

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

MARLEAN A. AMES,)
)
 Petitioner,)
)
 v.) No. 23-1039
)
 OHIO DEPARTMENT OF YOUTH SERVICES,)
)
 Respondent.)

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P R O C E E D I N G S

(10:10 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case Number 23-1039, Ames versus the Ohio Department of Youth Services.

Mr. Wang.

ORAL ARGUMENT OF XIAO WANG
ON BEHALF OF THE PETITIONER

MR. 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

1 employee who neither applied nor interviewed for
2 the position.

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

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

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

21 But the background circumstances rule
22 doesn't do that. It doesn't eradicate
23 discrimination; it instructs courts to practice
24 it by sorting individuals into majority and
25 minority groups based on their race, their sex,

1 or their protected characteristic, and applying
2 a categorical evidentiary presumption not in
3 favor of but against the non-moving party based
4 solely on their being in a majority group,
5 however you define it.

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

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

17 I welcome the Court's questions.

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

21 MR. WANG: I don't think it is an
22 application of this Court's precedents, Your
23 Honor. And -- and, Justice Thomas, it's because
24 this Court's precedents in McDonnell Douglas
25 lays out a framework, and then McDonald versus

1 Santa Fe Trail says they apply to the same terms
2 and same standards.

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

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

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

18 MR. WANG: Assuming that they are
19 qualified and --

20 CHIEF JUSTICE ROBERTS: Yeah, yeah.
21 Yeah.

22 MR. WANG: Yes.

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

25 MR. WANG: Yes, that -- that -- that

1 is true.

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

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

19 JUSTICE JACKSON: Can I just clarify
20 the Chief's hypo, though?

21 MR. WANG: Yeah.

22 JUSTICE JACKSON: In both situations,
23 the job stays open for a few months, but then it
24 is filled by a person of a different race. Is
25 that right?

1 MR. WANG: I -- I -- I was under the
2 understanding under the Chief Justice's
3 hypothetical it remained open.

4 JUSTICE JACKSON: It just remained
5 open?

6 MR. WANG: Yeah.

7 CHIEF JUSTICE ROBERTS: Yeah, that --

8 JUSTICE JACKSON: That that's enough?

9 CHIEF JUSTICE ROBERTS: -- that was my
10 understanding too.

11 (Laughter.)

12 MR. WANG: That -- that was my --
13 sorry.

14 JUSTICE JACKSON: Okay. Sorry.

15 MR. WANG: And -- and -- and I'm happy
16 to --

17 JUSTICE JACKSON: Sorry. I did --
18 I --

19 MR. WANG: -- answer an alternative.
20 Yeah. Sorry.

21 JUSTICE JACKSON: Okay.

22 MR. WANG: Sorry about that.

23 CHIEF JUSTICE ROBERTS: No, no. Well,
24 what if it was changed according to --

25 (Laughter.)

1 MR. WANG: That -- that's -- that's a
2 fair question. And I --

3 JUSTICE JACKSON: I guess my point is
4 that the -- the -- the standard, the test for
5 prima facie case at least as I understood it --
6 and maybe I'm misunderstanding it -- is that you
7 have to state circumstances that could give rise
8 to a reason to believe that there is racial
9 discrimination or discrimination of some sort.

10 And so I would think that just saying
11 I applied for a job and it remained open, I
12 don't know, is that enough, or do you have to
13 say and then it was filled by someone of another
14 race, and that is what then gives rise to the
15 inference of discrimination?

16 MR. WANG: Well, let -- let me try to
17 unpack that in --

18 JUSTICE JACKSON: Yeah.

19 MR. WANG: -- in two ways. I think
20 the first is whether when it's filled by someone
21 of the same group or a different race or
22 something, I think that that brings into the
23 issue of whether there's a similarly situated
24 comparator, which is a common analysis that
25 takes place in most of, I think, the lower

1 courts when it comes to stating a prima facie
2 case.

3 If it's held open, though, I think
4 that means that the prima facie case serves as
5 an explanation-forcing mechanism. It's just
6 meant to bring the employer to the table, as
7 Hicks says, to come forward with some sort of
8 explanation.

9 It's not supposed to be a heavy burden
10 on the employer. I think, naturally, as this
11 Court has pointed out, often it just happens
12 anyway, in depositions or in other declarations.
13 But it's just asking the employer to come
14 forward, provide some sort of explanation in
15 order to continue the process of understanding
16 whether discrimination occurred, Justice
17 Jackson.

18 CHIEF JUSTICE ROBERTS: I guess what I
19 was just trying to get at -- and I should have
20 been clearer that the position stays open --
21 that in one case, I suppose, just because of the
22 underlying facts, the -- the assertion that this
23 was discriminatory, it seems to me, is more
24 plausible than the assertion that it was
25 discriminatory if everybody else in the company

1 is -- is white as well.

2 But you're saying that you can't take
3 that fact into account?

4 MR. WANG: I'm not saying you can't
5 take the fact into account. What I'm saying is,
6 with regard to the question presented, it
7 becomes a categorical evidentiary presumption.
8 I don't think that's fair.

9 I think what we've said is that, look,
10 these facts might give rise to a prima facie
11 case of discrimination, and I think that the
12 employer, of course, will come forward with a
13 legitimate non-discriminatory reason. And then,
14 when it comes to pretext, when it comes to
15 the -- the ultimate question of discrimination,
16 one, of course, looks at all the facts that's
17 before them.

18 The question, I think, that is
19 presented here is whether there's an additional
20 burden specifically on majority-group
21 plaintiffs. I -- I don't think that's
22 consistent with either Title VII's text or -- or
23 this Court's precedent.

24 JUSTICE BARRETT: Counsel, what do you
25 have to say to the Department's contention that

1 this is just going to throw the door wide open
2 to Title VII suits because now everybody can
3 say, hey, this was discrimination on the basis
4 of race, gender, et cetera?

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

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

22 And I don't think there's a huge delta
23 between those circuits that apply it and -- and
24 those circuits that don't apply it, which I
25 think goes to the narrow question that's before

1 the Court today.

2 JUSTICE KAGAN: And in the circum- --
3 in the circuits that don't apply it, I guess I
4 was a little bit unclear about one of the points
5 that you made to the Chief Justice.

6 In the circuits that don't apply it,
7 you said it -- the -- the -- the fact of a
8 particular person's particular race or whatever
9 it is, gender or sexual orientation, can come
10 into account as a circumstance? What did you
11 mean by that?

12 MR. WANG: Yeah. I -- I'm not sure --
13 if I was a little bit unclear, let me try to
14 clean that up a bit.

15 I think what I meant is, in the
16 circuits that don't apply it, they -- as the
17 Third Circuit and the Eleventh Circuit lay out,
18 they just take the McDonnell Douglas standard
19 and they say: Well, what sort of protected
20 characteristic are you talking about? Are
21 you -- is it adverse? Are you qualified?
22 And -- and, you know, did the job remain open,
23 or did you fill it with a similarly situated
24 comparator?

25 I think the question of, well, you

1 know, context mattering, I think that often
2 comes in at steps 2 and 3. It comes in once the
3 employer comes forward, after you've settled
4 the -- the most common non-discriminatory
5 reasons.

6 If -- once the employer comes forward
7 with the explanation, then, of course, that
8 becomes more case-specific and you talk about,
9 you know, hiring patterns at the company, the
10 makeup of the company.

11 I think that, of course, all comes
12 into play. And I -- and I think that comes into
13 play in many of the lower courts.

14 JUSTICE GORSUCH: Mr. Wang, I'm going
15 to ask you an unfair question. This case has
16 proceeded on an assumption that McDonnell
17 Douglas applies at the summary judgment stage,
18 and yet this Court has never held that it
19 applies at the summary judgment stage. What
20 should we do or think about that?

21 MR. WANG: Well, Justice Gorsuch, I'm
22 going to try to give you a fair answer to
23 that -- that question.

24 And -- and my sense is that all the
25 parties here take McDonnell Douglas sort of as a

1 given. And I think one -- sort of the first
2 response -- the first-level response I'd have
3 is, because we take it as a given, we're trying
4 to focus just on this narrow question of --
5 of -- of whether this add-on to McDonnell
6 Douglas in the common cases is appropriate.
7 So -- so that's -- that's the first one.

8 I think the second one is, because the
9 parties sort of take it as a given, it's not
10 really the best vehicle to -- to -- to really
11 reexamine it. Of course, as Versana points out,
12 there is another case that's pending before this
13 Court that could be granted that re-examines it.

14 But I think maybe as a final point,
15 whether you have McDonnell Douglas or not,
16 there's still sort of this underlying question
17 of should you apply some sort of categorical
18 evidentiary presumption against an individual
19 based on being in a majority group.

20 And I think the -- the -- your -- the
21 Court's opinion in Bostock says the answer
22 should be no.

23 JUSTICE GORSUCH: Yeah. That's why it
24 was an unfair question, because nobody's asked
25 us to do anything about it in this case, and I

1 appreciate that. But you're standing at the
2 podium, so what the heck, right?

3 (Laughter.)

4 JUSTICE GORSUCH: McDonnell Douglas
5 was devised back when there were bench trials
6 for these cases, and that -- we passed that a
7 long time ago. And in summary judgment, I had
8 thought the standard a plaintiff needed to meet
9 was just whether there was a material dispute of
10 fact about a question of discrimination on an
11 individual basis.

12 MR. WANG: Correct.

13 JUSTICE GORSUCH: But the McDonnell
14 Douglas framework has three steps, none of which
15 appear in summary judgment or in the statute.
16 And the third step has really caught up a lot of
17 plaintiffs, right, having to show that the --
18 that the defendant's stated reasons for the
19 adverse employment action are pretextual.

20 MR. WANG: Right.

21 JUSTICE GORSUCH: It could be that
22 they are -- are not pretextual, but they're
23 still discrimination.

24 MR. WANG: Correct.

25 JUSTICE GORSUCH: Two causes, right?

1 MR. WANG: Correct.

2 JUSTICE GORSUCH: And, normally, we
3 would think Title VII would capture any but-for
4 cause.

5 MR. WANG: Correct.

6 JUSTICE GORSUCH: And -- and so just
7 thoughts about that.

8 MR. WANG: Yeah, I -- I don't want to
9 step on the petitioners or the respondents in
10 the Hittle case at all in this manner. My
11 personal sense is that the statute is trying to
12 understand, as -- as -- as you say, Justice
13 Gorsuch, it's trying to understand whether
14 discrimination happened.

15 And I think the takeaway from Hicks
16 and Reeves versus Sanderson is that: Look, if
17 you have this legitimate non-discriminatory
18 reason, let's not -- let's not just fight over
19 pretext and whether that happened or this
20 happened. Let's just try to get at the root of
21 the issue, whether discrimination happened.

22 And -- and if I can just maybe tie it
23 back to this case.

24 The question is whether individual
25 discrimination happened. It's not about

1 whether, as the Sixth Circuit put it, there's
2 some pattern or practice of group-based
3 discrimination or some specific look at the
4 status of the decisionmaker here.

5 I think it's about the individual
6 circumstances in any individual case.

7 JUSTICE KAVANAUGH: Isn't it about
8 whether the stated reason by the employer was
9 true or, if not, whether it was because of race
10 or sex or what have you?

11 MR. WANG: Well, I think, Justice
12 Kavanaugh, that -- that goes to, of course,
13 steps 2 and 3. And -- and I think whether it's
14 true or not, I -- I think that this Court's
15 precedents, I -- I think, instruct that: Look,
16 if it's not true under Reeves, that doesn't
17 necessarily require a finding or require a
18 directed verdict.

19 JUSTICE KAVANAUGH: Right. Not -- it
20 doesn't require --

21 MR. WANG: Right.

22 JUSTICE KAVANAUGH: -- but it often
23 will lead that way.

24 I thought McDonnell Douglas kind of
25 dropped out once the employer stated a reason.

1 MR. WANG: Yes. Yes, Your Honor.

2 JUSTICE KAVANAUGH: That's certainly
3 what the D.C. Circuit has said. That's, I
4 thought, what this Court had suggested in cases
5 like -- a variety of cases.

6 MR. WANG: Yeah. And -- and -- and,
7 Justice Kavanaugh, I think that's right. I
8 think that's --

9 JUSTICE KAVANAUGH: And the employer
10 usually states a reason in the answer, right?

11 MR. WANG: Well -- well, yeah. And --
12 and let me try to tackle that in -- in two ways.
13 I think, first, certainly --

14 JUSTICE KAVANAUGH: We're pretty far
15 afield from the question presented, but --

16 JUSTICE JACKSON: Yeah.

17 MR. WANG: Yeah, yeah. I -- and I
18 just -- I want to be sort of mindful of that but
19 also provide a -- a fulsome response here.

20 The -- the first point to -- to -- to
21 your question is I think that is a possible
22 takeaway from Aikens. And, certainly, the D.C.
23 Circuit in Brady did hold that.

24 I think the sort of -- why I don't
25 necessarily know if that can be resolved in this

1 case, this particular case, is -- is, look, our
2 client -- our client here, Ms. Ames, lost on
3 step 1. And -- and many other clients lose on
4 step 1. Sometimes you don't get to step 2.
5 It's not often, but sometimes you don't. And --
6 and that's why I think there's a circuit split
7 over whether there should be an additional
8 requirement at step 1.

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

15 MR. WANG: That -- that's right, Your
16 Honor. And I --

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

19 MR. WANG: I -- I think that would be
20 something -- well, I think you'd also have to
21 say reverse or vacate.

22 (Laughter.)

23 MR. WANG: I want to look out for my
24 client here a little bit.

25 But -- but, certainly, as to the

1 reasoning, yes, I -- I entirely agree. I think
2 that this is a narrow question, and it's a
3 question of is there an added burden.

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

8 JUSTICE SOTOMAYOR: I think there's a
9 footnote. It's not just whether discrimination
10 was a reason, but was it a motivating fact,
11 correct? Under the statute, it could be -- it
12 could be a legitimate reason, as Justice Gorsuch
13 said, but it still could have been based --

14 MR. WANG: Certainly, Justice
15 Sotomayor.

16 JUSTICE SOTOMAYOR: -- on race or sex
17 or -- or --

18 MR. WANG: Yes, yes.

19 JUSTICE SOTOMAYOR: -- gender
20 identity.

21 MR. WANG: Yes, Justice Sotomayor. I
22 think -- I -- I entirely agree with that. I
23 think that the -- the takeaway from several of
24 these Court's cases, like the Abercrombie &
25 Fitch case, say: Look, it needs to be the

1 motivating factor. So -- so I -- I entirely
2 agree. And I -- I don't think this case
3 would -- would implicate that -- those -- that
4 line of precedents.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 MR. WANG: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Thomas, anything further?

10 Justice Alito?

11 Justice Kavanaugh, anything?

12 Justice Barrett?

13 Justice Jackson?

14 Thank you, counsel.

15 MR. WANG: Thank you.

16 CHIEF JUSTICE ROBERTS: Ms. Robertson.

17 ORAL ARGUMENT OF ASHLEY ROBERTSON

18 FOR THE UNITED STATES, AS AMICUS CURIAE,

19 SUPPORTING VACATUR

20 MS. ROBERTSON: Mr. Chief Justice, and
21 may it please the Court:

22 The court of appeals applied a
23 different and more difficult standard to
24 Petitioner because it considered her a member of
25 the majority, but Title VII draws no

1 distinctions between plaintiffs based on their
2 race, religion, sex, or other protected
3 characteristic.

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

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

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

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

24 I welcome the Court's questions.

25 JUSTICE THOMAS: In McDonnell Douglas,

1 Justice Powell -- the first -- said this may be
2 done -- in -- in setting out the prima facie
3 case, this may be done by showing, one, that he
4 belongs to a racial minority.

5 What work does that do?

6 MS. ROBERTSON: We think that that
7 first prong identifies the protected class to
8 which the plaintiff belongs and, therefore,
9 focuses the litigation on whether the
10 discrimination occurred on the basis of that
11 protected class.

12 We don't think it does the work that
13 the court of appeals and the other courts that
14 have adopted the background circumstance thinks
15 it does, namely, that McDonnell Douglas was
16 predicated on some assumption about the rate at
17 which different groups were discriminated
18 against.

19 The Court has told us that the
20 McDonnell Douglas presumption arises because of
21 a different insight about employers, that they
22 act for reasons and will be able to provide
23 reasons so that if this is the rare employer who
24 can't come forward with any non-discriminatory
25 reason for their action, the reason becomes more

1 likely discriminatory. And that is an insight
2 that holds good regardless of the identity of
3 the plaintiff.

4 Of course, that's not to say that a
5 plaintiff who makes out a prima facie case is
6 necessarily going to trial. In virtually every
7 case, an employer will come forward with some
8 non-discriminatory reason for their actions, and
9 then the question will focus on whether that
10 reason is pretextual or whether there's
11 otherwise evidence to indicate that the employer
12 acted for a discriminatory reason. And that
13 itself is a difficult burden for plaintiffs to
14 meet.

15 We reject the Sixth Circuit's test
16 because it's adding an additional pretextual
17 burden at step 1 that risks screening out cases
18 that might otherwise satisfy the statute's
19 standard for liability.

20 JUSTICE BARRETT: Ms. Robertson, could
21 you give us a little background about the EEOC's
22 interpretation of this statute because it has a
23 different approach, right?

24 MS. ROBERTSON: No, the -- or the EEOC
25 has a different approach than what the Sixth

1 Circuit does here.

2 JUSTICE BARRETT: Than what the Sixth
3 Circuit. Yeah, yeah. Sorry. I didn't mean
4 than you do.

5 (Laughter.)

6 JUSTICE BARRETT: I meant than the
7 Sixth Circuit.

8 MS. ROBERTSON: Yes. The EEOC has
9 rejected the background circumstances rule. It
10 applies the same prima facie case, the one this
11 Court articulated in McDonnell Douglas, for all
12 plaintiffs. And it's been consistent with that
13 because it understands this Court's subsequent
14 decisions in McDonald, in Burdine, in Furnco to
15 reject the idea that McDonnell Douglas turned on
16 the race or identity of the plaintiff.

17 JUSTICE BARRETT: And, you know, I --
18 I asked -- I asked before whether this would
19 lead to a floodgate problem, as the Department
20 says, oh, then you're going to have all these
21 people filing suits. But the EEOC -- am I
22 remembering right -- it was like 2001 that it's
23 consistently had this interpretation of the
24 statute? What has the EEOC's experience been?

25 MS. ROBERTSON: The EEOC has had this

1 interpretation since 2006. The -- the EEOC, to
2 be clear, while it does investigate all charges,
3 parties don't need -- don't need the EEOC to
4 conclude that there is reasonable cause to
5 proceed. EEOC will always issue a right to sue
6 letter.

7 But I will say that in our experience
8 as an employer who regularly litigates these
9 cases as a defendant, we don't need a higher
10 prima facie case to weed out cases without
11 merit. That's because, in every case, the
12 government can provide a non-discriminatory
13 reason for its action.

14 And so the case will proceed to step 3
15 whether or not that reason is a pretext or
16 whether or not we ultimately acted for a
17 discriminatory reason. And that in itself, as I
18 said, is a high hurdle. And so, if a plaintiff
19 can't satisfy that bar, they won't go to trial.

20 So we -- we share Ohio's concerns with
21 making sure that meritless cases don't reach
22 trial. We simply think that raising the
23 standard at step 1 would be exactly the wrong
24 way to address that concern because it would
25 focus parties on a question that has often

1 become ancillary by the time a court considers a
2 motion for summary judgment because, during
3 discovery, a defendant will often, virtually
4 always, offer some reason for their action, be
5 it through a deposition, through a declaration,
6 some other paper evidence. And so for the court
7 to focus on whether a plaintiff has triggered a
8 burden of production that a defendant has
9 already met strikes us as beside the point.

10 And, of course, that's what the Court
11 said in Aikens and Hicks. That's what the D.C.
12 Circuit has said. And we think, to the extent
13 that there is confusion about McDonnell Douglas,
14 Justice Gorsuch, it would be helpful for this
15 Court to clarify in remanding to the Sixth
16 Circuit that because Ohio has already met its
17 burden of production here, the court can and
18 should proceed to the ultimate question of
19 whether a fact-finder could find discrimination.

20 JUSTICE GORSUCH: Yeah, that's --

21 JUSTICE ALITO: And when --

22 JUSTICE GORSUCH: -- that's -- I'm
23 sorry. Go ahead.

24 JUSTICE ALITO: Go ahead.

25 JUSTICE GORSUCH: Well, I -- I do want

1 to pick up on that point, Ms. Robertson, that at
2 least in many circuits, the -- the step 3
3 inquiry on pretext has become kind of a -- an
4 absolute condition that has to be met. You have
5 to show that the -- that the reason offered by
6 the employer is pretextual to get to trial.

7 And -- and -- and, again, we've never
8 held that. This Court's never done it in the
9 summary judgment context. I understand other
10 circuits may do it differently, but many have
11 done what I've described, which seems a little
12 inconsistent with, as Justice Sotomayor pointed
13 out, the motivating factor test and with the
14 but-for causation test, where there are two
15 possible causes. One might be
16 non-discriminatory and another might be
17 discriminatory.

18 Any thoughts about that for us?

19 MS. ROBERTSON: I'm mindful that the
20 Court has before it a pending petition, and so I
21 won't comment on whether what the Ninth Circuit
22 did specifically in that case was incorrect. I
23 will say that we understand that any plaintiff
24 that can produce evidence from which a jury
25 could infer discrimination should go to trial.

1 JUSTICE GORSUCH: Okay. Thank you.

2 JUSTICE JACKSON: Can I ask you about
3 the government's experience in terms of court
4 confusion? I mean, is -- is -- is it your
5 experience that at least with respect to step 1,
6 there's been sort of widespread misunderstanding
7 of what is supposed to happen?

8 MS. ROBERTSON: I do think there has
9 been confusion in the courts of appeals, and I
10 think that the Court in this case could take two
11 steps that would go a long way towards
12 addressing that confusion.

13 First, it can make clear that the
14 first step of McDonnell Douglas should not
15 screen out any case that might ultimately
16 satisfy the standard -- the statutory standard
17 for liability. So what the Sixth Circuit did
18 here, for instance, by asking for a reason to
19 think that an employer usually discriminates
20 against a group, requires evidence that a
21 plaintiff wouldn't need to establish liability
22 under the statute because, of course, even if an
23 employer generally treats a group well, if a
24 plaintiff has evidence that the employer
25 discriminated against her, she should be able to

1 proceed.

2 JUSTICE JACKSON: So I hear you saying
3 that first step is make sure you make clear
4 that, you know, step 1 is a low bar.

5 MS. ROBERTSON: It's a --

6 JUSTICE JACKSON: You're not proving
7 your case at that point.

8 MS. ROBERTSON: Yes. I do think that
9 that is another -- that that is an important
10 point. A plaintiff is not required at step 1 to
11 prove discrimination is more likely than not.
12 They need to prove at step 1 that the facts, if
13 left unexplained, would make discrimination more
14 likely than not.

15 And that lack of explanation itself
16 does significant work because, if an employer
17 cannot come up with a non-discriminatory reason,
18 any reason, even an arbitrary reason, for why it
19 took the employment action it took, that in
20 itself is highly probative of whether or not
21 there was discrimination. And the additional
22 facts necessary to prove discrimination in that
23 circumstance would be, as this Court has said,
24 quite minimal.

25 JUSTICE JACKSON: And I apologize for

1 cutting you off. You said there were two things
2 the Court could say.

3 MS. ROBERTSON: The second one I hit
4 on earlier and Justice Kavanaugh asked about as
5 well, which is clarifying that if an employer
6 has met its burden of production, whether that
7 employer had the burden in the first place is
8 not something that the court need answer.

9 Instead, the court can focus on the
10 ultimate question of whether there was
11 discrimination, including, of course,
12 considering any evidence that suggests that the
13 reason that the employer gave was pretextual.

14 JUSTICE JACKSON: But, of course, that
15 would be going on to talk about step 2 in a way
16 that really is a little bit outside the scope of
17 this case, right?

18 MS. ROBERTSON: We simply think that
19 in remanding to the Sixth Circuit, because Ohio
20 on these facts has -- the court has already
21 held, the court of appeals has already held, has
22 satisfied its step 2 burden, it would be
23 appropriate for the Court to say that the
24 court -- that the court of appeals can proceed
25 directly to step 3.

1 JUSTICE JACKSON: Thank you.

2 JUSTICE ALITO: Would it be -- the --
3 the rule that the Sixth Circuit applied was
4 apparently based on an intuition about the way
5 in which most employers behave. And maybe it
6 was sound at the time when McDonnell Douglas was
7 decided. Maybe, as some of the amici have
8 argued, it's no longer sound today. Suppose we
9 say that that was an error.

10 Would it be permissible for a court to
11 transport that same notion into the subsequent
12 steps of the McDonnell Douglas inquiry? In
13 other words, in taking into account whether
14 there is sufficient evidence to get beyond --
15 get by summary judgment, can a court take into
16 account the race of the decisionmaker and the
17 race of the -- of the plaintiff?

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

1 JUSTICE ALITO: Okay.

2 MS. ROBERTSON: That's not to say that
3 race is irrelevant in a race discrimination case
4 or that sex is irrelevant in a sex
5 discrimination place. And I think it's helpful
6 to understand how that type of evidence comes in
7 in practice.

8 In our experience litigating those
9 case -- these cases, it typically takes two
10 forms. First, a plaintiff can introduce
11 evidence that their employer has a history of
12 discriminating against their particular group,
13 be it a discriminatory pattern of hiring or
14 firing or a history of derogatory comments
15 directed at the particular group.

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

22 And just to give you an example of
23 what that means, in PriceWaterhouse, this Court
24 had no trouble understanding that when a male
25 supervisor tells a female subordinate that her

1 chances at promotion would be better if she wore
2 makeup, wore jewelry, was less aggressive, that
3 that comment invokes sex stereotypes, whereas,
4 if an employer told a female subordinate meet
5 your deadlines, common sense would tell us
6 that's not sex-based absent some other evidence
7 to suggest it is, like the employer doesn't
8 enforce deadlines for male colleagues.

9 So, of course, the Court can consider
10 those -- that type of context and common-sense
11 inferences. What a court can't do is what the
12 Sixth Circuit did here, which is draw inferences
13 solely from the identity of the plaintiff and
14 the court's own judgment, independent of any
15 evidence in the record, about how frequently
16 that group may or may not experience
17 discrimination.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Is a protected characteristic on the
21 part of the decisionmaker alone enough to
22 establish a prima facie case?

23 MS. ROBERTSON: No, we don't think so,
24 Chief Justice. And that hints at an oddity
25 about the Sixth Circuit's opinion, is that it

1 suggests that evidence that wouldn't be enough
2 to make out a prima facie case suddenly would be
3 if you changed the identity of the
4 decisionmaker.

5 But, because the prima facie case is
6 hitched to step 2 and looks to what would happen
7 if an employer couldn't come forward with any
8 explanation, we think that whether or not the
9 decisionmaker was of a particular identity or
10 not, if they can't come up with any
11 non-discriminatory reason for their actions,
12 that alone is a strong signal of discrimination.

13 CHIEF JUSTICE ROBERTS: Thank you.

14 Justice Thomas?

15 Justice Alito?

16 JUSTICE ALITO: Well, I want to follow
17 up on the point that you were answering
18 previously. So I -- I do think it's an
19 important point.

20 When you say that some of what the
21 Sixth Circuit appeared to be concerned about can
22 be considered at a later stage of the McDonnell
23 Douglas process, that does not mean that the
24 mere -- that stereotypes based solely on the
25 decisionmaker's race and the plaintiff's race

1 are permissible.

2 MS. ROBERTSON: That's right. The
3 Court always needs to look at the evidence in
4 the record before them. And I -- we think that
5 when the court is confronted with particular
6 facts about a particular employer, of course,
7 that's appropriate to consider.

8 And the fact that a plaintiff was a
9 member of a group that this employer has
10 historically discriminated against, of course,
11 can be relevant, and we wouldn't want the Court
12 to suggest otherwise in an opinion.

13 Likewise, as we said in Note 1 of our
14 brief, this case doesn't have to do with the
15 prima facie case in a pattern or practice case,
16 where, of course, whether the employer usually
17 discriminates is exactly the point.

18 But the Court should not, based on its
19 own independent sense of which group experiences
20 more discrimination or not, draw its own
21 conclusions absent evidence.

22 JUSTICE ALITO: Okay. So this is not
23 a pattern and practice case, and yet you say
24 that it would be permissible for a court at a
25 later stage of the McDonnell Douglas process to

1 take into account the -- the -- the employer's
2 hiring patterns. Yeah. So what does that --
3 what would that mean here?

4 Suppose that the plaintiff said:
5 Look, they -- I mean, they discriminated against
6 me because I'm -- because I'm heterosexual, and
7 here are five other instances where they did the
8 same thing.

9 Is that going to come in? Is the
10 court going to have mini trials or mini summary
11 judgment proceedings on all of these other
12 alleged instances?

13 MS. ROBERTSON: I think there are two
14 types of historical evidence about an employer's
15 hiring or firing patterns that might come in.
16 The first is statistical evidence of the sort
17 that the court in McDonnell Douglas said may be
18 relevant at step 3 of the litigation.

19 The second is any comparator evidence.
20 So, if a plaintiff can point to five similarly
21 situated individuals of a different protected
22 group that the employer treated differently,
23 that would be relevant.

24 CHIEF JUSTICE ROBERTS: Justice
25 Sotomayor?

1 Justice Kagan?

2 Justice Kavanaugh?

3 Justice Jackson?

4 Okay. Thank you, counsel.

5 Mr. Gaiser.

6 ORAL ARGUMENT OF T. ELLIOT GAISER

7 ON BEHALF OF THE RESPONDENT

8 MR. GAISER: Mr. Chief Justice, and

9 may it please the Court:

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

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

21 She claims the department took two
22 adverse actions against her in the first five
23 months of the administration, denying her a
24 promotion and demoting her because of her sexual
25 orientation.

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

8 In other words, she failed to make out
9 a prima facie case under the first step of
10 McDonnell Douglas that should apply to every
11 Title VII plaintiff. She didn't provide
12 evidence that, to quote Furnco, "if otherwise
13 unexplained, raises an inference of
14 discrimination."

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

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

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

8 I welcome the Court's questions.

9 JUSTICE THOMAS: Do you think the
10 Sixth Circuit's argument -- opinion is
11 consistent with your argument here?

12 MR. GAISER: I think, Justice Thomas,
13 that's the best way to read what the Sixth
14 Circuit was doing. My friends on the other side
15 have language they can point to about additional
16 or higher burden that -- that we think this per
17 curiam shouldn't be scrutinized on that level.

18 JUSTICE THOMAS: But it does say that
19 if the Petitioner were of a minority -- a
20 different group, that the additional burden
21 would not be necessary. So how is that
22 consistent with your argument?

23 MR. GAISER: Well, I -- I think that
24 what the court was doing was saying just going
25 through the four elements that what McDonald

1 calls the sample pattern of proof wasn't enough
2 in this particular case because there wasn't any
3 evidence that raised an inference of
4 discrimination merely from those bare four
5 facts.

6 JUSTICE THOMAS: So do you think the
7 concurrence got it wrong too?

8 MR. GAISER: Well, with great respect
9 for Judge Kethledge, we think that he latched
10 onto what Ms. Ames had said about the relative
11 qualifications. And so Ohio sees it differently
12 from Judge Kethledge.

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

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

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

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

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

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

14 JUSTICE KAVANAUGH: You -- you agree
15 that those passages are wrong?

16 MR. GAISER: We're not defending the
17 exact language there. This -- this per curiam,
18 we asked for oral --

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

1 think that it's wrong?

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

8 JUSTICE KAVANAUGH: So you agree with
9 Petitioner and the Solicitor General then?

10 MR. GAISER: On -- on that major
11 premise point. But we don't think --

12 JUSTICE KAVANAUGH: Which is the
13 question presented.

14 MR. GAISER: Well, we think that the
15 question presented here is -- is: What must a
16 plaintiff do to show at the prima facie step
17 that there's an inference of discrimination?
18 And we don't think Ms. Ames did that. And we
19 think that saying that what the United States
20 says, that just eliminating the two most common
21 reasons and then --

22 JUSTICE KAVANAUGH: That could be all
23 sorted out on remand, right? I mean, all we
24 have before us is really what Justice Kagan was
25 reading, I thought.

1 MR. GAISER: Well, our argument is
2 that this Court reviews judgments, and the
3 judgment was correct.

4 I think that everyone here agrees that
5 everyone should be treated equally.

6 JUSTICE JACKSON: All right. So what
7 is that treatment? What must a plaintiff do in
8 your view?

9 MR. GAISER: So, under Reeves, this
10 Court said: Provide enough evidence that
11 there's an inference of discrimination -- this
12 is also Footnote 7 of Burdine -- a legally
13 mandatory presumption of discrimination.

14 And then the Court said in --

15 JUSTICE JACKSON: Do we -- do we not
16 have the steps anymore within the -- you know,
17 that he was a member of a protected class, that
18 he suffered an adverse employment action, that
19 he was qualified and was replaced by someone
20 else? Is that not how you conceive of this as,
21 like, the statement?

22 You seem to be suggesting that
23 evidence has to come in at this very first stage
24 and you have to really establish that you have
25 been discriminated against. And -- and I had

1 not understand -- understood the first stage to
2 be that onerous.

3 MR. GAISER: Well, we don't think it's
4 onerous, but this is at summary judgment. This
5 is after complete discovery, document
6 production. Here, I think we had six
7 depositions under oath. If you can't show any
8 evidence that the employer was motivated by a
9 protected characteristic when they took the
10 adverse action, and, certainly, if you can't
11 show an adverse action at all, that's not enough
12 to create any burden of production for the
13 employer.

14 And that sample pattern of proof, the
15 four elements that McDonnell Douglas lays out,
16 courts have adopted that under this Court's
17 guidance. So, in Swierkiewicz versus Sorema,
18 this Court said, before discovery has unearthed
19 relevant facts and evidence, it may be difficult
20 to define the precise formulation of the
21 required prima facie case in a particular case.

22 And so what those four elements
23 happened to be, this Court has directed lower
24 courts to never treat them as an exclusive or --

25 JUSTICE JACKSON: I understand, but I

1 guess, you know, what -- what's happening is
2 that we have a burden-shifting test that we have
3 indicated on several occasions is sort of
4 graduated in terms of how you get to the
5 ultimate question.

6 And I -- I thought that the -- what
7 was necessary to shift the burden to the
8 employer to come up with the reason or explain
9 what -- was not supposed to be all the evidence
10 that you have related to discrimination, that it
11 was just enough that you give -- say things or
12 have enough evidence that -- that -- that
13 established an inference, you know, that you
14 could more likely than not, and then the burden
15 shifts and the employer really has to explain
16 what -- what's going on here.

17 MR. GAISER: Well, I agree with your
18 characterization, Justice Jackson. And that's
19 what this Court said in Reeves, where the Court
20 made clear that if you have enough evidence at
21 the prima facie stage, that you could, looking
22 alone at that, grant judgment for the plaintiff.
23 Then the employer has a burden.

24 JUSTICE JACKSON: So what was --

25 JUSTICE BARRETT: Mr. --

1 JUSTICE JACKSON: -- the failing --
2 oh, sorry. Go ahead.

3 JUSTICE BARRETT: I -- I was just
4 going to -- I just wanted to clarify what you
5 were saying to Justice Kagan and Justice
6 Kavanaugh.

7 Do you agree that if the law in the
8 Sixth Circuit is as Judge Kethledge's opinion
9 describes it that it's wrong?

10 MR. GAISER: I -- I think that if that
11 were an accurate characterization, yes.

12 JUSTICE BARRETT: So this whole
13 dispute then is really just about how we
14 interpret what the Sixth Circuit said?

15 MR. GAISER: No, I don't think that's
16 alone what's at issue, Justice Barrett. I
17 think, you know, the case that we cite I think
18 has -- has a better description.

19 You know, this per curiam opinion, we
20 asked the Department for oral argument, and my
21 friends on the other side too asked for oral
22 argument. The court just came out with this
23 decision two weeks -- or two months after the
24 Court's briefing.

25 JUSTICE BARRETT: So it might have

1 been sloppy, maybe it wasn't stated well, but
2 you agree that if it means what it says, what
3 Justice Kagan read to you, or if Judge
4 Kethledge's understanding was correct, you agree
5 that that's wrong?

6 MR. GAISER: We -- we agree. Ohio
7 agrees that it's wrong to treat people
8 differently.

9 JUSTICE BARRETT: So, if we said
10 someone like Ms. Ames, who is a member -- it
11 doesn't matter if she was gay or whether she was
12 straight; she would have the exact same burden
13 and be treated the exact same way under Title
14 VII if she sued as someone who was gay and
15 argued that they were discriminated against
16 under Title VII? Same?

17 MR. GAISER: I think that she should
18 have the same burden and that the best reading
19 of -- of what the Sixth Circuit said --

20 JUSTICE BARRETT: Well, no, no, no.
21 I'm just asking you what you think of the
22 statute. So that is what you think of the
23 statute. And same for someone who brings a race
24 discrimination, someone who brings -- you know,
25 a woman or a man who brings a sex discrimination

1 suit on the basis of -- discrimination against
2 on the basis of sex, all of those, you agree
3 that the court should apply the exact same
4 burden, treat them the exact same way?

5 MR. GAISER: We -- we agree with
6 that --

7 JUSTICE BARRETT: Okay.

8 MR. GAISER: -- Justice Barrett.

9 JUSTICE BARRETT: Thank you.

10 MR. GAISER: The only thing I would
11 add is it can't simply be the tick through the
12 mechanical rubric and then the employer has the
13 burden to disprove liability under Title VII.
14 That's inconsistent with the text of Title VII.

15 And we think what this Court said -- I
16 would point the Court to page 3 of my friend's
17 reply brief. They cite this per curiam -- this
18 unpublished decision from the Third Circuit that
19 really re-articulates what the United States
20 says at page 20 of their brief, and what they
21 say at the top of page 20 is that the fourth
22 element of a prima facie case should just be
23 circumstances which give rise to an inference of
24 discrimination.

25 If that's the rubric that this Court

1 says it should apply in every case, then I think
2 Ms. Ames hasn't made out a prima facie case.

3 JUSTICE BARRETT: So you're not
4 worried about -- you are not concerned -- you're
5 on the same page as your friends on the other
6 side when it comes to the central question of
7 how we should interpret Title VII. Your concern
8 is that we'll say something more about what kind
9 of evidence any plaintiff has to show no matter
10 what group they belong to?

11 MR. GAISER: Yes, our requirement --

12 JUSTICE BARRETT: But, if we didn't
13 say that, you would be satisfied with an opinion
14 that just said everyone's treated the same under
15 Title VII?

16 MR. GAISER: Well, I -- I think the
17 courts could be misled by hearing that, that
18 basically the prima facie case, as the National
19 Employment Lawyers Association explicitly asks
20 for, doesn't really play a factor in McDonnell
21 Douglas. McDonnell Douglas is a judicial gloss
22 on the statute that is trying to make it easier
23 for plaintiffs, but it's not such that the
24 burden is always and everywhere on the regulated
25 party. The Title VII standard still requires

1 the plaintiff to make out the burden of proof.

2 JUSTICE KAVANAUGH: Why then,
3 though --

4 JUSTICE SOTOMAYOR: Sorry. Why -- why
5 is it so hard on an employer to just say why
6 they didn't hire someone?

7 MR. GAISER: Well --

8 JUSTICE SOTOMAYOR: I mean, you're
9 making it sound as, if by making out a prima
10 facie case, it's unfair to the employer to say
11 you didn't hire them, explain why.

12 MR. GAISER: Well, two responses --

13 JUSTICE SOTOMAYOR: They don't have to
14 prove the why.

15 MR. GAISER: Yeah, two responses to
16 that, Justice Sotomayor.

17 Number one, the text of the statute
18 allocates the burden not to disprove liability
19 but to prove liability. And so the prima facie
20 case needs to be a complete case enough at that
21 circumstantial stage before the employer has a
22 burden under the text.

23 And then, secondly, doctrine. This
24 Court has said that that case needs to be enough
25 to create a legally mandatory inference of

1 discrimination.

2 JUSTICE SOTOMAYOR: But you seem to be
3 putting this on its head. You seem to be saying
4 that they have to be able to win the case on the
5 prima facie evidence. That -- that's what
6 you're suggesting.

7 MR. GAISER: If -- I'll answer --

8 JUSTICE SOTOMAYOR: Because Judge
9 Kethledge basically said you have a situation
10 here where she alleged she was a member of the
11 majority group, she was a 20-year employee,
12 great reviews, and then all of a sudden she's
13 not hired and someone's hired who's gay, doesn't
14 have her level of college experience, and didn't
15 even want the job. Something's suspicious about
16 that. It certainly can give rise to an
17 inference of discrimination.

18 Now, whether those facts are enough to
19 make out that the employer's proffered reason is
20 pretextual or -- pretextual in some way, the
21 court hasn't gotten to that yet.

22 MR. GAISER: Well, so, Justice
23 Sotomayor, I think the -- the really crucial
24 fact here is every circuit -- and we point this
25 out in our bio -- every circuit has said that if

1 the employer isn't even aware of the protected
2 trait, it's not possible to infer that they were
3 motivated by that protected trait.

4 And that doesn't come in at prong 2 of
5 the McDonnell Douglas burden-shifting. You
6 don't have to disprove the negative. It's the
7 burden on the plaintiff at very minimum to say
8 they knew about your protected characteristic.

9 And what the evidence here showed was
10 that no one knew Ames's or Frierson's sexual
11 orientation. The Petition Appendix at 32a, the
12 district court made a factual finding that has
13 not been appealed here that no one knew
14 Ms. Ames's sexual orientation at the time of the
15 relevant employment decisions. And Director
16 Gies testified that he did not know
17 Mr. Stojsavljevic was gay, even though others
18 may have suggested that in the record to other
19 people, and that's at J.A. 46 and 48.

20 JUSTICE SOTOMAYOR: Thank you,
21 counsel.

22 JUSTICE KAGAN: General, I -- I -- I
23 guess my reaction to a lot of what you're saying
24 is this: You say you agree with your friends on
25 the question that we took this case to decide.

1 The question presented is whether a
2 majority-group plaintiff has to show something
3 more than a minority-group plaintiff, here,
4 whether a straight person has to show more than
5 a gay person. Everybody over here says no. You
6 say no too. That was the question that we took
7 the case to decide.

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

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

20 MR. GAISER: Well, I think there are
21 two responses to that, Justice Kagan.

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

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

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

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

21 And so our thought is the Court should
22 still affirm because what the Sixth Circuit's
23 judgment did here is what we ask every court to
24 do at the first step of McDonnell Douglas even
25 if we agree that's saying that an additional

1 burden is a mischaracterization of what this
2 Court has said in the past.

3 JUSTICE GORSUCH: Mr. Gaiser, I guess
4 maybe another way of coming at perhaps the same
5 question is what would be wrong with a judgment
6 holding that everybody is treated equally at the
7 first step of McDonnell Douglas, if it applies
8 at summary judgment, we've never so held, but
9 let's assume, and that you would then on remand
10 be able to argue about what that fourth prong of
11 the first prong of McDonnell Douglas means for
12 everybody? What's enough circumstances to give
13 rise to an inference of discrimination?

14 We -- we wouldn't say anything that
15 would prohibit you from making these arguments
16 to that court in the first instance. And,
17 normally, of course, we are a court of review,
18 not first views, Justice Ginsburg would like to
19 remind us.

20 MR. GAISER: Well, Justice Ginsburg
21 was very wise, Justice Gorsuch. And we don't
22 want to make assumptions either way. I think
23 the -- the Court should still affirm. I'm
24 defending the judgment on behalf of my client.

25 But, if the Court is going to say

1 anything about what that first prong happens to
2 mean --

3 JUSTICE GORSUCH: Well, I'm -- I'm --
4 I'm positing a circumstance where we don't;
5 affiants sayeth not anything about what that
6 first prong means, other than to say it applies
7 the same to everybody.

8 MR. GAISER: Well, we agree that the
9 Court should say that at the very, very minimum.
10 But, if --

11 JUSTICE GORSUCH: We're in radical
12 agreement today on that, it seems to me.

13 (Laughter.)

14 JUSTICE GORSUCH: Counsel before us
15 seem to be in total agreement.

16 And then, if your argument is, as
17 applied to everybody, she fails on the fourth
18 prong of the first prong of McDonnell Douglas,
19 perhaps a court should take a look at that
20 before we do.

21 What -- what would be wrong with that?

22 MR. GAISER: Well, I think there's
23 something in between those two levels of -- of
24 abstraction, Justice Gorsuch. We agree on that
25 first level. And we think that the Court can

1 avoid that -- that sort of third level down, but
2 the second level here --

3 JUSTICE GORSUCH: Boy, I'm lost. We
4 have four prongs and three prongs and four
5 levels.

6 (Laughter.)

7 JUSTICE GORSUCH: Just what's wrong
8 with the opinion I outlined to you?

9 MR. GAISER: Well, I think a lot of
10 courts are going to get the misimpression that
11 that first prong of the prima facie case, that
12 McDonnell Douglas step 1, if it applies equally
13 to everyone and the Court sayeth nothing further
14 about that, that it just means the burden is on
15 the employer to produce evidence --

16 JUSTICE GORSUCH: No, no.

17 JUSTICE KAVANAUGH: I don't know
18 why --

19 JUSTICE GORSUCH: No. Why would that
20 be? We would say -- I mean, you know, you -- as
21 the government points out, you point out,
22 everybody points out, you've got to show you're
23 a member of a protected class, one; two, who is
24 qualified for the relevant position; three, was
25 subject to an adverse employment action; and,

1 four -- and this seems to be where the dispute
2 is -- was taken under circumstances which give
3 rise to an unlawful discrimination.

4 And you say that's not met because the
5 relevant decisionmakers didn't know the
6 plaintiff's sexual orientation. Interesting
7 argument. Not presented here. Let a lower
8 court pass on it first.

9 Why wouldn't that be a wise course for
10 this Court to follow?

11 MR. GAISER: I -- I -- I think it
12 would be wise if the Court adopted the four
13 prongs read just as you read them, Justice
14 Gorsuch. And if the Court doesn't want to say
15 anything more about that, we still think the
16 Court can affirm, but if the Court is going to
17 make sure to say what is at the top of page 20,
18 I think that would be good guidance for this
19 Court to give.

20 JUSTICE KAVANAUGH: Well, I thought --
21 this is not what I think we should do, but I'm
22 just going to throw it out there, which is, if
23 we talk about McDonnell Douglas, I thought, once
24 the employer stated a reason, the whole thing
25 kind of drops out, and then, as Justice Gorsuch

1 says, you're just figuring out was there -- was
2 it based on the stated reason or was it based on
3 a prohibited characteristic.

4 MR. GAISER: Well, I -- I think there
5 are two issues with that. Number one, if you
6 have a case like this one where the employer has
7 good evidence that they didn't even know the
8 relevant protected characteristic, the employer
9 shouldn't have to say, if I want to make that
10 argument, I also have to forego providing a
11 legitimate reason if I want to be able to win on
12 that first fundamental threshold.

13 So, under the Brady opinion in the
14 D.C. Circuit, I think there's a really good
15 argument that McDonnell Douglas no longer
16 applies, this Court has already said it in Aiken
17 at trial, and it doesn't apply because this
18 Court said it in Sorema at motion to dismiss.
19 And what does it do in summary judgment?

20 I still think there needs to be room
21 for the employer to proffer a good reason and
22 use that as an alternative grounds for, and the
23 plaintiff didn't even meet their prima facie
24 case. In other words, the employer shouldn't be
25 forced to choose one of those two --

1 JUSTICE KAVANAUGH: Well, it's we --

2 MR. GAISER: -- possible litigation
3 tactics.

4 JUSTICE KAVANAUGH: -- we fired the
5 person because of X. We didn't even know they
6 were, you know, whatever the characteristic is.

7 MR. GAISER: Well, I think --

8 JUSTICE KAVANAUGH: I mean, I don't
9 know if you -- calling it prima facie, I'm --
10 I'm far afield, but, you know, as you're aware,
11 I don't think that's pretty -- very useful to
12 how to figure out these cases once the employer
13 has stated a reason, so I'll leave it there,
14 though.

15 MR. GAISER: Well, I think the Court
16 should allow employers to be able to make that
17 alternative argument. They didn't make a prima
18 facie case, and we have a good reason. And
19 either is a grounds on which --

20 JUSTICE KAVANAUGH: Well, I think
21 they're -- I agree with that, but they're both
22 arguments for why it wasn't discriminatory. I
23 think the -- the decision to fire the person was
24 not based on their sexual orientation or their
25 race or what have you. It was based on

1 something else.

2 MR. GAISER: Well, I -- I think that
3 they both do go to the ultimate question,
4 Justice Kavanaugh. I do think, though, that one
5 is a very negative shield sort of argument and
6 the other is an affirmative sword sort of
7 argument. And the prima facia case is there to
8 capture was there enough evidence to show at
9 sort of freezing time in place with no answer at
10 all from the employer that Title VII elements
11 could be met, that there could be an inference
12 of discrimination at the first step.

13 And I don't think the Court should
14 retreat from any of those statements that it's
15 made from Burdine to Furnco to Reeves.

16 JUSTICE KAVANAUGH: Okay. Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Anything further? Anything further?

20 No?

21 Thank you.

22 Rebuttal, Mr. Wang?

23 REBUTTAL ARGUMENT OF XIAO WANG

24 ON BEHALF OF THE PETITIONER

25 MR. WANG: Thank you, Mr. Chief

1 Justice. I'll be very brief.

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

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

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

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 MR. WANG: Thank you.

4 CHIEF JUSTICE ROBERTS: The case is
5 submitted.

6 (Whereupon, at 11:06 a.m., the case
7 was submitted.)

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