many employers required to prepare AAP's, government contracts are a significant part of their business. Loss of the ability to bid on these contracts could sound a financial death nell for these contractors. They do not produce AAP's because they want to but because they must. Producing an AAP is time consuming and expensive. Most contractors would readily dispense with AAPs if they could.

On the other hand, the use of race in college admissions is not required by law. Instead, the practice is one that has been voluntarily adopted by some colleges and universities in an effort to promote diversity. AAP's create goals for the inclusion of minorities and women, but those goals are based on census data showing the percentage of people in a particular demographic that possess the skills the employer is seeking, within the employer's reasonable recruitment area. The theory is that absent discriminatory reasons the employer's workforce would mirror the percentages of qualified minorities in the area from which the employer recruits its workforce. Once that goal has been reached, the employer is to stop creating goals. The process is governed by empirical statistical evidence. College admissions however are governed, if at all by a process created by the college to meet a need the college has determined exists.

If the purpose of the "background circumstances" element is to cast some light as to whether the employer had an intention to discriminate against males and non-minorities. Employers required by the federal government to engage in affirmative action planning should in no way be considered to have a bias against male whites, merely because they are following federal law. Having an affirmation plan is in no way an indicator of discrimination on the part of an employer. In addition, no one who ever counsels employers on Affirmative Action would ever counsel an employer to enter into a voluntary affirmative action plan. To be able to adopt a voluntary plan and have it survive scrutiny would require an employer to admit that it had engaged in discrimination in the past. Such an admission would likely expose an employer to increased judicial and public scrutiny.

## So Onward to Trial?

In the late 1990s the U.S. Supreme Court decided two cases that would change the game for sexual harassment claims in the United States. Faragher v. City of Boca Raton[31] and *Burlington v. Ellerth*[32] changed the way companies and courts viewed harassment claims. *Ames* threatens to be a similarly significant case for the employment law bar. Reverse discrimination is not a new topic to the high court. The Court first considered the matter in *Regents of University of California v. Bakke*[33] In that case, Allan Bakke, a 35-year-old white male, had been denied admission to the U.C. Davis Medical School. He challenged the med school's practice of reserving 16 seats for minority students. At the end of the case the Court found that Affirmative action programs such as the U. C. Davis' practice were lawful under the equal protection clause of the 14th amendment to the US constitution and title VII of the civil rights act of 1964. The court found that the state had a compelling interest in diversity in the school. The practice of specifically setting aside seats only for minorities went too far, however. The school was ordered to admit

Bakke and the practice of setting aside quotas was struck down. Fast forward 45 years to *Students For Fair Admissions v. Harvard*[34] and *Students For Fair Admissions v. University Of North Carolina*[35], and cases and the court's attitude had changed. As stated earlier, in those cases, the High Court struck down the practice of race-based admissions. Indeed, societal views of reverse discrimination in general, seemed to have changed. *Ames* is of course, a single plaintiff case, unlike the university cases, which ultimately have immediate effect for large groups of individuals. To recap, Ames had been hired in 2004. She was promoted 10 years later. Five years after that, in 2019, Ames sought a promotion to the position of Bureau Chief. She was not the successful candidate. The candidate who was successful was a gay female. Ames was also demoted from her position, and it was awarded to a gay male. Ames, who is heterosexual, filed a claim alleging she was subjected to discrimination on the basis of her sexual orientation. The issue for the court's consideration in Ames is the lower courts addition of a new element to the prima facie case requiring the plaintiff to produce evidence of "background circumstances" that demonstrate some pension on the part of the employer to discriminate against "majority" groups. It is anyone's guess regarding the direction the Supreme Court will go. On its face, it would seem counterintuitive to require one group of similarly situated persons to present a difficult a different privacy case than another. So how do we determine what considerations should go into defending a reverse discrimination claim. If you can, it is worth extoling the virtues of the employer's efforts to administer its policies fairly. Consider using wage studies and other processes that can help show a lack of bias.

## Jury Selection

Jury selection is at the very heart of your defense, and it is critical to ensuring the best possible outcome to your case. You will want to learn about your potential jurors' life experiences, their attitudes and biases before focusing on the crucial task of obtaining a jury that is plus one in your favor. To that end, every effort you can make to learn about how your potential jurors may analyze your case is critical. In a discrimination trial it is of extreme importance to learn whether your potential juror has had any experience with discriminatory discharge or other personnel actions based on demographics, either for themselves or through a family member or a friend. Depending on the nature of the jury pool, it may be worthwhile to consider pre *voir dire* motions, like a motion to change venue. Use caution here, however, while a motion requesting a change of venue may be tempting, especially where your case may have a high profile, you should consider the effect of a denial of your motion on the case. As with any motion, a motion to change venue should be based on unequivocal evidence in order to avoid the appearance of frivolity. It goes without saying that you don't wear your heart on your sleeve and express displeasure that you lost that really great juror.

### *Selecting a Jury (Voir Dire).*

Federal Rule of Civil Procedure, Rule 47(a), specifically addresses the issue of examining jurors. The rule provides:

> *The court may permit the parties or their attorneys to examine prospective jurors or may itself do so. If the court examines the jurors, it must permit the parties or their attorneys to make any further inquiry it considers proper, or must itself ask any other additional questions it considers proper.*

F.R.C.P. 47(a).

The rule obviously allows for broad discretion on the part of the trial judge as to the conduct of *voir dire*. A review of the local rules for the Middle District of Pennsylvania ("MD Pa") where the author practices reveals that of the eleven judges in the Middle District at the time of this writing, seven allow attorneys to

*ask voir* dire questions. The remaining four allow attorneys to provide follow-up questions either through written questions that the judge asks or by in-person questioning.[36] The purpose of the *voir dire* process, of course, is to obtain a fair and impartial jury, not a jury that is favorable to one side or the other.

When given the opportunity to question potential jurors on *voir dire*, counsel should take care to avoid embarrassing potential jurors with some questions. For example, we earlier stated that a juror's experience with discrimination would be a matter of great interest to a litigant on either side. Asking the question, however, could be fraught with peril. Placing the prospective juror in an embarrassing situation will not win you any friends. For this reason, carefully consider both the question and the method of asking.

Consider your demeanor when asking *voir dire* questions. Don't cross-examine your potential jurors. You may want to try using a helpful approach, saying something like: "I realize that you've been waiting for some time. If you will bear with me for a few moments, we will have you out of here shortly." Self-disclosure is important. Say a little about yourself and why your client is there. Try to obtain the commitment that the juror will treat a company as it would an individual. In the end, you want to craft your questions so that they will help identify jurors who would be bad for your case.

Much of your ability to script your way through the *voir dire* is going to be constrained by how far the judge will let you go. To the extent you believe you have a basis to challenge a juror for cause, either because he is unqualified or because the juror is unduly partial, the judge will ultimately decide if cause exists to challenge the juror. Counsel challenging the judge's discretion in *voir dire* must be able to show prejudice or abuse of discretion. To avoid unnecessary difficulties in challenges, be sure to familiarize yourself with the expectations of your judge on the issue of challenges for cause. Jury Selection Procedures in United States District Courts, Federal Judicial Center 1982, p. 54, by Gordon Bermat.

Finally, Rule 47(b) of F.R.C.P. acknowledges that 28 U.S.C. §1870 addresses the number of peremptory challenges allowed:

> *In civil cases, each party shall be entitled to three (3) challenges. Several defendants or several plaintiffs may be considered as a single party for the purpose of making challenges, or the court may allow additional peremptory challenges and permit them to be exercises separately or jointly.*

28 U.S.C. §1870

Be sure to use your peremptory challenges judicially. It is better to have both sides strike the other's best jurors, leaving a neutral jury, than to keep bad jurors in the pool.

## *Jury Consultants.*

In most cases, it is very unlikely that in a single plaintiff discrimination trial, you will see a plaintiff using a jury analysis expert. Jury consultants can be very expensive and whether or not a defendant, regardless of wherewithal, will be prepared to spend the money for a jury consultant in the standard single plaintiff sexual harassment or discrimination case is anybody's guess. At some level, the use of jury consultants may seem unfair. In 1997, Justice Sandra Day O'Connor wrote an article in *The Federal Lawyer*. In part, the article read:

> *Some scholars have questioned whether "scientific" juror selection really helps the parties any more than the old-fashioned lawyer's instinct approach. But whether it*

*does or not, I believe its prevalence has contributed to the sense that jury trials may be unfair because parties with more money can stack the odds overwhelmingly in their favor. Most citizens involved in litigation whether as a criminal defendant accused of murder or as a civil plaintiff suing a large corporation cannot possibly afford this type of preparation, and one cannot help but think that it may work, at least sometimes, and therefore that wealthy parties can give themselves an advantage through the use of peremptory challenges that is unavailable to the less well off.*[37]

The Justice's commentary makes it clear that the use of jury consultants may at times serve to make the plaintiff a more sympathetic figure. As defense counsel in a reverse discrimination case, you will already have to contend with the appearance that the big bad corporation is taking advantage of the plaintiff. You should carefully consider whether the use of a jury consultant will provide sufficient value to overcome the potential specter of David vs. Goliath that it could foster.

## Opening Statements

Some studies have shown 80-90% of jurors decide a case after the opening statements and before any evidence has been presented. Jurors tend to take sides at the beginning of trial and then view the evidence throughout from the perspective of their "side", pulling for one side or the other throughout the trial. Since the case may be won or lost in the opening statement, crafting the right opening statement can be crucial. Juries may be more receptive to an opening statement told in "story" form because this is the traditional way that humans communicate. Juries like to settle on a story to explain all the facts. If you tell a logical, believable story about your client's view of the facts, the jury is more likely to adopt that as the story that explains what happened. Lawyers should consider presenting their opening statements in the same way they might tell a story to a friend. How though do you begin to craft the statement. Many would say, start at the beginning and draft your closing first, creating a roadmap for where you want to go.

### *Crafting The Opening Statement.*

In crafting their opening statement lawyers should consider setting a theme in the first few sentences. The story you tell should constantly refer back to the theme. One subsidiary theme that could be considered, is using the idea that injustice will result if your client does not prevail. Try to emphasize that you are trying to right a wrong. The first few sentences are very important. Try to say something interesting that will make a positive impression from the start with the jury; personalizing your story may be very helpful. Juries need to see your client as a person. Always refer to your client by name.

You can further humanize your client by discussing his/her background. By the same token, you can depersonalize your opponent, whether male or female, by never using his or her first name. While this may be effective, be careful to still be respectful of your opponent. Too much depersonalizing can make you an unlikeable litigant. Take care to ensure that everything that you say to the jury is true. Jurors will feel betrayed to the extent that they feel you have misled them. At some point during the trial, that feeling of betrayal may come back to haunt you. State any problems in your case honestly during the opening statement and show how you will overcome them.

Analogies are a very effective tool to help jurors remember your opening. You should think, however, about how your analogies will play into your story carefully before using it. Try to create vivid pictures in a jury's mind by speaking in terms of different "scenes" in the development of the case. Like the acts of a play, your opening statement should help to weave the facts together in a manner that is supportive of your client's story. Describe things and experiences that jurors can visualize, and they will retain those

images and remember your side more clearly than they will your opponent's.

Exhibits can be used to help juries retain your presentation more clearly. Many people think visually. With all of the technology available today, there are any number of tools available to help you with this. Video is a very easy way to help create pictures in a juror's mind. Electronic charts and graphs can be effective as well but ensure that they are not too complicated, so they do not confuse your opening. Lawyers should determine in advance whether the court will allow you to use various types of exhibits in an opening. Finally, in as strong a fashion as possible, the last statement in your opening should be the thing most likely to be remembered by jurors. Try to conclude with a strong positive point.

We end this section with a few don'ts. Don't spend your time explaining the purpose of your opening statement or introducing everyone to the courtroom. It takes away from your story. Don't exaggerate because it will cause you to lose credibility with the jury. Don't promise things you can't deliver. This includes referring to inadmissible evidence when the lack of evidence is clear. If you say you will present something, be sure that you can present it to the jury. Not doing so will be held against you. If there is a negative in your case, consider bringing it up initially and explaining why it is incorrect. Be sure to refer back to this in your case in chief. When defending corporate clients, remember to always personalize the corporation. Remind jurors the corporation should be treated the same as individuals under the law. You can also point out the fact that corporations employ real people and provide important goods and services to the public. Consider the length of your opening as well. Many times, an overly long opening statement can cause jurors to lose attention to what you are talking about.

## Elements of a Reverse Discrimination Claim

For the purposes of this Article, we will address the elements of a reverse discrimination claim from the perspective of those Circuit courts which have adopted the "background circumstances" element as an additional element of the *prima facie* case in reverse discrimination claims. The 6th, 7th, 8th, 10th, and DC Circuits have all adopted the "background circumstances" requirement, while the 3rd and 11th circuits expressly rejected the requirement. The remaining circuits do not apply the additional requirement. At the crux of the matter for those courts which have adopted the additional requirement is the fact that discrimination against "majority" groups is relatively uncommon in U.S. society today. The Courts that have adopted this different standard for discrimination claims raised by "majority" groups require the following elements for the Plaintiff to establish a prima facie case: (1) background circumstances that raise an inference that the employer has a reason to discriminate against the "majority" group or that there is something "fishy" about the facts at hand; (2) Plaintiff was meeting the employer's expectations; (3) Plaintiff suffered an adverse employment action, and; (4) Plaintiff was treated less favorably than persons who were not members of their protected class.[38] Lets consider some factors litigators should think about when rebutting each of these elements on behalf of the employer. Much of what you will or won't do in defending these cases will be fact specific. By the time you respond, of course, Plaintiff will have already put on their case in chief. Carefully consider the evidence as presented by Plaintiff and be prepared to modify your own argument if needed.

### *Proving Circumstances*

Consider the fact that reverse discrimination complaints have often been used as a challenge to DEI and affirmative action policies in corporate America. To the extent that the Plaintiff in your case attempts to assail such programs at your client's facilities, take the opportunity to educate the jury on the idea that not all such programs are created equal. Present evidence establishing that your client's diversity initiatives are not rigid quotas or set asides. Establish that while your client's programs may seem to

corral a diverse selection of candidates, that the program ultimately seeks the best of all available candidates. To the extent that your client is subject to mandated affirmative action planning, make it clear that your client is legally required to prepare and administer such plans as a condition of its government contracts, don't stop there though. Be clear on the fact that these government mandated programs may require enhanced efforts at recruiting minorities or considering them for advancement, but nothing about affirmative action plans require or even suggest that an employer select unqualified candidates. Selecting the best qualified candidates in no way violates the principals of an affirmative action plan. The point being, if Plaintiff was not selected, he or she is likely not the best candidate. Avoid discussions of issues like societal goals of increasing diversity in the workplace. Jurors may or may not share those goals and you discussing it may sour those individuals who do not share your views on your argument.

Take every opportunity to tout the qualifications of the individual selected over plaintiff. You want to establish, not only that the successful candidate was qualified for the position, but that they were the best qualified. Be sure to rebut efforts by Plaintiff that introduce disparaging or negative comments about "majority" groups. Finally, Plaintiff may attempt to establish that your client engaged in discriminatory conduct against majority group members in the past. To the extent that these are merely accusations, explain to the jury that no such adjudication has ever been made. Assert the legitimate non-discriminatory reasons for your client's actions. Show that your client's decision was the right one.

## *Was Plaintiff Meeting The Employer's Expectations?*

Plaintiff will often point to performance evaluations to establish this element. It may be a double-edged sword but consider addressing the validity of the valuations as a whole. Explain that most people are actually average. It is the reason the bell curve has the big bulge in the middle. Being average in one's position does not establish that the employee is best suited for the next level position. Evaluations generally consider past performance over future success in higher positions. If the reviewing manager rated everyone similarly, put that out as well. To the extent that Plaintiff has received discipline or performance improvement plans, explain those issues to the jury.

## *Did Plaintiff Suffer An Adverse Employment Action?*

The question of how to determine whether a plaintiff suffered an adverse job action was once up for debate.  It depended on where you were in the country. The DC Circuit previously stated that an adverse employment action must result in materially adverse consequences.[39] Other courts previously found that only ultimate employment decisions like hiring and firing reached the level of an adverse employment action. The Supreme court ended this dispute with its decision in *Muldrow v. City of St. Louis*.[40] The court ultimately determined that there must be "some harm" to Plaintiff, though it need not rise to the level of significant harm. You may well be able to establish an argument that there is no real difference between some harm and significant harm. Ultimately, the goal is to challenge the idea that Plaintiff suffered any harm whatsoever. After Muldrow, an employer may be best off explaining its legitimate nondiscriminatory reasons for its actions and leaving that with the jury.

## *Was Plaintiff Treated Less Favorably Than Persons Not Members Of The Protected Class?*

One factor to consider is that this element of the prima face case refers to similarly situated non-members of Plaintiff's protected class. Make every effort to point out the differences between Plaintiff and the comparators that Plaintiff sets forth. Proper comparators must be similarly situated in all relevant respects. Find these differences and exploit them.

## The Affirmative Defense

In 1998 the U.S. Supreme Court issued two critical opinions. Both of these opinions addressed the fact that an employer had an affirmative defense available to it in the event of sexual harassment by a supervisor. The cases led the Supreme Court to opine that, in cases where there is harassment by a supervisor and there has been no tangible job action, an affirmative defense may be asserted. The court determined that where an employer took reasonable care to prevent and correct the harassing behavior, and the employee unreasonably failed to take advantage of corrective or preventative opportunities, or otherwise avoid harm, the employer may assert those facts as an affirmative defense.

The validity of the defense was further supported by *Penn State Police v. Suders.*[41] In Suders, the court reaffirmed the affirmative defense. The court also clarified that a plaintiff who does not allege a tangible employment action has the duty to mitigate harm, but the defendant bears the burden to allege and prove that plaintiff failed in that regard. As to the defense itself, the first prong includes much more than simply having a policy. The savvy litigator will present evidence of the initial training on non-discrimination an employer provides as well as repeated follow-on training. Employees who have not engaged in follow-on training about their policies and its reporting chains will have a difficult road to hoe. This defense has not specifically been identified by the courts as viable with respect to reverse discrimination claims. One can theorize that if Plaintiff can present evidence of AAPs a defendant can present evidence of its unbiased non-discrimination efforts and policies If you can present the requisite evidence along with a policy with multiple reporting chains, you will be well positioned to defend based on this defense.

## Cross-Examination

The real purpose of cross-examination is to expose the truth. Unfortunately, witnesses are often programmed to lie or distort, and some witnesses do so very well. The questioner's uppermost objective is to expose the lies by any means possible. There is a really fine line between exposing the truth and appearing to being a bully, however. The questioner must be firm with the witness without appearing to be unfair or inappropriate in questioning. The best approach is through friendly persuasion. Adverse witnesses are often predisposed to getting into a fight with the questioner. If the questioner can diffuse the witness or otherwise allay the witness' fears, it may cause the witness to become more compliant. Even if the questioner decided the best move was to, in effect, bully the witness, the best approach is to use psychological or verbal pressure rather than what appears to be unprovoked belligerence. Courts will often take a dim view of the lawyer who tries to bully a witness.

That said, as a defense lawyer you should be aware that some witnesses are often viewed as fair targets for questioning. This has been especially viewed as true in cases of decision-makers, bosses, CEOs and experts. In a harassment case, the defendant should be extremely cautious to make any effort at aggressively questioning the alleged plaintiff unless the opening to do so is clear.

The storied attorney, F. Lee Bailey, was famous for his cross-examination. Like Bailey, the most important thing a litigator can do in preparing for cross-examination is to listen carefully to the answers given by a witness when being questioned on direct. There will inevitably be openings and, to the extent that the cross-examiners is too focused on what he intends to say next, the chances are that he will miss the openings presented to him by the witness.

Having focus on the witness' testimony in the moment does not mean that the litigator has not prepared for the points he intends to make on cross-examination. To the contrary, you should carefully plan out

the points you intend to raise during your trial preparation. Outline your points but then try to work with limited notes if possible. If you are tied to an outline, you won't be watching the witness and hearing what the witness has to say. You have to look at and hear the witness to effectively cross-examine. Listen to the volume of the witness' voice, pauses prior to an answer, watch their facial expressions and look for signs of awkwardness.

Listen for inappropriate language (such as speaking in a stilted manner or in third person when speaking about themselves). It is very possible that this sort of speech pattern is indicative of the witness having difficulty with the subject matter. Try to take advantage of any irritation the plaintiff seems to show over questioning. At times, the best approach may be to encourage or allow the witness to lie. If you have impeaching evidence, either through the witness' previous testimony or through a document, allowing the witness to lie and impeach himself may be the best answer. Once you believe that you've struck a blow, it is not time to take a victory lap. Letting the witness know that you may have just compromised them may change the witness' demeanor altogether.

Finally, the old adage "quit while you're ahead" is no less true in the cross-examination scenario. If you happen to score a key point or even if you cannot get the witness to say things you need, prolonging cross-examination will only serve to undermine your efforts. Remember that arguing with the witness does nothing but bolster the witness' credibility. Avoid this at all costs.

## Tips On Closing Arguments

You should start early in preparing your closing argument. At the start of each new case, be prepared to start creating a record of those brilliant thoughts that come to you at inopportune times after the case has begun. If you find articles or law review comments that support your case, hold on to them. Most successful trial lawyers are compelled to author a book or an article on closing arguments at some point during their lives. You should read those articles carefully. If possible, go into court and watch experts deliver closings. A key element here, though, is do not try to be those persons. Learn what you can and then create your own style.

As we mentioned earlier, the theme is the framework which you will eventually hope the jurors will view your evidence. You can finetune your theme throughout the conduct of your case but forming your theme early is extremely important to fully developing a story that can be effectively told at the end of the trial. Your closing argument should be fully developed and written before the trial begins. A detailed outline can be a viable substitute. During the pre-trial procedures and as the trial itself progresses, you can reduce your closing, modify it or add to it as necessary. Many times, during the trial some testimony will come forth that was completely unexpected. See if you can use that to bolster your closing. Practice is extremely important in preparing a closing argument. Remember that you are being watched by that jury at all times. If you can practice in front of your colleagues or even in front of a mirror, it can do wonders for cementing your delivery.

When conducting a defense closing, be careful to avoid factual chronology. Defense closings are often better presented episodically while returning to the theme repeatedly. You can state your theme in one or two sentences at the beginning of your closing. Remember to explain the law again in layman's terms in strict accordance with the anticipated charge of the court. End your closing argument with your client's most powerful argument. Remember to always stick to the facts. To the extent that you raise facts in your closing argument that were not presented at your trial, you can expect that both the jurors and the court will hold it against you. As a defense lawyer, remember that throughout your closing argument you want to put a face on your client. Do not use the term "defendant" to describe your client

but rather humanize the client for the jury. If there are negative points to your case, raise those in your closing argument and blunt them. In doing so, your opponent's argument will be less effective. Do not forget that at the end of your closing you must ask the jurors for what you want. If you want your client to be found not liable in a sexual harassment trial, those words should be one of the last to come out of your mouth. Do not forget to thank the jury for their attention.

# Conclusion

## Summary of key arguments for defending reverse discrimination claims

### Defending Against Reverse Discrimination Laws Can Be A Difficult Task.

Certainly, Title VII's prohibition based on protected class dose not delineate between members of the same protected class, singling out certain members for protection while denying those protections to others. The statute does not limit the protection on discrimination on the basis of race, for example, to members of one racial group, while denying that protection to members of another racial group. This is a fact that should not need to be explained, but many employers, and even members of advocacy groups appear unable to accept the concept. Even defining reverse discrimination can be a difficult task. We have described it here as more or less as majority members of a protected group being treated less favorably than minority members of the same group. Even this cannot be said to be one hundred percent correct. Consider that women make up a larger portion of the American population than do men. That said, if a male were to bring a claim of sex discrimination, alleging that he was being treated less favorably than his similarly situated female counterparts that claim would still be considered a reverse discrimination claim. Perhaps the better definition may be to say that historically favored members of a protected group are being treated less favorably than historically disfavored members of the same group.

Perhaps the best defense to these claims is to be able to show that the defendant has applied its policies evenly and had a legitimate, non-discriminatory reason for its actions, using the McDonnel Douglas burden shifting analysis. This supposes that the employer has kept proper documentation and can show similar action in similar circumstances, without regard to demographic. Surely, should the "background circumstances" element remain after the High Court's review, it also offers some fodder for the defense. The author does not believe this element will survive scrutiny, however. Avoiding arguments challenging the Plaintiff's ability to bring a race claim to begin with is a prudent step, as it may well anger jurors and backfire on the advocate and her client.

To the extent the Plaintiff raises the argument that he was the victim of an affirmative action or DEI program, it will be important to establish that any such program the employer has adopted is not applied as a discriminatory tool to deny access to traditionally favored groups. Instead, establish that these tools are used to ensure that a diverse pool of candidates is available for consideration and the employer selects the candidate best suited for the task.

### *Final Thoughts On The Future Of Affirmative Action And Reverse Discrimination In American Society*

Talk of the supreme court sounding the death nell for Affirmative Action after its Harvard and NC state decisions is just that, talk. Those college admissions decisions have nothing to do with true affirmative action programs that apply to federal government contractors. Those programs are federally mandated for government contractors and are the subject of binding federal law. There is an entire bureaucracy



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built around affirmative action programs. That is unlikely to change anytime soon. The incoming trump administration may well hamstring the OFCCP through its efficiency initiatives but that remains to be seen.

DEI programs are not true affirmative action programs. If they are administered properly and are used as tools to ensure the best candidates are considered without regard to demographic, they too can survive. The current non-standardized process of creating DEI programs, however, is unsustainable.

## *The Ethical And Legal Balance Between Promoting Diversity And Avoiding Discrimination*

Surely, with the history of slavery and racial and gender based discriminatory action that has occurred in the United States, the government may rightly have an interest in attempting to rectify those wrongs, but how far is too far when it comes to governmental intervention? When a court determines that a statute, regulation, or other government action challenged under equal protection distributes burdens or benefits based on race, ethnicity, or national origin, it will apply the rigorous "strict scrutiny" test.[42] This test applies even if the government rule is intended to benefit, rather than harm, a minority racial group.[43] The test also applies whether or not other factors are considered alongside race. For example, if a grant program prioritizes applicants who are veterans, people with disabilities, or members of a minority racial group, the racial preference is subject to strict scrutiny even though it is not the only preference.[44] Similarly, if race is a factor in deciding who receives a benefit, the use of race is subject to strict scrutiny even if factors other than race play a role in selection. Strict scrutiny will likely still be the standard for evaluating affirmative action and other programs that address protected classes for the foreseeable future. The future of reverse discriminations may well be decided by the Supreme Court's decision in *Ames*. We will all need to await that outcome.

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[1] Ginger Christ, *Celebrating 60 years: A visual history of Title VII of the Civil Rights Act*, HR Dive (July 2, 2024), https://www.hrdive.com/news/celebrating-60-years-of-title-vii-of-the-civil-rights-act/720381/.



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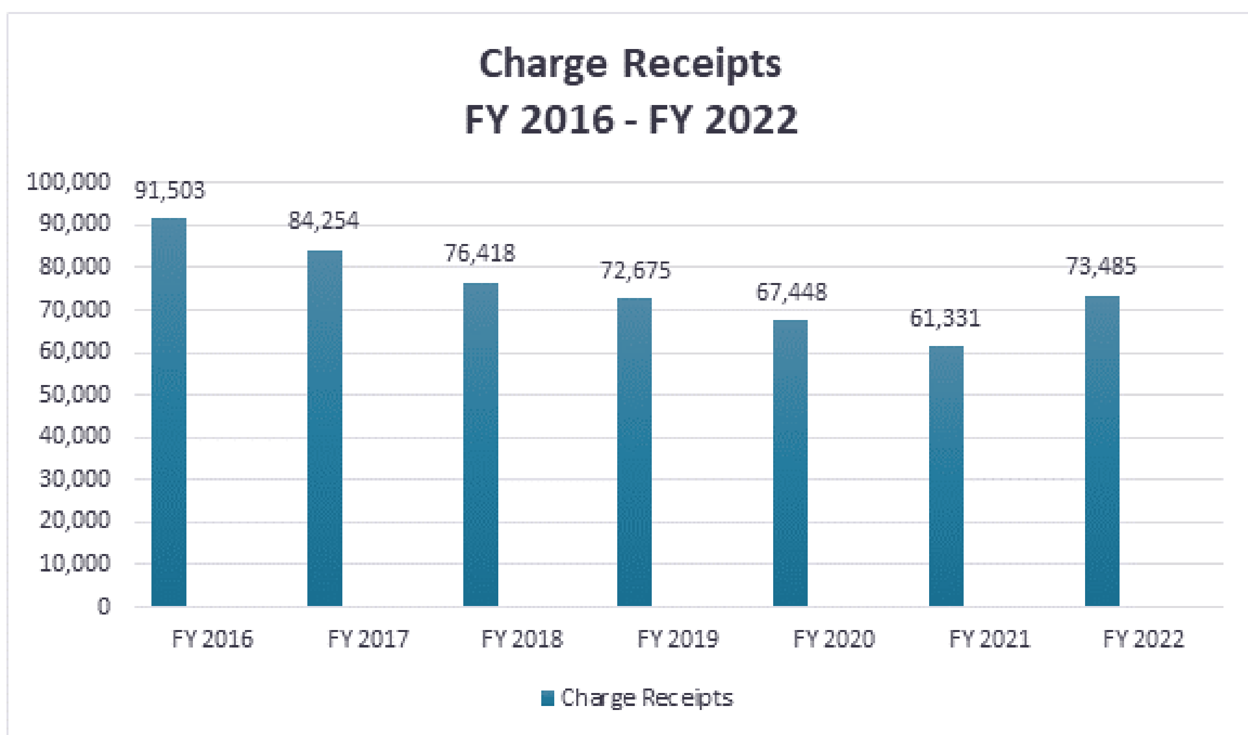
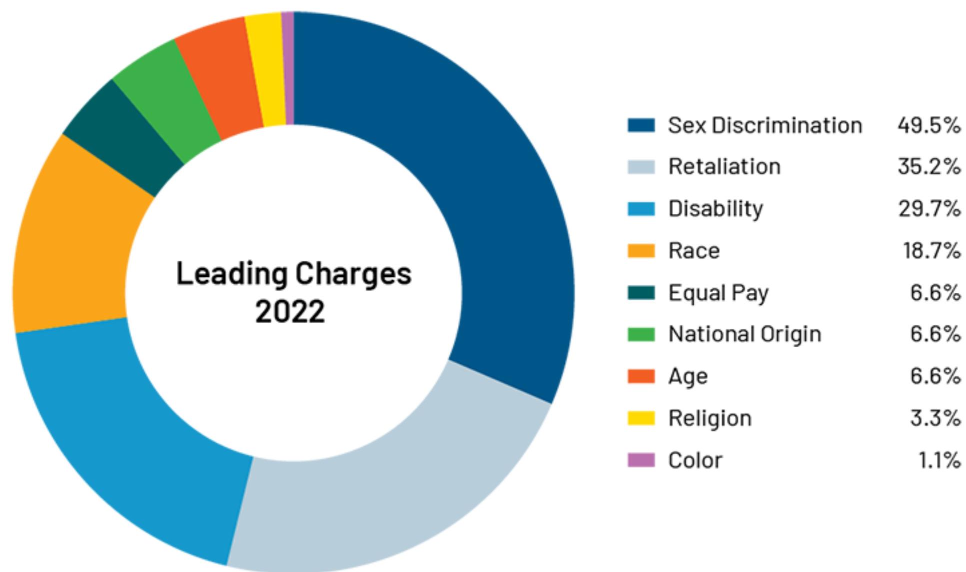
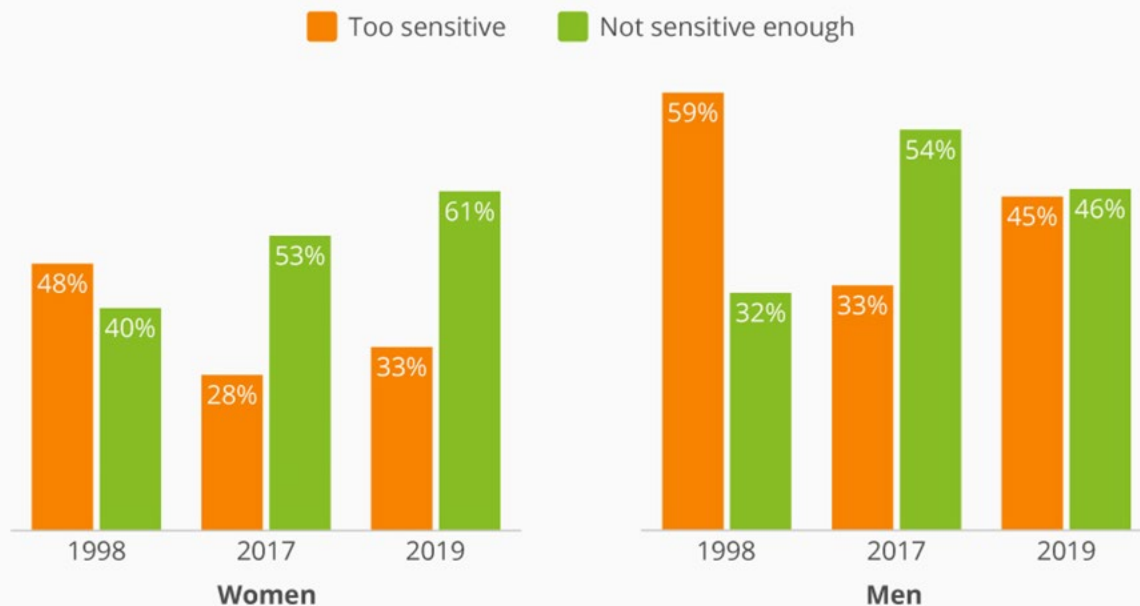



[2] *Ames v. Ohio Department Of Youth Services*, 87 F.4th 822 (6th Cir 2023).




*Source: U.S. Equal Employment Opportunity Commission, Office of General Counsel Fiscal Year 2022 Annual Report*

[3] *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181, 143 S. Ct. 2141 (2023)



[4] *Students for Fair Admissions, Inc. v. Univ. of N.C.,* 567 F. Supp. 3d 580 (M.D.N.C. 2021)
[5] *Nytimes.Com*, (June 29, 2023), https://www.nytimes.com/2023/06/29/us/politics/affirmative-action-polls.html.
[6] *United Steelworkers of Am. v. Weber*, 439 U.S. 1045, 99 S. Ct. 720 (1978)
[7] *Phillips v. Starbucks Corp.,* 624 F. Supp. 3d 530 (D.N.J. 2022)
[8] *Duvall v. Novant Health, Inc.*, 95 F.4th 778 (4th Cir. 2024)
[9] *Bless v. Cook Cnty. Sheriff's Office*, 9 F.4th 565 (7th Cir. 2021)
[10]
[11] *Parker v. Balt. & O. R. Co.,* 555 F. Supp. 1182 (1983)
[12] Id at 1015
[13] Id at 1016
[14] Id at 1017-18
[15] *Parker*, 652 F2d at 1017.
[16] *Furnco Constr. Corp v. Waters*, 438 U.S. 567, 577 (1978)
[17] *Parker*, 652 F.2d at 1017.
[18] *Harding v. Gray*, 9 F.4th 822, 824 (6th Cir. 2023)
[19] Supra Endnote 2
[20] *Ladimarco v. Runyon*, 190 F.3d 151, 160 (3d Cir. 1999)
[21] Id at 163
[22] Id at 163
[23] William R. Corbett, Reverse Discrimination: An Opportunity to Modernize and Improve Employment Discrimination Law, 79 U. Mia. L. Rev. 160 () Available at: https://repository.law.miami.edu/umlr/vol79/iss1/5
[24] *Texas Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 255 n.8 (1981); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993).

[25] See Supra note 24 and accompanying text.
[26] See *Sullivan*, supra note 8, at 1049, 1058, 1131.
[27] See, e.g., *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986) (stating that there is no issue for trial "unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party").
[28] FED. R. CIV. P. 50(a) (stating that a court may grant a motion for judgment as a matter of law if "the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue")
[29] See, e.g., *Jenkins v. Nell*, 26 F.4th 1243, 1250–51 (11th Cir. 2022); *Ortiz v. Werner Enters., Inc.*, 834 F.3d 760, 763–64 (7th Cir. 2016). Some courts have noted the artificial nature of trying to force evidence into the three stages of *the McDonnell Douglas* analysis. See, e.g., *Smith v. Lockheed-Martin Corp*., 644 F.3d 1321, 1328 (11th Cir. 2011) (stating that "[plaintiff] did not need to rely on the McDonnell Douglas presumption to establish a case for the jury").
[30] Deborah C. Malamud, The Last Minuet: Disparate Treatment After Hicks, 93 MICH. L. REV. 2229, 2324 n.30 (1995).
[31] *Faragler v. City of Boca Raton*, 524 U.S. 775 (1998)
[32] *Burlington v. Ellerth*, 524 U.S. 742 (1998)
[33] *Regents of University of California v. Bakke*, 438 U.S. 265 (1978).
[34] See Supra Note 3
[35] See Supra Note 4
[36] MD PA Local Rules
[37] Sandra Day O'Connor, *Juries: They May Be Broke, but We Can Fix Them*, 44 The Federal Lawyer 22-23 (1997).
[38] See *Cook County Sheriff's Office*, Supra
[39] See Example *Ortiz-Diaz v. U.S. Department of Housing and Urban Development,* 867 F. 3d. 70, 74 (DC Cir. 2017).
[40] M*uldrow v. City of St. Louis*, 601 U.S. (2024)
[41] *Penn State Police v. Suders*, 542 U.S. 129 (2006)
[42] *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.* No. 1, 551 U.S. 701, 720 (2007); *Adarand Constructors*, 515 U.S. at 219; see also *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 289–91 (1978) (opinion of Powell, J.); *Oyama v. California*, 332 U.S. 633, 640 (1947). Legal definitions of race, ethnicity, or national origin have not been at issue in
[43] *Adarand Constructor*s, 515 U.S. at 218, 222; see also *City of Richmond v. J.A. Croson Co*., 488 U.S. 469, 500 (1989) (opinion of O'Connor, J.).
[44] See *Vitolo v. Guzman*, 999 F.3d 353, 366 (6th Cir. 2021).