No. 23-

In the Supreme Court of the United States

MARLEAN A. AMES,
PETITIONER
v.
OHIO DEPARTMENT OF YOUTH SERVICES,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

EDWARD L. GILBERT
EDWARD L. GILBERT CO., L.P.A.
3070 W. Market Street
Suite 100
Akron, OH 44333

XIAO WANG
Counsel of Record
UNIVERSITY OF VIRGINIA SCHOOL OF LAW SUPREME COURT LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903
(434) 924-8956
x.wang@law.virginia.edu

Counsel for Petitioner

QUESTION PRESENTED

Whether, in addition to pleading the other elements of Title VII, a majority-group plaintiff must show "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority." App. 5a.

RELATED PROCEEDINGS

United States District Court (S.D. Ohio)

Ames v. Ohio Department of Youth Services, No. 2:20-cv-05935, 2022 WL 912256 (Mar. 29, 2022).

Ames v. Ohio Department of Youth Services, No. 2:20-cv-05935, 2023 WL 2539214 (Mar. 16, 2023). Judgment entered Mar. 16, 2023.

United States Court of Appeals (6th Cir.)

Ames v. Ohio Department of Youth Services, No. 23-3341, 87 F.4th 822 (6th Cir. 2023). Judgment entered Dec. 4, 2023.

TABLE OF CONTENTS

TABLE OFAUTHORITIES

Page(s)

Cases

Page(s)

Cases—cont'd

Page(s)

Cases—cont'd

Page(s)

Cases—cont'd

Page(s)

Cases—cont'd

Page(s)

Statutes

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Marlean Ames respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Sixth Circuit is published at 87 F.4th 822 (6th Cir. 2023) and is reproduced in the appendix to this petition at App. 2a–11a. The district court's order on Respondent's motion for summary judgment is unpublished and is reproduced at App. 13a–40a. The district court's order on Respondent's motion for judgment on the pleadings is unpublished and is reproduced at App. 42a–57a.

JURISDICTION

The Sixth Circuit issued its opinion on December 4, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1). On February 26, 2024, Justice Kavanaugh granted Petitioner's application for extension of time to file a petition for writ of certiorari, from March 3 to March 18, 2024.

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 2000e-2(a)(1) provides:

> It shall be an unlawful employment practice for an employer to fail or refuse to hire or to

> discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

INTRODUCTION

Title VII of the Civil Rights Act of 1964 bars employers from "discriminat[ing] against any individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Though this language is unequivocal—prohibiting discrimination against any individual based on a protected characteristic—five courts of appeals require majority-group plaintiffs, in addition to the other elements of Title VII, to also prove "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority." App. 5a. And as Judge Kethledge observed in his concurring opinion, "application of the 'background circumstances' rule alone" prevented Marlean Ames from obtaining "a jury trial" on her claim of sexual orientation discrimination. App. 10a (Kethledge, J., concurring).

Ames is a heterosexual woman. App. 5a. She has worked at the Ohio Department of Youth Services since 2004, beginning as an Executive Secretary before earning several promotions and eventually becoming a Program Administrator. App. 16a–17a. In 2017, she started reporting to Ginine Trim, a gay woman. App. 3a. In 2019, Ames applied for a promotion to Bureau Chief. App. 4a. She did not receive that promotion. Instead, the

Department offered it to a gay woman who (1) started after Ames, (2) did not originally apply for the promotion, and (3) "lacked the minimum qualifications" for the job, thus requiring the Department to "circumvent[] its own internal procedures" to hire her. App. 20a–21a, App. 10a (Kethledge, J., concurring). Shortly thereafter, the Department removed Ames from her position as Program Administrator, giving her the choice between a demotion or termination. App. 4a, App. 44a. In her place, the Department hired a gay man as the new Program Administrator, despite that individual, like the woman who had obtained the Bureau Chief position over Ames, also "being neither qualified nor having formally applied" for the role. App. 44a.

As the Sixth Circuit observed, under *McDonnell Douglas*'s burden shifting framework, "Ames's prima-facie case" of sexual orientation discrimination should have been "easy to make." App. 5a. "[H]er claim is based on sexual orientation, which is a protected ground under Title VII, she was demoted from her position [that she had] held . . . for five years, with reasonably good reviews; and she was replaced by a gay man. Moreover, for the Bureau Chief promotion that Ames was denied, the Department chose a gay woman." *Id.* (citing *Bostock v. Clayton Cnty., Ga.*, 590 U.S. 644, 651–52 (2020)).

But such facts were insufficient here for Ames to survive summary judgment. That is because, in the Sixth Circuit, a majority-group plaintiff like Ames—i.e., a heterosexual woman alleging sexual orientation discrimination—must, on top of Title VII's other requirements, *also* show background circumstances. *Id.* Ames could do so by proving that a "member of the relevant minority group (here, gay people) made the

employment decision at issue" or by marshaling "statistical evidence showing a pattern of discrimination by the employer against members of the majority group." App. 5a–6a. A minority-group plaintiff shoulders no such burden. And significantly, because of circuit precedent, Ames could not satisfy background circumstances by referring to her own failure to secure a promotion in favor of a gay woman. Nor could she point to her demotion in favor of a gay man, since a majority-group "plaintiff cannot point to her own experience to establish a pattern of discrimination." App. 6a (citing *Sutherland v. Mich. Dep't of Treasury*, 344 F.3d 603, 615 (6th Cir. 2003)).

As Judge Kethledge outlined, the Sixth Circuit is not alone in imposing this additional element. The D.C., Seventh, Eighth, and Tenth Circuits also require majority-group plaintiffs to show background circumstances. App. 10a (Kethledge, J., concurring). Two circuits—the Third and Eleventh—"have expressly rejected this rule." *Id.* And five circuits "simply do not apply it." *Id.* Within this third group, the First and Fifth Circuits have employed language that conveys disapproval of the rule without explicitly rejecting it. The Second, Fourth, and Ninth Circuits, meanwhile, have each acknowledged the existence of the split but declined to take a side. That tack has left district courts in these circuits in disarray, with some judges in the same courthouse requiring background circumstances and others declining to do so.

In short, "nearly every circuit has addressed this issue one way or another." App. 11a. And just like the Sixth Circuit here, half a dozen other courts of appeals have acknowledged a "split" on the issue. *See, e.g.*, *Iadimarco v. Runyon*, 190 F.3d 151, 155 (3d Cir. 1999); *Zottola v. City*

of Oakland, 32 F. App'x 307, 310 (9th Cir. 2002*)* ("There is currently a circuit split on this issue."); *see also Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1325 n.15 (11th Cir. 2011); *Aulicino v. N.Y.C. Dep't of Homeless Servs.*, 580 F.3d 73, 81 n.5 (2d Cir. 2009); *Weeks v. Union Camp Corp.*, 215 F.3d 1323, *6 n.13 (4th Cir. 2000) (Table); *Hague v. Thompson Distrib. Co.*, 436 F.3d 816, 821–22 (7th Cir. 2006). District courts have, in like manner, recognized this "circuit split" and described it as "widespread," *McNaught v. Va. Comm. Coll. Sys.*, 933 F. Supp. 2d 804, 818 (E.D. Va. 2013), and "entrenched," *Newman v. Howard Univ. Sch. of L.*, 2024 WL 450245, at *10 n.5 (D.D.C. Feb. 6, 2024).

Finally, because a background circumstances rule imposes "burdens on different plaintiffs *based on their membership in different demographic groups*," it is, as Judge Kethledge observed, "not a gloss upon the 1964 Act, but a deep scratch across its surface." App. 9a–10a (emphasis in original). After all, as the Court has "stressed over and over again," interpretation of Title VII "must begin with, and ultimately heed, what [the] statute actually says." *Groff v. DeJoy*, 600 U.S. 447, 468 (2023) (internal quotation marks and alterations omitted); *Bostock*, 590 U.S. at 655–56. Yet for decades, five circuits have failed to do just that. With background circumstances proving dispositive for Ames, this case is an ideal opportunity for the Court to examine the rule and hold that it conflicts with Title VII's text and purpose.

STATEMENT OF THE CASE

A. Legal framework.

A Title VII plaintiff may prove their "case by direct or circumstantial evidence." *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983). But because "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes," *id.* at 716, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), outlined a burden-shifting framework for analyzing discrimination claims based on the circumstantial evidence presented by the plaintiff in that case.

First, the plaintiff "must carry the initial burden . . . of establishing a prima facie case of racial discrimination." *Id.* at 802. "This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *Id.* If that prima facie case is met, the burden "shift[s] to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.* Finally, the burden returns to the plaintiff to show that the employer's "stated reason" for its employment action "was in fact pretext." *Id.* at 804.

B. Factual background.[1]

The Ohio Department of Youth Services ("Department") is "a state agency that oversees juvenile corrections, parole, and the rehabilitation of youth through community programs." App. 14a. Marlean Ames has worked at the Department since 2004, when she was hired as an Executive Secretary. App 16a. She was promoted in 2009 to Community Facility Liaison. *Id.* Between 2011 and 2013, Ames's supervisor "signed off on strong reviews of her performance each year." App. 22a. In 2014, the Department promoted Ames to Program Administrator for the Prison Rape Elimination Act ("PREA"). App. 3a, App. 17a.

In 2017, Ames began reporting to Ginine Trim, a gay woman. App. 3a. In Ames's 2018 review, Trim wrote that Ames had "met 'expectations' in ten competencies and exceeded them in one." *Id.* Ames's evaluation did note that she "needed to improve her management of PREA grant funds." App. 22a. But overall, she received "reasonably good reviews" for her performance. App. 5a.

In April 2019, Ames applied to be the Department's Bureau Chief of Quality Assurance and Improvement. She interviewed for the position with Trim and Julie Walburn, then-Assistant Director of the Department. App. 19a. Although Ames believed she had received "positive feedback" during the interview, she was not ultimately offered the role. *Id.* Instead, the position went unfilled for several months before "Trim

[1] Because this matter arises in a summary judgment posture, the facts are viewed in the light most favorable to Ames, with reasonable inferences drawn in her favor. *Tolan v. Cotton*, 572 U.S. 650, 651 (2014) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

offered the Bureau Chief position" on a temporary (and, eventually, permanent) basis to Yolanda Frierson, a gay woman. App. 20a. Frierson had joined the Department two years after Ames. App. 21a. Unlike Ames, who was "qualified and fulfill[ed] the application requirements," App. 44a, Frierson "lacked the minimum qualifications for the job" and did not apply for the position when it was originally posted, App. 10a (Kethledge, J., concurring). Thus, to promote Frierson to Bureau Chief, "the Department circumvented its own internal procedures." *Id.*

Yet Ames was not just passed over for Bureau Chief. On May 10, 2019, Walburn and Robin Gee, a member of the Department's HR team, informed Ames that she was being removed from her position as PREA Administrator. App. 4a. Ames was given the choice of returning to one of her previous roles, "which would amount to a demotion," or being terminated from the Department. App. 4a, App. 44a. She chose the former and, as a result, her wages nearly halved, from $47.22 per hour to $28.40. App. 4a.

In Ames's place, the Department selected Alexander Stojsavljevic, a gay man, as the new PREA Administrator. *Id.* Stojsavljevic had joined the Department in May 2017 as a social worker. App. 43a. In October of that year, he was promoted to PREA Compliance Manager. Ames testified that such a promotion would have normally "violated the agency's hiring processes" on promoting employees on probationary status. *Id.* To circumvent that rule, Stojsavljevic's superintendent "apparently devised a work-around." App. 24a. According to Ames, Stojsavljevic's supervisor "asked Stojsavljevic to resign from his job and then hired him in the new role the next day." *Id.* That "work-around" allowed the Department to

make Stojsavljevic a Compliance Manager despite him not being "eligible for the promotion." *Id.*

After becoming Compliance Manager, Stojsavljevic expressed to Ames an "impatient attitude towards climbing the ranks within the Department," "claim[ed] that he could manipulate people to get what he wanted on the basis of being a gay man," and "acknowledge[d]" that he had "been angling for Ames's position for some time, stating in front of their coworkers that he wanted the PREA Administrator position." App. 23a; *accord* App. 43a. Ames further alleged that Stojsavljevic "told Trim—in front of [Ames]—that [Ames] should retire." App. 43a. Much like Frierson with the Bureau Chief role, the Department appointed Stojsavljevic to PREA Administrator "[d]espite [him] being neither qualified nor having formally applied" for the role. App. 44a.

Ames remains at the Department today; she has, following her 2019 demotion, since been promoted to Human Services Program Administrator. App. 18a.

C. Proceedings below.

On August 21, 2019, Ames filed a charge of discrimination against the Department with the Ohio Civil Rights Commission and the Equal Employment Opportunity Commission ("EEOC"). App. 25a. Following an investigation, the EEOC reached a determination of reasonable cause and, on September 20, 2020, issued to Ames a right to sue letter. *Id.* On November 18, 2020, Ames filed suit in the Southern District of Ohio. *Id.* Her complaint asserted causes of action under Title VII, the Fourteenth Amendment, the Age Discrimination in Employment Act ("ADEA"), and state law. *Id.*

On March 29, 2022, the district court dismissed Ames's Fourteenth Amendment claim, ruling that the Department was not a "person" for purposes of 42 U.S.C. § 1983. App. 50a. It also dismissed Ames's ADEA and state law claims, reasoning that, because the State of Ohio had not "waived its immunity," the court lacked subject-matter jurisdiction. App. 47a–49a. Finally, Ames's complaint alleged three Title VII violations, for (1) sex and sexual orientation discrimination, (2) hostile work environment, and (3) retaliation. App. 25a. The district court dismissed the hostile work environment and retaliation claims for failure to state a claim. App. 53a, App. 57a. The Department did not move to dismiss, and the district court did not address, Ames's claim of sex and sexual orientation discrimination.

After discovery, the Department moved for summary judgment on Ames's remaining claim for sex and sexual orientation discrimination. App. 26a. As to sex discrimination, Ames asserted that the Department discriminated against her on account of her sex because "she was demoted and replaced [as PREA Administrator] by Stojsavljevic," a man. App. 34a. On sexual orientation discrimination, Ames pointed to the fact that she was denied a promotion to Bureau Chief in favor of a gay woman and later removed from her position as PREA Administrator in favor of a gay man. App. 30a–34a.

On her sex discrimination charge, the district court, applying the traditional *McDonnell Douglas* framework, held that Ames could "carry her burden of establishing a *prima facie* claim." App. 34a. She was "a member of a protected class (as a female), was qualified for her role as PREA Administrator, was terminated (i.e., an adverse employment action), and was replaced by a male employee." App. 35a. But the Department had also, from

the district court's view, offered "legitimate, nondiscriminatory business reasons" behind its decision: e.g., a "desire to revamp the Department's PREA strategy" and a concern over Ames's "vision, ability, [and] leadership skills," which "shift[ed]" the "burden of production" back to Ames "to show that [these] proffered reason[s] [were] pretextual." App. 35a, 38a. Upon considering the totality of the evidence, the district court concluded that Ames had not cleared that bar. App. 38a–40a.

As to Ames's claim of sexual orientation discrimination, the court likewise stated that *McDonnell Douglas* governed. App. 28a. But because Ames is a "member of a majority group"—i.e., a heterosexual woman—she had to overcome the added obstacle of "show[ing] that 'background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority' to establish the first prong of the *prima facie* case." *Id.* (quoting *Parker v. Balt. & Ohio R.R. Co.*, 652 F.2d 1012, 1017 (D.C. Cir. 1981)). And although the Department had twice promoted a gay employee in a manner adverse to Ames, such evidence was insufficient because "a plaintiff cannot point to her own experience to establish a pattern of discrimination." App. 6a. Because Ames "failed to provide 'background circumstances,'" the district court granted summary judgment to the Department on her sexual orientation discrimination claim. App. 39a–40a.

Ames filed a notice of appeal on her sex and sexual orientation discrimination claim to the Sixth Circuit. On sex discrimination, the Sixth Circuit agreed with the district court that Ames had failed to show that the

Department's "nondiscriminatory reasons for her demotion" were "pretext[ual]." App. 6a–8a.[2]

On sexual orientation discrimination, the Sixth Circuit, like the district court, recognized that the "principal issue" was whether Ames had "made the necessary showing of 'background circumstances.'" App. 5a. That is because, as the panel noted, Ames's case under *McDonnell Douglas* was otherwise "easy to make." *Id.* Ames was a member of a protected class, received "reasonably good reviews" as PREA Administrator, was demoted in favor of a gay man, and was denied a promotion to Bureau Chief in favor of a less-qualified gay woman. *Id.* "Where Ames founders, however, is on the requisite showing of 'background circumstances.'" *Id.* As the Sixth Circuit noted, "[p]laintiffs typically make that showing with evidence that a member of the relevant minority group (here, gay people) made the employment decision at issue, or with statistical evidence showing a pattern of discrimination by the employer against members of the majority group." App. 5a–6a. Ames had checked neither box.

Judge Kethledge concurred. Like the majority, he agreed that, but-for background circumstances, Ames's claim of sexual orientation discrimination could have gone forward to a jury. "[N]obody," Judge Kethledge underscored, "disputes that Ames has established the other elements of her prima-facie case": After all, "twice in one year the Department promoted an arguably less-

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[2] Ames did not raise her state law, ADEA, or Fourteenth Amendment claims before the Sixth Circuit. Though she did seek review before the Sixth Circuit of the district court's sex discrimination ruling, her petition here concerns only the court of appeals's decision on her allegations of sexual orientation discrimination.

qualified gay employee in a manner adverse to Ames." App. 10a. Judge Kethledge, though, wrote separately to "express [his] disagreement" with the background circumstances rule. App. 9a. Though he acknowledged that circuit precedent "bound" the court to apply the rule against Ames, he asserted that the Sixth Circuit and several other courts of appeals "have lost their bearings in adopting this rule." App. 9a, 11a. Title VII, Judge Kethledge explained, bars discrimination based on an individual's "race, color, religion, sex, or national origin." App. 9a (quoting 42 U.S.C. § 2000e-2(a)(1)). "The statute," he emphasized, "expressly extends its protection to 'any individual.'" App. 10a. Yet the Sixth Circuit's approach "treats some 'individuals' worse than others—in other words, it discriminates—on the very grounds that the statute forbids." *Id.*

Judge Kethledge characterized background circumstances not as "a gloss upon the 1964 Act, but a deep scratch against its surface." *Id.* He went on to outline a split in the courts of appeals, noting that "five circuits (including our own) have adopted the 'background circumstances' rule since the D.C. Circuit first adopted it in 1981." *Id.* Two circuits have "expressly rejected this rule," and five others "simply do not apply it." App. 10a–11a. In sum, "nearly every circuit has addressed this issue one way or another" and, Judge Kethledge concluded, "[p]erhaps the Supreme Court will soon do so as well." App. 11a.

REASONS FOR GRANTING THE PETITION

Under Title VII, an employer may not "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e–2. That language, as this Court has long emphasized, is clear: "What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). "Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." *Id.* Imposing a background circumstances requirement on majority-group plaintiffs, as five courts of appeals have done, defies these fundamental principles.

I. THE FEDERAL COURTS OF APPEALS ARE DIVIDED OVER WHETHER MAJORITY-GROUP PLAINTIFFS MUST SHOW BACKGROUND CIRCUMSTANCES.

A. The D.C., Sixth, Seventh, Eighth, and Tenth Circuits require background circumstances.

The D.C. Circuit was the first court of appeals to apply a heightened standard for claims brought by majority-group plaintiffs, doing so in *Parker v. Baltimore & Ohio Railroad Co.*, 652 F.2d 1012 (D.C. Cir. 1981).

In that case, Karl Parker, Jr., a white man, "claim[ed] that his efforts to become a locomotive fireman were defeated by illegal preferences given to black and female applicants." *Id.* at 1014. To examine Parker's claim, the

D.C. Circuit started with *McDonnell Douglas*, noting that "the standard enunciated in that case remains the cornerstone of evidentiary analysis in disparate treatment cases under Title VII." *Id.* at 1016. But, according to the panel, "[b]efore this test can be applied to Parker's claim, however, a further adjustment must be made." *Id.* at 1017. "The original *McDonnell Douglas* standard," the D.C. Circuit noted, "required the plaintiff to show 'that he belongs to a racial minority.'" *Id.* "Membership in a socially disfavored group was the assumption on which the entire *McDonnell Douglas* analysis was predicated, for only in that context can" there be a general "infer[ence] [of] discriminatory motive from the unexplained hiring of an outsider rather than a group member." *Id.* Although the court acknowledged that "[w]hites are also a protected group under Title VII," it held that "it defie[d] common sense to suggest that the promotion of a black employee justifies an inference of prejudice against white co-workers in our present society." *Id.* Thus, "to prove a prima facie case of intentionally disparate treatment," a majority-group plaintiff must point to "background circumstances [which] support the suspicion that the defendant is that unusual employer who discriminates against the majority." *Id.*

The D.C. Circuit expounded on the background circumstances rule in *Harding v. Gray*, 9 F.3d 150 (D.C. Cir. 1993). Emphasizing that "invidious racial discrimination against whites is relatively uncommon in our society," *id.* at 153, the court elaborated on the sort of evidence that could demonstrate background circumstances. It identified two specific categories: (1) "evidence indicating that the particular employer at issue has some reason or inclination to discriminate invidiously against" majority groups, and (2) "evidence indicating

that there is something 'fishy' about the facts of the case at hand that raises an inference of discrimination." *Id.* Finally, although *Harding* required a majority-group plaintiff to "show additional background circumstances" to "establish a prima facie case," it claimed that "[t]his requirement [was] not designed to disadvantage" such a plaintiff. *Id.* (internal quotation marks omitted).

In the wake of *Parker* and *Harding*, four other courts of appeals soon followed the D.C. Circuit's lead and adopted a background circumstances requirement. *See, e.g.*, *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 67 (6th Cir. 1985); *Mills v. Health Care Serv. Corp.*, 171 F.3d 450, 457 (7th Cir. 1999); *Hammer v. Ashcroft*, 383 F.3d 722, 724 (8th Cir. 2004); *Notari v. Denver Water Dep't*, 971 F.2d 585, 589 (10th Cir. 1992).

Critically, though the D.C. Circuit insisted that a "'background circumstances requirement,' [was] not an additional hurdle" for majority-group plaintiffs, *Harding*, 9 F.3d at 154, cases from each of these five courts of appeals suggest otherwise.

In *Hairsine v. James*, 517 F. Supp. 2d 301, 313 (D.D.C. 2007), for instance, the court found that a plaintiff's claim of race discrimination foundered for lack of background circumstances. There was, in the court's view, "no question that the record demonstrates that [the plaintiff] was qualified for the Head Deskperson and Group Chief positions"—positions that ultimately went to Black candidates. *Id.* But because those candidates were "at least as well qualified," the plaintiff could not "demonstrate background circumstances raising an inference that [his employer] discriminated against him based on his race." *Id.* at 314.

The facts here are even more jarring. As noted above, neither Frierson nor Stoksavljevic was even "at least as well qualified" as Ames. *Id.* To the contrary, "twice in one year the Department promoted an arguably less-qualified gay employee in a manner adverse to Ames." App. 10a (Kethledge, J., concurring). The Department, in fact, "circumvented its own internal procedures because Frierson lacked the minimum qualifications for the job," *id.*, and may have done the same for Stoksavljevic as well, App. 44a. That should have been enough, at minimum, to allow Ames to present her case to a jury. But based on "application of the 'background circumstances' rule alone," the Sixth Circuit "den[ied] Ames" that opportunity. App. 10a (Kethledge, J., concurring).

The Sixth Circuit has, beyond this case, elsewhere confirmed that "[a] reverse-discrimination claim carries a different *and more difficult* prima facie burden" because plaintiffs bringing such claims must demonstrate "background circumstances." *Briggs v. Porter*, 463 F.3d 507, 517 (6th Cir. 2006) (internal quotation marks omitted) (emphasis added); *see also Pierce v. Commonwealth Life Ins.*, 40 F.3d 796, 801 n.7 (6th Cir. 1994) ("We have serious misgivings about the soundness of a test which imposes a more onerous standard for plaintiffs who are white or male than for their non-white or female counterparts."), *overruled on other grounds by Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000).

Cases from the Seventh Circuit likewise acknowledge the unique and more demanding burden borne by majority-group plaintiffs. In *Katerinos v. U.S. Department of Treasury*, 368 F.3d 733, 736 (7th Cir. 2004), the Seventh Circuit noted that the plaintiff, a white male, needed to show "background circumstances" as part of "his prima facie case." The court, in contrast to the D.C.

Circuit's contention that background circumstances were "not an additional hurdle," characterized this added requirement as "a major hurdle." *Compare Harding*, 9 F.3d at 153, *with Katerinos*, 368 F.3d at 736. And because the plaintiff in *Katerinos* could point to "only one example of such circumstances," his Title VII claim foundered. *Id.* Similarly, in *Gore v. Indiana University*, 416 F.3d 590 (7th Cir. 2005), the court ruled that "a male plaintiff alleging gender discrimination must "show something more than the fact that he is gendered." *Id.* at 592. Rather, plaintiffs "in such cases must show background circumstances," and Gore had "offer[ed] nothing to overcome this added burden." *Id.* at 592, 593 (internal quotation marks omitted).

Courts in the Eighth Circuit have likewise applied the rule to bar potentially meritorious claims. In *Cano v. Paulson*, for instance, the defendant "concede[d] that plaintiff ha[d] met the first three elements of a *prima facie* case." 2008 WL 4378463, at *7 (E.D. Mo. Sept. 23, 2008). But plaintiff, according to the defendant, had "failed to establish that the defendant is that unusual employer who discriminates against the majority." *Id.* The court agreed, dismissing the case. *Id.* at *8.

Finally, in *Adamson v. Multi Community Diversified Services, Inc.*, 514 F.3d 1136 (10th Cir. 2008), the Tenth Circuit held that a minority-group plaintiff may establish a "presumption of invidious intent" under *McDonnell Douglas* "*because* the plaintiff belongs to a disfavored group." *Id.* at 1149 (emphasis in original). But "[w]hen [a] plaintiff is a member of a historically favored group, by contrast, an inference of invidious intent is warranted only when background circumstances" are presented. *Id.* (internal quotation marks omitted). That "burden," the Tenth Circuit explained, "is higher" for majority-group

plaintiffs. *Id.* at 1141. And this "higher" burden sank one of the claims in *Adamson* because the plaintiff's facts fell "short of demonstrating 'background circumstances' sufficient to create an inference of reverse discrimination." *Id.* at 1141, 1150.

B. The Third and Eleventh Circuits have explicitly rejected a background circumstances requirement.

Cognizant of the difficulties with applying a background circumstances test, two courts of appeals have explicitly repudiated the requirement.

In *Iadimarco v. Runyon*, 190 F.3d 151, 160 (3d Cir. 1999), the Third Circuit summarized the problems posed by the rule and "reject[ed] the 'background circumstances' analysis set forth in *Parker*, *Harding*, and their progeny." First, the court noted that, in *Parker* and *Harding*, the D.C. Circuit claimed "that the background circumstances test is not an additional hurdle for white plaintiffs" and was "merely a faithful transposition of the *McDonnell Douglas*/*Burdine* test." *Id.* at 159 (citing *Harding*, 9 F.3d at 154) (internal quotation marks omitted). But when it came to applying this legal standard to actual cases, *Iadimarco* noted, "some courts have concluded that substituting 'background circumstances' for the first prong of *McDonnell Douglas* does raise the bar." *Id.* These courts have, like the decisions discussed above in I.A., described background circumstances as "impos[ing] a more onerous burden" or levying a "heightened burden" on majority-group plaintiffs. *Id.* (quoting *Eastridge v. Rhode Island Coll.*, 996 F. Supp. 161, 166 (D.R.I. 1998), and *Ulrich v. Exxon Co.*, 824 F. Supp. 677, 683–84 (S.D. Tex. 1993)). Requiring a plaintiff to prove that their supervisor is an "unusual employer"

that discriminates against the majority is an "arbitrary barrier which serves only to frustrate those who have legitimate Title VII claims." *Id.* (citing *Collins v. Sch. Dist. of Kansas City*, 727 F. Supp. 1318, 1320 (W.D. Mo. 1990)).

Second, imposing background circumstances strays from Title VII's text and purpose. As the Third Circuit explained, the "central focus of the inquiry" in a Title VII suit "is always whether the employer is treating some people less favorably than others because of their race, color, religion, sex, or national origin." *Id.* at 160 (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)). "[A]ll that should be required," then, "is for the plaintiff to present sufficient evidence to allow a fact finder to conclude that the employer is treating some people less favorably than others based upon a trait that is protected under Title VII." *Id.* at 161. Asking a plaintiff to state their case "in terms of 'background circumstances'" is "both problematic and unnecessary." *Id.*

Finally, "the concept of 'background circumstances' is irredeemably vague and ill-defined." *Id.* Many courts, the Third Circuit noted, had found it "difficult, if not impossible, to come up with a definition of 'background circumstances' that is clear, neither under nor over inclusive, and possible to satisfy." *Id.* at 162–63. In other words, even *if* the D.C. Circuit meant for background circumstances "to merely be a restatement of *McDonnell Douglas*," the test had become "too vague and too prone to misinterpretation and confusion to apply fairly and consistently." *Id.* at 163–64 n.10.

The Eleventh Circuit has also declined to impose a heightened requirement for majority-group plaintiffs, stating decades ago that "reverse discrimination" claims are held to the same standard as other Title VII claims.

Bass v. Bd. of Cnty. Comm'rs, 256 F.3d 1095, 1102–03 (11th Cir. 2001), *overruled in part on other grounds by Crawford v. Carroll*, 529 F.3d 961 (11th Cir. 2008). And in *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1325 n.15 (11th Cir. 2011), the Eleventh Circuit drew on *Bass* to explicitly reject a background circumstances requirement. Plaintiff in *Smith* claimed that his former employer, Lockheed-Martin, discriminated against him because of his race when it fired him for sending an offensive email but did not fire Black employees for a similar infraction. *Id.* at 1324. The court explained that, to establish his prima facie case, a plaintiff must show that he is a member of a protected class, and he had done so since race is one such protected characteristic. *Id.* at 1325.

The Eleventh Circuit acknowledged that other courts had "require[d] majority-member plaintiffs to establish" background circumstances. *Id.* at 1325 n.15 (citing *Parker*, 652 F.2d at 1017). But it "rejected" that requirement because, as the court emphasized, "discrimination is discrimination no matter what the race, color, religion, sex, or national origin of the victim." *Id.* (quoting *Bass*, 256 F.3d at 1103). More recent cases from both the Third and Eleventh Circuits have, following *Iadimarco* and *Smith*, declined to require a heightened showing for majority-group plaintiffs. *See, e.g.*, *Phillips v. Legacy Cabinets*, 87 F.4th 1313, 1321 (11th Cir. 2023); *Ellis v. Bank of New York Mellon Corp.*, 837 F. App'x 940, 941 n.3 (3d Cir. 2021).

C. The First, Second, Fourth, Fifth, and Ninth Circuits do not apply the rule.

In his concurrence, Judge Kethledge grouped the courts of appeals into three categories. Beyond those that have either explicitly adopted the requirement or

explicitly rejected it, he stated that "[f]ive other[] [circuits] simply do not apply it." App. 10a.

Within this third category, two courts of appeals—the First and the Fifth Circuits—have not expressly addressed the rule but have in their decisions declined to impose a heightened burden on majority-group plaintiffs. In *Williams v. Raytheon*, 220 F.3d 16 (1st Cir. 2000), for instance, the First Circuit applied the traditional *McDonnell Douglas* framework to a male plaintiff's claim of gender discrimination, with the court holding that the plaintiff "sustained the 'not onerous' burden of establishing a prima facie case" of gender discrimination. *Id.* at 19 (quoting *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253–54 (1981)). In *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 426 (5th Cir. 2000), the Fifth Circuit held that membership in a majority group "does not prevent [an employee] from making a *prima facie* case of reverse discrimination." Instead, a plaintiff must only "be a member of . . . a group protected under Title VII" to bring a claim; the plaintiff in *Byers* could therefore establish a prima facie case of reverse discrimination even though he "was not a racial minority in his workplace." *Id.*

District courts within these two circuits have read decisions like *Williams* and *Byers* as constructively rejecting background circumstances. *See, e.g.*, *Duchesne v. Banco Popular De Puerto Rico, Inc.*, 742 F. Supp. 2d 201, 212 (D.P.R. 2010) ("While the First Circuit has not addressed the 'background circumstances' requirement, the Court gleans from the appellate court's language that a heightened burden should not be substituted for the first prong of *McDonnell Douglas*.") (citation omitted); *Metoyer v. American Eagle Airlines, Inc.*, 806 F. Supp. 2d 911, 918 (W.D. La. 2011) ("The Fifth Circuit, however,

and other courts, apply the *McDonnell Douglas* analysis without such an additional element.").

Finally, and unlike the First and Fifth Circuits, the Second, Fourth, and Ninth Circuits—*have* addressed the background circumstances rule but have ultimately declined to take a side. In *Aulicino v. N.Y.C. Department of Homeless Services*, 580 F.3d 73 (2d Cir. 2009), the Second Circuit recognized that some courts, like the D.C. Circuit, require majority-group plaintiffs to "proffer evidence of background circumstances" while others, like the Third Circuit, have rejected the requirement. *Id.* at 80 n.5 (citing *Parker*, 652 F.2d at 1017, and *Iadimarco*, 190 F.3d at 160). But the court "d[id] not decide" whether parties in the Second Circuit must do so. *Id.* The *Aulicino* defendants did not argue for the rule and, in any event, there was "sufficient evidence" of background circumstances. *Id.* Similarly, the Ninth Circuit has noted the "circuit split" but held, in *Zottola v. City of Oakland*, 32 F. App'x 307, 310–11 (9th Cir. 2002), that it "need not take sides in this inter-circuit dispute" since plaintiff's claim failed for other reasons. Likewise, the Fourth Circuit has acknowledged that some courts "impose[] a higher prima facie burden on majority plaintiffs," but has "expressly decline[d] to decide . . . whether a higher burden applies." *Lucas v. Dole*, 835 F.2d 532, 534 (4th Cir. 1987); *accord Weeks v. Union Camp Corp.*, 215 F.3d 1323, at *6 n.13 (4th Cir. 2000) (Table) ("We have not taken a position on this issue.").

Unsurprisingly, this "deciding-not-to-decide" approach has not produced a clear or workable framework for plaintiffs, defendants, or judges. To the contrary, courts in the Second, Fourth, and Ninth Circuits are in disarray. In the Second Circuit, for instance, most district

courts have "rejected a heightened burden of proof" for majority-group plaintiffs. *Pesok v. Hebrew Union Coll.—Jewish Inst. of Religion*, 235 F. Supp. 2d 281, 286 (S.D.N.Y. 2002); *Maron v. Legal Aid Soc'y*, 605 F. Supp. 3d 547, 558 n.7 (S.D.N.Y. 2022). But at least one court has held otherwise, applying "a slightly altered analysis" to a majority-group plaintiff. *Olenick v. N.Y. Tel./A NYNEX Co.*, 881 F. Supp. 113, 114 (S.D.N.Y. 1995). In the same vein, at least one Ninth Circuit case has analyzed a sex discrimination claim without discussing background circumstances. *See Hawn v. Exec. Jet Mgmt., Inc.*, 615 F.3d 1151 (9th Cir. 2010). And several district courts have "explicitly rejected" a background circumstances rule, *Ducharme v. Las Vegas Metro. Police Dep't*, 2006 WL 8441859, at *4 (D. Nev. Jan. 19, 2006), or "appl[ied] the traditional, non-modified *McDonnell Douglas* elements," to majority-group plaintiffs, *Hilber v. Int'l Lining Tech.*, 2012 WL 1831558, at *3 n.4 (N.D. Cal. May 18, 2012). But just this year, a district court went the other way, applying background circumstances to bar a discrimination claim. *Seidler v. Amazon*, 2024 WL 97351, at *5 (W.D. Wash. Jan. 9, 2024).

Courts in the Fourth Circuit exemplify this state of indecision and confusion. As one judge from the District of South Carolina recently noted, "some courts in this District have held that a plaintiff asserting . . . discrimination against a member of the majority group . . . must establish one additional element"—i.e., "background circumstances." *Owen v. Boeing Co.*, 2022 WL 5434230, at *7 n.6 (D.S.C. Mar. 3, 2022). "However, other courts in this District have not required plaintiffs to prove this extra element to establish a prima facie case." *Id.* In other words, different judges in the same district court have taken different approaches to and required

different showings for claims arising under the same federal law. Such circumstances, emblematic of the broader split of authority on this critical issue, underscore the need for this Court's review.

II. THE SIXTH CIRCUIT'S DECISION IS INCORRECT.

The Sixth Circuit erred in invoking background circumstances as a basis for denying Ames relief. That is because the requirement (a) conflicts with the statutory text, (b) is contrary to precedent, and (c) is already "irredeemably vague and ill-defined," *Iadimarco*, 190 F.3d at 161, and will only become harder to administer.

A. Requiring only majority-group plaintiffs to show background circumstances is contrary to Title VII's text.

"This Court has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end." *Bostock v. Clayton Cnty., Ga.*, 590 U.S. 644, 673–74 (2020). "The people," *Bostock* notes, "are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration." *Id.* at 674. But as Judge Kethledge observed, by imposing a heightened burden on majority-group plaintiffs, the Sixth Circuit and other courts have done just that: "disregard[ed]" Title VII's "plain terms based on some extratextual consideration," *id.*, thereby leaving "a deep scratch across [the Act's] surface," App. 10a (Kethledge, J., concurring). That is because Title VII's plain language does not distinguish between plaintiffs of different demographic groups. App.

9a (Kethledge, J., concurring). To the contrary, as this Court has explained, the law explicitly forbids "treating 'some people less favorably than others because of their race, color, religion, sex, or national origin.'" *Aikens*, 460 U.S. at 715 (quoting *Furnco Constr. Corp.*, 438 U.S. at 577)).

Consistent with that understanding, the Court has routinely rejected similar departures from the Civil Rights Act's text. *Bostock*, for example, carefully reviewed Title VII's text to hold that the Act prohibits discrimination based on sexual orientation. 590 U.S. at 662. In reaching this conclusion, the Court emphasized that "only the words on the page constitute the law adopted by Congress and approved by the President." *Id.* at 654. It is inappropriate for judges to "add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and [their] own imaginations." *Id.* at 654–55. To do so would "deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations." *Id.* at 655.

Next, in his concurring opinion in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181, 290 (2023), Justice Gorsuch examined Title VI by reviewing, in part, the text and precedent governing Title VII. From the premise that when Congress uses the same terms in the same statute those words "have the same meaning," Justice Gorsuch concluded that both Title VI and Title VII "codify a categorical rule of 'individual equality.'" *Id.* (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 416 n.19 (1978) (Stevens, J., opinion concurring in judgment in part and dissenting in part) (emphasis deleted)). Put another

way, "to safeguard the civil rights of all Americans, Congress chose a simple and profound rule" barring all discrimination. *Id.* Courts, Justice Gorsuch underscored, have "no right to make a blank sheet" of either Title of the Civil Rights Act. *Id.* at 310; *see also Smyer v. Kroger Ltd. P'ship I*, 2024 WL 1007116, at *7 (6th Cir. Mar. 8, 2024) (Boggs, J., concurring) (asserting that *SFFA* "significantly undermined" the background circumstances analysis).

Last, in *Groff v. Dejoy*, 600 U.S. 447, 468 (2023), the Court reiterated that "statutory interpretation must begin with, and ultimately heed, what a statute actually says." *Id.* (internal quotation marks and alteration omitted). Consequently, *Groff* held that the term "undue hardship" in Title VII should not be read to mean any effort or cost that is "more than [] de minimis" for purposes of assessing a worker's claim for religious accommodation, as several lower courts had done. *Id.* at 454.

The reasoning from these opinions contradicts *Parker*, which, as Judge Kethledge noted, forms the basis of the background circumstances requirement. App. 10a (Kethledge, J., concurring). *Parker* did not follow Title VII's text. Instead, the court there posited that "it defie[d] common sense to suggest that the promotion" of a minority candidate could "justif[y] an inference of prejudice" against a majority-group plaintiff. 652 F.2d at 1017. Although such reasoning was "likely a good faith effort to address societal concerns," *Smyer*, 2024 WL 1007116, at *9 (Readler, J., concurring), it ultimately belies Title VII's mandate of "individual equality," *SFFA*, 600 U.S. at 310 (Gorsuch, J., concurring)—a mandate accomplished by applying the law as written, *Groff*, 600

U.S. at 468, rather than invoking "extratextual sources," such as a judge's "own imagination," *Bostock*, 590 U.S. at 655, or "common sense," *Parker*, 652 F.2d at 1017.

B. The background circumstances rule conflicts with precedent.

For their part, both *Parker* and the D.C. Circuit's subsequent decision in *Harding* tried to characterize background circumstances as adhering to *McDonnell Douglas*. After all, the plaintiff in *McDonnell Douglas* established his prima facie case by showing that "he belong[ed] to a racial minority." *McDonnell Douglas*, 411 U.S. at 802. And in a footnote, this Court observed that, because "[t]he facts necessarily will vary in Title VII cases," the "specification" of "the prima facie proof required . . . is not necessarily applicable in every respect to differing factual situations." *Id.* at n.13. Thus, read in isolation, *McDonnell Douglas could* justify background circumstances for majority-group plaintiffs as a necessary update to that case's burden-shifting framework.[3]

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[3] Courts that apply a background circumstances analysis require plaintiffs to show such evidence as part of their prima facie case under the *McDonnell Douglas* framework. *See, e.g.*, App. 5a, App. 28a. As one judge recently noted, however, that underlying framework—that is, *McDonnell Douglas*—lacks a "textual warrant in Title VII," is inconsistent with the Federal Rules, and should be "relegate[d] . . . to the sidelines." *Tynes v. Fla. Dep't of Juvenile Just.*, 88 F.4th 939, 952, 958 (11th Cir. 2023) (Newsom, J., concurring). Petitioner takes no position on this question. That is because, regardless of the baseline lens one employs in evaluating a discrimination claim, imposing a "different burden on different plaintiffs *based on their membership in different demographic groups*," flouts the statutory text and relevant precedent. App. 9a (Kethledge, J., concurring).

But courts are not supposed to "stitch together" words from a single case to scaffold a doctrine out of whole cloth. *Denezpi v. United States*, 596 U.S. 591, 602–03 (2022). That is especially true where, as here, precedent both before and after *McDonnell Douglas* disclaims a heightened burden for majority-group plaintiffs.

Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)—decided five years before *McDonnell Douglas*—declared that "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed" in Title VII. *McDonnell Douglas* itself quoted this very passage from *Griggs* before outlining its burden-shifting framework, seemingly making explicit that Title VII protects all individuals from discrimination. *McDonnell Douglas*, 411 U.S. at 800–01.

Furthermore, even if some language from *McDonnell Douglas* may have left things muddled, the trend line of subsequent cases is clear. In *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 276 (1976), for instance, a pair of white plaintiffs alleged that their employer "had discriminated against" them when it fired them for misconduct but retained a Black employee who had participated in the same misconduct. Writing for the Court, Justice Marshall underscored that Title VII's "terms are not limited to discrimination against members of any particular race." *Id.* at 278–79. "The Act prohibits *all* racial discrimination in employment," he declared, "without exception for any group of particular employees." *Id.* at 283 (emphasis in original). "We therefore hold today that Title VII prohibits racial discrimination against the white petitioners in this case *upon the same standards* as would be applicable were they Negroes and Jackson white." *Id.* at 280 (emphasis

added). *Santa Fe Trail*, importantly, rejected the respondents' efforts to rely on *McDonnell Douglas* for support, explicitly holding that "[w]e find this case indistinguishable from *McDonnell Douglas*." *Id.* at 282. Employment criteria "must be 'applied[] alike to members of all races,' and Title VII is violated if, as petitioners alleged, it was not." *Id.* at 283 (quoting *McDonnell Douglas*, 411 U.S. at 804).

Case law after *Sante Fe* is of a piece. In *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983), the Court emphasized that "the factual inquiry in a Title VII case is whether the defendant intentionally discriminated against the plaintiff"—no more, no less. *Id.* at 715. (internal quotation marks and alteration omitted).[4] In *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981), it ruled that "[t]he burden of establishing a prima facie case of disparate treatment is not onerous," which plainly conflicts with the "different and more difficult prima facie burden" shouldered by majority-group plaintiffs like Ames, *Briggs*, 463 F.3d at 517.

And in more recent cases, the Court has held that Title VII "focuses on discrimination against individuals, not groups," which squarely conflicts with the Sixth Circuit's decision here to impose a more demanding pleading

[4] *Aikens* did observe that *McDonnell Douglas* was "never intended to be rigid, mechanized, or ritualistic." 460 U.S. at 715. But that comment only means that courts can and should adapt *McDonnell Douglas* to different employment situations, not different plaintiffs. Though *McDonnell Douglas* arose in the context of a re-hiring decision, for example, this Court and others have adapted it to account for other situations, such as discriminatory discharge, and has modified the relevant aspects of the prima facie case accordingly. *See, e.g.*, *Burdine*, 450 U.S. at 255–58.

requirement on an entire sub-group of plaintiffs. *Bostock*, 590 U.S. at 667.

C. Requiring background circumstances is administratively unwieldy.

Finally, background circumstances are "irremediably vague and ill-defined." *Iadimarco*, 190 F.3d at 161. One way, to be sure, to show such circumstances is through "statistical evidence showing a pattern of discrimination by the employer against members of the majority group." App. 5a–6a. But gathering such evidence is often a challenging exercise for any plaintiff. That is especially so for an individual like Ames, who cannot—under circuit precedent—"point to her own experience to establish a pattern of discrimination." App. 6a.

Yet the other methods for showing background circumstances are even more "amorphous," *Iadimarco*, 190 F.3d at 163: asking plaintiffs to show "there is something 'fishy' about the facts of the case at hand," *Harding*, 9 F.3d at 153, or that their employer is "unusual," *Parker*, 652 F.2d at 1017. These standards provide little meaningful guidance. "What may be 'fishy' to one [judge] may not be to another." Christian Joshua Myers, *The Confusion of* McDonnell Douglas*: A Path Forward for Reverse Discrimination Claims*, 44 SEATTLE U. L. REV. 1065, 1121 (2021).

What is more, we live in "a world where it has become increasingly difficult to determine who belongs in the majority." *Smyer*, 2024 WL 1007116, at *7 (Boggs, J., concurring). And, to this point, the case law provides little instruction on how to define or circumscribe "majority" and "minority" status given demographic change. A plaintiff who is a racial, gender, or sexual orientation

minority in one profession or geography could well be part of the majority group in another profession or geography, and vice versa.

This case uniquely and vividly captures several of these administrability concerns. Ames, after all, alleged both sex and sexual orientation discrimination because the Department demoted her in favor of a gay man. Since she had also been denied a promotion in favor of a gay woman, her "evidence of pretext is notably stronger" as to sexual orientation discrimination than sex-discrimination. App. 10a (Kethledge, J., concurring).

On sex discrimination, the Sixth Circuit did not require background circumstances, instead applying the traditional *McDonnell Douglas* framework and concluding, at the final step, that Ames had failed to show pretext. App. 6a–8a. But on sexual orientation discrimination, where Ames's "evidence of pretext [was] notably stronger" and which involved the same demotion decision between the same two employees, the Sixth Circuit never even reached *McDonnell Douglas*'s final step. App. 10a (Kethledge, J., concurring). Instead, "application of the 'background circumstances' rule alone" prevented Ames from receiving "a jury trial on this claim." *Id.* There is no plausible way that Congress meant for this result when it enacted Title VII.

III. THIS CASE IS AN IDEAL VEHICLE TO DECIDE AN IMPORTANT ISSUE OF DISCRIMINATION LAW.

Judge Kethledge captured the depth and importance of the issue at hand when he wrote that "nearly every circuit has addressed this issue one way or another.

Perhaps the Supreme Court will soon do so as well." App. 11a. Foisting a background circumstances rule departs from text and precedent and is "prone to misinterpretation and confusion." *Iadimarco*, 190 F.3d at 163 n.10. Disagreement over the rule has resulted in a deep, defined, and open circuit split; "[i]t appears that the Federal Circuit is the only circuit not to opine on the issue." *Smyer*, 2024 WL 1007116, at *7 n.1 (Boggs, J., concurring). The split has been analyzed in scholarship, *see supra* Myers, and recognized by courts, *see Aulicino*, 580 F.3d at 80 n.5. And it touches on a critical question: As this Court has recognized, "few pieces of federal legislation rank in significance with the Civil Rights Act of 1964." *Bostock*, 590 U.S. at 649–50.

This case offers an ideal opportunity to resolve this important split. To start, Ames's case cleanly and squarely presents the legal question at hand. As the Sixth Circuit observed, "the necessary showing of 'background circumstances' is the principal issue," as the rest of Ames's prima facie case was "easy to make." App. 5a. Judge Kethledge spoke in even stronger terms: Because of the "application of the 'background circumstances' rule alone . . . we deny Ames a jury trial on" her sexual orientation discrimination claim. App. 10a.

What is more, the Sixth Circuit's disposition rendered Ms. Ames's case final. Seven of her eight claims were dismissed by the district court, and Ames elected not to appeal those claims to the Sixth Circuit. App. 3a, 26a. When the Sixth Circuit disposed of the remaining Title VII count—for sex and sexual orientation discrimination—it left nothing for the district court to decide. Ames now seeks review only on her sexual orientation discrimination claim. Such facts make this

matter an excellent vehicle to address this important question in employment discrimination law that has divided the federal courts of appeals.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD L. GILBERT
EDWARD L. GILBERT CO., L.P.A.
3070 W. Market Street
Suite 100
Akron, OH 44333

XIAO WANG
Counsel of Record
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW SUPREME
COURT LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903
(434) 924-8956
x.wang@law.virginia.edu

Counsel for Petitioner

March 18, 2024

APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 23a0264p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MARLEAN A. AMES,

Plaintiff—Appellant,

v.

OHIO DEPARTMENT OF YOUTH SERVICES,

Defendant—Appellee.

No. 23-3341

Appeal from the United States District Court for the Southern District of Ohio at Columbus.
No. 2:20-cv-05935—Algenon L. Marbley, District Judge.

Decided and Filed: December 4, 2023

Before: MOORE, McKEAGUE, and KETHLEDGE, *Circuit Judges*.

COUNSEL

ON BRIEF: Edward L. Gilbert, EDWARD L. GILBERT CO., L.P.A., Akron, Ohio, for Appellant. Cathleen B. Slater, Megan E. Jewett, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee.

The court delivered a PER CURIAM opinion. KETHLEDGE, J. (pp. 7–8), delivered a separate concurring opinion.

OPINION

PER CURIAM. Marlean Ames sued the Ohio Department of Youth Services under Title VII of the Civil Rights Act of 1964, asserting claims of discrimination based on sexual orientation and sex. The district court granted summary judgment to the Department, holding that Ames lacked evidence of "background circumstances" necessary to establishing her prima-facie case for her claim based on sexual orientation, and that Ames lacked evidence of pretext for purposes of her sex-discrimination claim. We affirm.

I.

We view the evidentiary record in the light most favorable to Ames. *See Sloat v. Hewlett-Packard Enter. Co.*, 18 F.4th 204, 207 (6th Cir. 2021).

The Ohio Department of Youth Services oversees the confinement and rehabilitation of juvenile felony offenders in the state. The Department hired Ames, a heterosexual woman, in 2004, and in 2014 it made her its Administrator of the Prison Rape Elimination Act (which the Department referred to as "PREA"). The position was "unclassified," meaning that Ames was an at-will employee who could be dismissed without cause. Ohio Rev. Code § 124.11.

In 2017, Ames was assigned a new supervisor, Ginine Trim, who is gay. Trim reported to Assistant Director Julie Walburn. In a December 2018 performance evaluation, Trim said that Ames met "expectations" in ten competencies and exceeded them in one. In January 2019, Ohio's governor appointed Ryan Gies to be the

Department's Director. Walburn and Gies are both heterosexual.

In April 2019, Ames applied and interviewed to be the Department's Bureau Chief of Quality. The Department chose not to hire her for that position. In a conversation after the interview, Trim congratulated Ames on 30 years of public service, but also suggested that Ames retire. Four days later, on May 10, 2019, Walburn and Human Resources Administrator Robin Gee called Ames into a meeting where they terminated her as PREA Administrator and gave her the option of returning to her previous position, which would amount to a demotion. Ames took the demotion, reducing her wages from $47.22 an hour to $28.40. The Department then selected Alexander Stojsavljevic, a 25-year-old gay man, for the position of PREA Administrator, informing him two business days later of his promotion. Later, in December 2019, the Department chose Yolanda Frierson, a gay woman, as its Bureau Chief of Quality.

Ames later filed a discrimination charge with the Equal Employment Opportunity Commission, which issued a right-to-sue letter. Ames then brought this suit, in which the district court granted summary judgment. This appeal followed.

II.

We review the district court's grant of summary judgment de novo. *See Spees v. James Marine, Inc.*, 617 F.3d 380, 388 (6th Cir. 2010).

Ames sought to prove her discrimination claims by indirect evidence, which required her to show the following: (1) that she was a member of a protected class; (2) that she was subject to an adverse employment decision; (3) that she was qualified for the relevant position; (4) and that her employer treated more favorably

a similarly qualified person who was not a member of the same protected class. *Jackson v. VHS Detroit Receiving Hosp., Inc.*, 814 F.3d 769, 776 (6th Cir. 2016).

A.

We begin with Ames's claim of discrimination based on sexual orientation, in which she says the Department discriminated against her when it denied her a promotion to Bureau Chief and demoted her from the position of PREA Administrator. Ames is heterosexual, however, which means she must make a showing in addition to the usual ones for establishing a prima-facie case. Specifically, Ames must show "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority." *Arendale v. City of Memphis*, 519 F.3d 587, 603 (6th Cir. 2008) (cleaned up); *see also Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 67 (6th Cir. 1985).

Whether Ames made the necessary showing of "background circumstances" is the principal issue here. For otherwise Ames's prima-facie case was easy to make: her claim is based on sexual orientation, which is a protected ground under Title VII, *see Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020); she was demoted from her position as PREA Administrator and had held that position for five years, with reasonably good reviews; and she was replaced by a gay man. Moreover, for the Bureau Chief position that Ames was denied, the Department chose a gay woman.

Where Ames founders, however, is on the requisite showing of "background circumstances." Plaintiffs typically make that showing with evidence that a member of the relevant minority group (here, gay people) made the employment decision at issue, or with statistical evidence showing a pattern of discrimination by the employer

against members of the majority group. *See Zambetti v. Cuyahoga Cmty. Coll.*, 314 F.3d 249, 257 (6th Cir. 2002); *Sutherland v. Mich. Dep't of Treasury*, 344 F.3d 603, 615 (6th Cir. 2003). But Ames has made neither showing. First, Ames was terminated as PREA Administrator by Walburn and Gies, who are both heterosexual. Ames does argue that Trim, a gay woman, was the person who denied her the position of Bureau Chief and who instead chose Frierson, who is also gay. But Ames argued in the district court that Walburn and Gies were the decisionmakers for that position, which means that Ames's argument that Trim was the decisionmaker is forfeited. *See Watkins v. Healy*, 986 F.3d 648, 667 (6th Cir. 2021). Second, Ames's only evidence of a pattern of discrimination against heterosexuals is her own demotion and the denial of the Bureau Chief position. Under our caselaw, however, a plaintiff cannot point to her own experience to establish a pattern of discrimination. *See Sutherland*, 344 F.3d at 615 (requiring statistical evidence beyond plaintiff's own experience to prove pattern); *see also Treadwell v. Am. Airlines, Inc.*, 447 F. App'x 676, 678-79 (6th Cir. 2011).

Ames therefore has not made the necessary showing of "background circumstances." For that reason her claim of sexual-orientation discrimination fails.

B.

Ames next argues that a jury could find that she was demoted from her position as PREA Administrator because of her sex. The Department concedes that Ames has stated a prima-facie case as to this claim, because she was replaced by a man. But the Department has provided nondiscriminatory reasons for her demotion: namely, that Gies had been appointed Director of the Department a few months before, in January 2019; that Gies wanted to improve the Department's performance regarding "sexual victimization[,]" and wanted "people in places that can

fulfill the vision of moving us forward, not just meeting minimum standards"; and that Ames's 2018 evaluation showed she mostly met expectations rather than exceeded them, and needed improvement in some areas.

To demonstrate pretext, a plaintiff must ultimately prove both that her employer's stated reason for the adverse employment decision "was not the real reason for its action, *and* that the employer's real reason" was discrimination. *E.E.O.C. v. Ford Motor Co.*, 782 F.3d 753, 767 (6th Cir. 2015) (en banc). At summary judgment, however, a plaintiff need only produce evidence that would allow a jury to find that her employer's stated reason "is unworthy of credence." *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 147 (2000); *see Miles v. S. Cent. Hum. Res. Agency, Inc.*, 946 F.3d 883, 888 (6th Cir. 2020). To that end, a plaintiff can typically create a genuine issue of fact by producing evidence that the employer's stated reason (1) had no basis in fact; (2) did not actually motivate the employer's actions; or (3) was insufficient to motivate the employer's actions. *See Briggs v. Univ. of Cincinnati*, 11 F.4th 498, 515 (6th Cir. 2021).

Ames contends that the Department's reasons for demoting her had no basis in fact. But Gies was in fact appointed in January 2019, a few months before Ames's demotion; and her evaluation the month before was lukewarm in many respects and critical in some others. Specifically, for 10 of 11 of the "competencies" for which Ames was evaluated, her rating was "meets expectations" rather than that she "exceeds" them. And in three areas—providing accurate guidance to "other groups[,]" "[p]erforming day-to-day (routine) administrative tasks[,]" and managing and distributing "all PREA grant-related funds[,]" the report noted that she had "an opportunity to improve[.]" The report therefore provides some support for the Department's stated reasons for

demoting her, which means they had some basis in fact. Ames therefore has not created a genuine issue of fact on this ground. *See Miles*, 946 F.3d at 888-89 ("For a plaintiff's challenge to the factual basis of an employer's proffered termination rationale to establish pretext, the plaintiff must provide evidence that the employer's allegations never happened.").

Ames also contends that that the Department has offered shifting justifications for Ames's demotion, which in her view is evidence that the Department's stated reasons did not actually motivate its decision to demote her. Ames is right that the Department has offered different reasons for her demotion at different times. When Walburn and Gee told Ames about her demotion, they refused to provide any reason for it. Later, before the EEOC, the Department said that it demoted Ames because her position was at-will and that it could remove her at any time without cause. And Gies, in his deposition, said that Ames was not the right person to fulfill his "vision" of exceeding PREA minimum standards rather than just meeting them. Absent some conflict between an employer's nondiscriminatory reasons for an adverse employment decision, however, that the employer offers more than one of them—even at different times—is not enough to create a genuine issue of fact as to pretext. *Miles*, 946 F.3d at 891. Hence this contention likewise falls short.

Finally, the Department's process for promoting Stojsavljevic to the PREA Administrator position was not so irregular as to create a genuine issue as to pretext. On that issue Ames provides no evidence other than her own experience in applying for the PREA Administrator position. Such evidence is insufficient. Nor were Ames's qualifications for that position so "objectively superior" to Stojsavljevic's as to create a genuine issue as to pretext.

The district court was correct to grant summary judgment.

* * *

The district court's judgment is affirmed.

CONCURRENCE

KETHLEDGE, Circuit Judge, concurring. I join the court's opinion in full, but write to express my disagreement with the rule that we must apply here. Title VII of the Civil Rights Act of 1964 bars employment discrimination against "any individual"—itself a phrase that is entirely clear—"because of such individual's race, color, religion, sex, or national origin[.]" 42 U.S.C. § 2000e-2(a)(1). Thus, to state the obvious, the statute bars discrimination against "any individual" on the grounds specified therein. Yet our court and some others have construed this same provision to impose different burdens on different plaintiffs *based on their membership in different demographic groups*. Specifically—to establish a prima-facie case when (as in most cases) the plaintiff relies upon indirect evidence of discrimination—members of "majority" groups must make a showing that other plaintiffs need not make: namely, they must show "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority." *Zambetti v. Cuyahoga Cmty. Coll.*, 314 F.3d 249, 255 (6th Cir. 2002) (cleaned up) (quoting *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 67 (6th Cir. 1985)).

Our panel is bound to apply this rule here, since Ames claims that the Department discriminated against her because of her status as a heterosexual. As a member of a

majority group, Ames must make the requisite showing of "background circumstances"; and, as our opinion explains, she has not done so. Meanwhile, nobody disputes that Ames has established the other elements of her prima-facie case, which would be enough to establish that case if she were a gay person. And Ames's evidence of pretext is notably stronger for this claim than for her sex-discrimination one: twice in one year the Department promoted an arguably less-qualified gay employee in a manner adverse to Ames; and in promoting one of those employees, Yolanda Frierson, the Department circumvented its own internal procedures because Frierson lacked the minimum qualifications for the job. Thus—based our application of the "background circumstances" rule alone—we deny Ames a jury trial on this claim.

The "background circumstances" rule is not a gloss upon the 1964 Act, but a deep scratch across its surface. The statute expressly extends its protection to "any individual"; but our interpretation treats some "individuals" worse than others—in other words, it discriminates—on the very grounds that the statute forbids. Yet five circuits (including our own) have adopted the "background circumstances" rule since the D.C. Circuit first adopted it in 1981. *See Parker v. Balt. & Ohio R. R. Co.*, 652 F.2d 1012, 1017-18 (D.C. Cir. 1981); *Murray*, 770 F.2d at 67; *Mills v. Health Care Serv. Corp.*, 171 F.3d 450, 455-57 (7th Cir. 1999); *Hammer v. Ashcroft*, 383 F.3d 722, 724 (8th Cir. 2004); *Notari v. Denver Water Dep't*, 971 F.2d 585, 588-89 (10th Cir. 1992). Two circuits have expressly rejected this rule. *See Iadimarco v. Runyon*, 190 F.3d 151, 157-62 (3d Cir. 1999); *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1325 n.15 (11th Cir. 2011). Five others simply do not apply it. *See Williams v. Raytheon Co.*, 220 F.3d 16, 18-19 (1st Cir. 2000); *Aulicino*

v. N.Y.C. Dep't of Homeless Servs., 580 F.3d 73, 80-81 & n.5 (2d Cir. 2009); *Lightner v. City of Wilmington, N.C.*, 545 F.3d 260, 264-65 (4th Cir. 2008); *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 426 (5th Cir. 2000); *Hawn v. Exec. Jet Mgmt., Inc.*, 615 F.3d 1151, 1156 (9th Cir. 2010).

Respectfully, our court and others have lost their bearings in adopting this rule. If the statute had prescribed this rule expressly, we would subject it to strict scrutiny (at least in cases where plaintiffs are treated less favorably because of their race). And nearly every circuit has addressed this issue one way or another. Perhaps the Supreme Court will soon do so as well.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

MARLEAN A. AMES, Plaintiff, v. STATE OF OHIO DEPARTMENT OF YOUTH SERVICES, Defendant.	:	Case No. 2:20-cv-05935 Chief Judge Algenon L. Marbley Magistrate Judge Elizabeth P. Deavers

OPINION & ORDER

This matter comes before the Court on the Motion for Summary Judgment of Defendant State of Ohio Department of Youth Services ("DYS" or "the Department"). (*See* ECF No. 71). This case arises from allegations of sex-based discrimination experienced by Plaintiff Marlean Ames in the course of her employment with DYS. For the reasons set forth more fully below, the Court **GRANTS** Defendant's motion.

I. BACKGROUND

A. Factual Background

There are two incidents at the core of Ames's allegations. The Court begins by laying out the background context of employment within a state agency, describes Ames's employment history with DYS, and then delves into the two incidents in detail.[1]

[1] The facts set forth below are largely drawn from Defendant's Motion for Summary Judgment (ECF No. 71), as Ames has stated that "[t]he Statement of Facts included in the Defendant's Motion for Summary

1. The Ohio Civil Service and the Department of Youth Services

DYS is a state agency that oversees juvenile corrections, parole, and the rehabilitation of youth through community programs. *See generally* Ohio Rev. Code ch. 5139. The Department's offices consist of the agency headquarters located at the central office in Columbus, three (3) juvenile correctional facilities, and five (5) district sites for parole services. (*See* Declaration of Kelly East ("East Decl.") ¶ 4, ECF No. 71-4). The correctional facilities are: Circleville Juvenile Correctional Facility ("CJCF"); Cuyahoga Hills Juvenile Correctional Facility ("CHJCF"); and Indian River Juvenile

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Judgment is largely correct" and appears to adopt portions of Defendant's Statement of Facts verbatim in her reply brief. There are two exceptions. First, Ames suggests that Defendant has omitted one factual allegation regarding comments made by Alex Stojsaljevic. (Memo. in Opp'n at 1, ECF No. 72). The omitted allegation is included and discussed *infra*.

Ames also requests that the unsworn statements presented by Defendant's witnesses, which Defendant relies on in its Statement of Facts, be struck. (*Id.* at 1). Fed. R. Civ. P. 56(c) requires that "[a] party asserting that a fact cannot be . . . genuinely disputed must support the assertion by [] citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits, or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." Further, "[a]n affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4). Defendant's Statement of Facts is supported by a number of declarations and depositions. Each declaration is signed and sworn under penalty of perjury. (*See, e.g.*, Declaration of Robin Gee at 4, ECF No. 71-1). Similarly, each deponent was first duly sworn before testifying. (*See, e.g.*, Deposition of Ryan Gies 6:1–3, ECF No. 69). As such, Defendant has fully complied with the requirements of Rule 56; Ames's request to strike is without basis and is therefore denied.

Correctional Facility ("IRJCF"). *See Facilities*, OHIO DEP'T OF YOUTH SERVS., https://dys.ohio.gov/facilities/welcome.

The Department employs around 961 individuals, spread across nine divisions. (*See* Memo. in Supp. Mot. for Summ. J. ("Memo. in Supp.") at 2, ECF No. 71). DYS employees are either classified or unclassified civil servants, as the Department falls within Ohio's civil service. *See* Ohio Rev. Code § 124.11. Classified employees, if in a skilled position, must pass a civil service examination, *see id.* § 124.11(B)(1), and are typically employed in non-managerial positions. *Cf. id.* § 124.11(A) (noting that the unclassified service includes elected officials, members of boards and commissions, heads of departments, etc.). Classified civil servants enjoy "considerable job protection," including a statutory fallback right. *Campbell v. Wash. Cnty. Pub. Libr. Bd. of Trs.*, No. 04CA44, 2005 WL 1405789, at *2 (Ohio Ct. App. June 10, 2005). Unclassified employees, on the other hand, "serve at the pleasure of their appointing authority, and may be dismissed from their employment with or without cause." *McClain v. Nw. Cmty. Corr. Ctr. Jud. Corr. Bd.*, 440 F.3d 320, 330 (6th Cir. 2006) (quoting *Campbell*, 2005 WL 1405789, at *2 (internal citations omitted)). Unclassified positions include elected officials and department officials; many high-level managerial positions within state agencies are also unclassified. *See, e.g.*, Ohio Rev. Code § 124.11(A)(9). In the case of DYS, unclassified positions are appointed by the Director of the Department. *See id.* § 5139.01(B). The "fallback right" allows a classified employee who is appointed to an unclassified position to retain the right to 'fall back' to her most recently held classified position—that is, "to resume the position and status held . . . in the classified service immediately prior to [her] appointment to the position in

the unclassified service"—if her unclassified position is revoked. Ohio Rev. Code § 124.11(D)(2).

Because of the unique nature of unclassified positions, the application and interview process for these positions at DYS differs greatly from the equivalent process for classified positions. For example, openings for unclassified positions are not required to be posted and do not require interviews. (*See* Declaration of Robin Gee ("Gee Decl.") ¶¶ 7–11, ECF No. 71-1). Additionally, whereas an applicant for a classified position within DYS must complete an application upon seeing an open position posting and an HR analyst must evaluate her qualifications before the applicant interviews for the position, the sequence of events for filling unclassified positions in DYS is less rigid; the application and even the qualifications verification may occur after an individual has already been interviewed or appointed. (*Id.* ¶¶ 11, 13–14).

2. Employment History with the Department

Ames first began working for DYS in 2004. (Deposition of Marlean Ames ("Ames Dep.") 37:14–16, ECF No. 62). She started as an Executive Secretary in the Akron Parole Region, before moving to the IRJCF in the same role in 2005. (*Id.* 37:19–23). This position was in the classified civil service. (*See id.* 53:4–5, 19–22). In early 2009, Ames was appointed to a position with the specification of Administrative Assistant 3 and a working title of Community Facility Liaison,[2] which was part of the

[2] Employment positions are referred to by both "class specification" and by a "working title" or "position." The "specification" is, in effect, the grade level as set by the Ohio Department of Administrative Services for positions at all state agencies. (*See* Declaration of Kelly East ("East Decl.") ¶ 6, ECF No. 71-4). Each department or agency may have multiple "positions" for a given "class specification." A "position" or "working title" is specific to the actual role and is a more

unclassified civil service. (*Id.* 54:6–14). The specification of the position later changed from Administrative Assistant 3 to Program Administrator 2, but with no alteration to Ames's responsibilities or pay grade. (*See id.* 72:3–20; Ames Dep. Ex. 7, ECF No. 62-1 at 10). As Community Facility Liaison, Ames did not supervise or direct other employees; her primary responsibilities included assisting her supervisor in evaluating, monitoring, and inspecting facilities and facility programs, and working with facilities to ensure compliance with the Ohio Administrative Code. (*See* Ex. 6, ECF No. 62-1 at 9). The role also required Ames to help facilities comply with the Prison Rape Elimination Act of 2003 ("PREA"), 34 U.S.C. § 30301–09. (*Id.*; *see also* Ames Dep. 74:18–21, ECF No. 62). The role was based out of the Department's central office in Columbus. (Ames Dep. 60:19–20, ECF No. 62).

In 2014, Ames was promoted to the position of PREA Administrator, located within the DYS Office of Quality and Improvement. (*Id.* 38:5–7). The position of PREA Administrator had a specification of Program Administrator 3 and was unclassified. (*See id.* 78:16–23). As PREA Administrator, Ames did not supervise any employees. (*See* Ex. D, ECF No. 71-4 at 16). She was initially supervised by Wendy Faulkner, who Ames identified as a "straight female," until 2017, when Ginine Trim, who Ames identified as a member of the "LBGTI" community, took over. She had good, professional working relationships with both Faulkner and Trim. (*See* Ames Dep. 94:12–15, 95:2–6, 96:7–20, ECF No. 62; Deposition of Julie Walburn ("Walburn Dep.") 17:14– 16, ECF No. 60). At the time, Trim was the Deputy Director of the Division

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tailored label based on the requirements and responsibilities of the role. (*See id.* ¶ 7; Memo. in Supp. at 12 & n.6, ECF No. 71). A position is not classified (in terms of the classified/unclassified distinction) simply because it has a class specification.

of Professional Standards and Chief Inspector in the Office of Quality and Improvement. (*See* Deposition of Ginine Trim ("Trim Dep.") 25:6–12, ECF No. 64). Trim reported to Julie Walburn, the assistant director of DYS, who reported to Ryan Gies, the director of DYS appointed by Governor DeWine in 2019. (*Id.* 27:22–25; *see* Deposition of Ryan Gies ("Gies Dep.") 13:7–9, ECF No. 69). Ames had no personal knowledge about the sexual orientation of Walburn or Gies but assumed that Gies was straight. (Ames Dep. 109:1–5, 110:5–9, ECF No. 62).

In 2019, while Ames was still serving as PREA Administrator, the Office of Quality and Improvement announced the creation of a new position: the Bureau Chief of Quality Assurance and Improvement.[3] (*See id.* 115:23–2; Trim. Dep. 79:2–8, ECF No. 64). Ames applied and interviewed for the position but did not receive the promotion. (*See* Ames Dep. 116:19–117:3, ECF No. 62). Shortly afterward, on May 10, 2019, Robin Gee, from the Department's HR team, and Walburn informed Ames that she was being removed from her unclassified position as PREA Administrator and offered her the option of invoking her statutory fallback right. (*Id.* 97:4–17; Gee Decl. ¶¶ 22, 31, ECF No. 71-1). Ames eventually accepted the decision and returned to her most recently classified position as an Administrative Professional 4 (the new classification for Executive Secretary 1, the position Ames had last held in 2009 before she was appointed to the unclassified position of Administrative Assistant 3) at the Indian River facility. (Ames Dep. 99:22–100:15, ECF No. 62). She is currently still employed by the Department, after being promoted to Human Services Program Administrator 2, an unclassified position. (*See* Memo. in Supp. at 7, ECF No. 71).

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[3] The "class specification" for this position is Administrative Officer 3.

The two adverse employment events of 2019—first, the decision not to appoint Ames to the position of Bureau Chief of Quality Assurance and, second, the decision to revoke her unclassified appointment as PREA Administrator—are described more fully in the following sections.

3. Application for Appointment to Bureau Chief

Walburn envisioned the new position of Bureau Chief of Quality Assurance as a management role responsible for providing leadership and oversight of staff members in the Office of Quality and Improvement. (*See* East Decl. Ex. B, ECF No. 71-4 at 10). Management, workforce planning, and supervision were among the knowledge areas that the Department was looking for in applicants to the position. (*Id.*). Once Department leadership decided to create the position, Trim announced the position to the employees within the Office of Quality and Improvement via both email and an informal internal meeting and invited any interested team members to apply. (Trim Dep. 79:13–20, 87:21, 88:7–20, EF No. 64).

Three team members, including Ames, applied for the position and interviewed with Trim and Walburn in April 2019. (Ames Dep. 117:11–16, 119:7–9, ECF No. 62). In preparation for the interview, Ames conducted research and generated ideas about how to address deficiencies with the Department's facilities in a more holistic, multidisciplinary fashion. (*See id.* 119:9–19; 123:3–12). Ames felt confident coming out of the interview, especially as Walburn had expressed interest in an article on juvenile justice that Ames mentioned and Walburn and Trim had given Ames positive feedback at the end of the interview. (*See id.* 125:8–126:13). Overall, Ames felt like Walburn and Trim gave her a fair shot. (*Id.* 126:14–16). Walburn and Trim, however, had a different impression about Ames's suitability for the role. In particular, Walburn expressed

concern that Ames failed to lay out her "vision for what the job was meant to do or any vision for how to get the job done . . . [or] ideas on how to lay the foundation for this role." (Walburn Dep. 40:9–14, ECF No. 60; *see also* Trim Dep. 90:8–11, ECF No. 64) (suggesting that Ames "wasn't able to really express the vision" for the position). Walburn also worried that Ames lacked the requisite leadership skills for the position. (*See* Walburn Dep. 40:24–41:1, ECF No. 60).

Ames was not hired for the position. Walburn and Trim had not set a deadline for filling the Bureau Chief position and decided to prioritize finding the best fit over hiring someone promptly. (*See* Walburn Dep. 34:17–21, ECF No. 60). Six months later, Yolanda Frierson, who also worked in the Office of Quality and Improvement, reached out to Trim to ask about the status of the search process for a new Bureau Chief. Neither she nor her colleagues in the Office had heard any updates from Walburn or Trim since April about any of the three applicants and was unsure if the position was still open or even still existed. (*See* Deposition of Yolanda Frierson ("Frierson Dep.") 48:9–50:23, ECF No. 63). On December 10, 2019, Trim offered the Bureau Chief position to Frierson on a temporary basis, which she accepted. (*Id.* 75:25–76:5; *see id.* 74:6–75:8; 77:4–9). Frierson was then given a permanent appointment as Bureau Chief on January 23, 2020.[4] (Frierson Dep., Ex. 47, ECF No. 63-1 at 18).

Although Trim informed Frierson of the appointment, it was Walburn who had decided to select Frierson and recommended her appointment to Gies. (*See* Trim Dep. 91:20–92:2, 92:21– 93:1, ECF No. 64) (noting that Trim did not have decisionmaking power and that the final decision for the Bureau Chief appointment rested with Walburn

[4] The effective date of the appointment was January 19, 2020. (*id.*).

and Gies). Whereas Walburn had expressed fears that Ames lacked vision and leadership, Walburn had worked well with Frierson in the past and felt that Frierson had good ideas on how to formulate the Bureau Chief position. (*See* Walburn Dep. 35:2–7, 20–23, 37:12–16, ECF No. 60). Importantly, Frierson had previously worked in management roles within the Department, where she had gained experience supervising other employees and completing performance evaluation—tasks that Ames had never handled. (*See* Declaration of Yolanda Frierson ("Frierson Decl.") ¶¶ 6, 8, ECF No. 71-5) (describing her work supervising staff as Unit Manager at SJCF and as Deputy Superintendent of Direct Services at CJCF). Frierson had joined DYS in 2006, two years after Ames; prior to the promotion to Bureau Chief, she had served as a Juvenile Corrections Officer, a Unit Manager, and a Human Services Program Administrator 2 at SJCF, before moving to CJFC as a Deputy Superintendent and then to the Department's Columbus office as Facility Resource Administrator and later Human Services Program Administrator 3 (with a brief return to CJCF as Deputy Superintendent of Program Services in between). (*Id.* ¶¶ 2, 5–11). Frierson identifies as female and gay. (Frierson Dep. 10:14–19, ECF No. 63).

4. Removal as PREA Administrator

The lack of vision identified by Walburn during Ames's interview for Bureau Chief ultimately resulted in her removal from her position as PREA Administrator as well. The Governor's Office had indicated to Gies, upon his appointment as Director, that addressing issues of sexual victimization within the juvenile corrections system was a priority concern. (*See* Gies Dep. 62:19–63:4, ECF No. 69). Gies quickly set about reorganizing the Department, combining the previously separate Chief Inspector's Office and the Office of Quality and Improvement into a

single division. (Declaration of Ginine Trim ("Trim Decl.") ¶¶ 7–9, ECF No. 71-3). This reorganization required moving personnel around: Trim, for example, moved from the Office of Technology to the new division. (*Id.* ¶ 8).

In his previous role as deputy director for the parole courts and community division of DYS, Gies had supervised Ames and had signed off on strong reviews of her performance each year between 2011 to 2013. (*See* Gies Dep. 28:2–30:22, ECF No. 69). But, apparently, Gies's impression of Ames as an employee took a downward turn between then and when he was appointed Director, based on feedback he had received from community partners that Ames was difficult to work with, abrasive, and not collaborative (though the feedback did not contain any criticisms of her work ethic or dedication). (*See id.* 31:22–32:6). And whereas the Governor's Office wanted Gies to revamp the Department's PREA approach, Gies recalls Walburn expressing concerns that Ames "did not have a vision and could not carry the culture of our facilities and preventing victimization from occurring." (*Id.* 63:19–23). Walburn was worried, specifically, that Ames would be unable to steer DYS towards more proactively complying with PREA standards. (Walburn Dep. 20:18–21:10). One sticking point was Ames's administration of PREA grant funds; Trim, Ames's direct supervisor, remembered Gies and Walburn being unhappy with the slow rollout of grants. (*See* Trim Dep. 36:22–37:8, 40:8–12, ECF No. 64). In fact, Trim noted in a performance review that Ames needed to improve her management of PREA grant funds (though she nevertheless rated Ames's overall performance as meeting expectations). (*Id.* 40:19–21).

Based on the sum of these concerns, Gies and Walburn made the decision to remove Ames from her classified position as PREA Administrator. (*See* Walburn Dep. 54:22–55:1, ECF No. 60). They discussed potential

replacements and eventually settled on Alex Stojsavljevic. (Gies Dep. 73:19–20, 75:23–46:5, ECF No. 76). Gies does not recall the precise timeline of these discussions (including whether any such discussions occurred before Ames was notified of the decision), but is adamant that he and Walburn agreed not to contact any potential candidates prior to removing Ames. (*Id.* 74:1975:4). Gies liked Stojsavljevic as a potential candidate because he had worked firsthand with Stojsavljevic, Stojsavljevic had experience with PREA while at the Indian River facility, and Gies felt that Stojsavljevic had demonstrated strong planning and communication skills. (*See id.* 79:5–14).

Ames claims that her demotion and replacement by Stojsavljevic was part of a long-running scheme to kick her out. She claims that Trim had previously suggested to her a number of times that she should consider resigning or returning to the Indian River facility to be closer to home. (*See* Ames Dep. 191:12–192:18, ECF No. 62). Trim does not recall any such conversations with Ames. (Trim Dep. 52:1–6, ECF No. 64). Ames also claims that Stojsavljevic had apparently been angling for Ames's position for some time, stating in front of their coworkers that he wanted the PREA Administrator position. (*See* Ames Dep. 179:2–5, ECF No. 62). Stojsavljevic acknowledges telling Ames, as well as other co-workers, but characterized it as an inside joke between the two of them. (*See* Deposition of Alex Stojsavljevic ("Stojsavljevic Dep.") 67:10– 68:11, ECF No. 61). At the time, he and Ames were living together with roommates. (Ames Dep. 174:15–21, ECF No. 62). Ames considered him not only a friend, but also a mentee, though she was worried at times about Stojsavljevic's impatient attitude towards climbing the ranks within the Department and his claims that he could manipulate people to get what he wanted on the basis of being a gay man. (*See id.* 180:18–183:1). And Ames was concerned that

these claims might have been true, because she had heard that Stojsavljevic had been promoted to PREA Compliance Manager at IRJCF in October 2017 without even being eligible for the promotion. The superintendent there, Chris Freeman, apparently devised a work-around to the rule that employees on probationary status, like Stojsavljevic, could not be promoted; he asked Stojsavljevic to resign from his job and then hired him in the new role the next day.[5] (*See id.* 188:10–190:1).

Ames also claims that Stojsavljevic's former supervisors, Stephanie Groff and Jodi Slagle, had reassured him that they would help him with his goal of becoming PREA Administrator. (*See id.* 175:8–20; *see also* Stojsavljevic Dep. 52:10–24, ECF No. 61). Further, Ames claims that Slagle, who was friendly and familiar with Gies, went to Gies about Stojsavljevic's desire for the job. (Ames Dep. 175:21–176:1, ECF No. 62). This claim is not corroborated by other deponents; Stojsavljevic, for example, remembers Slagle and Groff telling him, in response to his interest in the PREA Administrator position, that Ames "was not going to move out of that position" but that they would "help [him] get more PREA experienced or activities that [he] wanted to do surrounding PREA." (Stojsavljevic Dep. 93:23–94:14, ECF No. 61). Gies makes no mention in his deposition of any such conversation with Slagle, or, in fact, any awareness of Stojsavljevic's interest in the job. (*See* Gies Dep. 85:7–14, ECF No. 69).

Gies and Walburn finalized the decision to appoint Stojsavljevic as the new PREA Administrator on May 26, 2019. (*See id.* 91:22–92:2). Gies had been told by others at the Department that Stojsavljevic was gay some years

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[5] Ames does not have first-hand knowledge of this event. (*Id.* 189:22–190:1).

prior, but did not have any personal knowledge to that effect. (*See id.* 90:17–91:17). Trim also knew that Stojsavljevic was gay, though she did not have any role in the decision to appoint him; she was informed of the decision to promote Stojsavljevic by Walburn after the decision was made. (Trim Dep. 70:11–71:3, ECF No. 64).

B. Procedural Background

Plaintiff filed a charge of discrimination against Defendant Ohio Department of Youth Services with the Ohio Civil Rights Commission and the U.S. Equal Employment Opportunity Commission ("EEOC") on August 21, 2019. (*See* Pl.'s Ex. 3, ECF No. 1-3). The EEOC reached a determination of reasonable cause and issued a 90-day right to sue letter on September 8, 2020. (*Id.*). Subsequently, on November 18, 2020, Ames filed her initial Complaint (ECF No. 1) in this Court, alleging eight causes of action under federal and state law. Ames later amended her complaint. (*See* Am. Compl., ECF No. 28). In the Amended Complaint, Ames again asserted eight claims: (1) gender and sexual orientation discrimination pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17; (2) hostile work environment based on sexual orientation and age under Title VII; (3) retaliation under Title VII; (4) age discrimination under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–34; (5) violations of due process rights under the Fourteenth Amendment; (6) age discrimination under Ohio Rev. Code ch. 4112;[6] (7) gender discrimination under Ohio Rev. Code ch. 4112; and (8) hostile work environment under Ohio Rev. Code ch. 4112.

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[6] Plaintiff did not specify a statute within Chapter 4112 for Counts 6–8.

On June 23, 2021, Defendant DYS filed its Motion for Judgment on the Pleadings (ECF No. 31). The Court dismissed Counts 2–7, finding that: (1) the Plaintiff had failed to state a claim with regards to her Title VII hostile work environment, Title VII retaliation, and Fourteenth Amendment due process claims (Counts 2, 3, and 5, respectively); (2) the Court lacked subject matter jurisdiction over Plaintiff's ADEA claim (Count 4); and (3) Plaintiff's state law claims (Counts 6, 7, and 8) were barred by the State's sovereign immunity under the Eleventh Amendment. (*See generally* Op. & Order, ECF No. 50). Count 4 was dismissed with prejudice, and Counts 2, 3, 5, 6, 7, and 8 dismissed without prejudice. The parties subsequently engaged in extensive discovery. On June 10, 2022, Defendant DYS filed its Motion for Summary Judgment (ECF No. 71) as to the remaining Title VII sex-based discrimination claim. That motion is now ripe for this Court's review.

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 56(a) states that summary judgment is appropriate "if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." The Court must view the evidence in the light most favorable to the non-moving party, and draw all reasonable inferences in the non-movant's favor. *S.E.C. v. Sierra Brokerage Servs., Inc.*, 712 F.3d 321, 327 (6th Cir. 2013) (citing *Tysinger v. Police Dep't of City of Zanesville*, 463 F.3d 569, 572 (6th Cir. 2006)). This Court then asks "whether 'the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Patton v. Bearden*, 8 F.3d 343, 346 (6th Cir. 1993) (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 251–52 (1986)). Summary judgment is inappropriate, however, "if the

evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson*, 477 U.S. at 248. Evidence that is "merely colorable" or "not significantly probative" is not enough to defeat a motion for summary judgment, *id.* at 249–50, nor is "[t]he mere existence of a scintilla of evidence to support [the non-moving party's] position" sufficient. *Copeland v. Machulis*, 57 F.3d 476, 479 (6th Cir. 1995); *see also Anderson*, 477 U.S. at 251.

The initial burden rests upon the movant to present the Court with law and argument in support of its motion, and to identify the relevant portions of "'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56). If this initial burden is satisfied, the burden then shifts to the nonmoving party to set forth specific facts showing that there remains a genuine issue for trial. *See* Fed. R. Civ. P. 56(e); *see also Cox v. Ky. Dep't of Transp.*, 53 F.3d 146, 150 (6th Cir. 1995) (noting that after the burden shifts, the nonmovant must "produce evidence that results in a conflict of material fact to be resolved by a jury").

III. LAW & ANALYSIS

Allegations of discrimination in the employment context may be established by the introduction of either direct evidence of discrimination or by providing circumstantial evidence that supports an inference of discrimination. *See Kline v. Tenn. Valley Auth.*, 128 F.3d 337, 348 (6th Cir. 1997) (citing *Talley v. Bravo Pitino Rest., Ltd.*, 61 F.3d 1241, 1248 (6th Cir. 1995)). Direct evidence of discrimination, such as "'eyewitness' testimony as to the employer's mental processes," *U.S. Postal Serv. Bd. of Governors v. Aiken*, 460 U.S. 711, 716 (1983), is rarely

available, *see Kline*, 128 F.3d at 348, and Ames has acknowledged that her "evidence of discrimination is entirely circumstantial" in this case. (*See* Pl.'s Resp. at 5, ECF No. 72).

In assessing allegations of discrimination based on circumstantial evidence, courts rely on the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04 (1973). Under that framework, the plaintiff alleging discrimination bears the initial burden of establishing a *prima facie* case of retaliation, by demonstrating that: "(1) he or she was a member of a protected class; (2) he or she suffered an adverse employment action; (3) he or she was qualified for the position; and (4) he or she was replaced by someone outside the protected class or was treated differently than similarly-situated, non-protected employees." *Briggs v. Univ. of Cincinnati*, 11 F.4th 498, 508 (6th Cir. 2021) (quoting *Wright v. Murray Guard, Inc.*, 455 F.3d 702, 707 (6th Cir. 2006) (internal citations omitted)). Where the plaintiff is a member of a majority group, however, she bears an additional "burden of demonstrating that [s]he was intentionally discriminated against 'despite [her] majority status.'" *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 67 (6th Cir. 1985) (internal citations omitted). As such, a plaintiff alleging reverse discrimination must show that "background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority" to establish the first prong of the *prima facie* case. *Id.* (quoting *Parker v. Balt. & Ohio R.R. Co.*, 652 F.2d 1012, 1017 (D.C. Cir. 1981)); *see also Romans v. Mich. Dep't of Hum. Servs.*, 668 F.3d 826, 837 (6th Cir. 2012) (internal citations omitted).

If a plaintiff is able to demonstrate a *prima facie* case of employment discrimination, the burden shifts to the

defendant to provide a "legitimate, nondiscriminatory reason" for its actions. *McDonnell Douglas*, 411 U.S. at 802. This is satisfied if the employer "explains what [it] has done or produces evidence of legitimate nondiscriminatory reasons." *Texas Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 256 (1981). And, if the employer is able to satisfy its burden, "the burden of production shifts back to [Plaintiff] to demonstrate that [the employer's] proffered reason was a mere pretext for discrimination." *Kenney v. Aspen Techs., Inc.*, 965 F.3d 443, 448 (6th Cir. 2020) (citing *Abbott v. Crown Motors Co.*, 348 F.3d 537, 542 (6th Cir. 2003)). There are three ways in which a plaintiff can demonstrate pretext: "(1) that the proffered reasons had no basis in law, (2) that the proffered reasons did not actually motivate the employer's actions, or (3) that they were insufficient to motivate the employer's actions." *Romans*, 668 F.3d at 839 (quoting *Chen v. Dow Chem. Co.*, 580 F.3d 394, 400 (6th Cir. 2009)). The essential question for courts evaluating claims of pretext is "whether the employer made a reasonably informed and considered decision before taking an adverse employment decision." *Burdine*, 450 U.S. at 256.

Having set forth the analytical framework for employment discrimination claims pursuant to Title VII, the Court now turns to the allegations made by Ames in this case. Ames alleges two instances of discrimination: first, the failure to promote her to the position of Bureau Chief; and second, the decision to revoke her appointment as PREA Administrator. (*See* Pl.'s Resp. at 4, ECF No. 72). Ames alleges that both instances constitute sex-based discrimination,[7] because she is a woman and is

[7] Ames refers to both bases of discrimination as "gender-based." (*See, e.g.*, Pl.'s Resp. at 4, ECF No. 72). Title VII bars discrimination on the basis of an individual's "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2. Title VII does not, on the other hand, mention

heterosexual. *Cf. Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1743 (2020) (affirming that discrimination on account of sexual orientation or gender identity is "in part because of sex").

A. Failure to Promote

As set forth previously, Ames applied for a promotion to the position of Bureau Chief of Quality Assurance and Improvement in April 2019, but did not receive the promotion. That position was eventually given to Yolanda Frierson, a gay woman, on a full-time basis in January 2020. Ames alleges that the decision to choose Frierson over her demonstrates sex-based reverse discrimination in violation of Title VII—in other words, that she was denied for the position because she is heterosexual.[8]

Accordingly, this Court evaluates Ames's failure-to-promote claim under the modified *McDonnell Douglas* burden-shifting framework set forth above, under which Ames must point to "background circumstances" to establish the first prong of her *prima facie* case. Examples of "background circumstances" sufficient to demonstrate that an employer has discriminated against a majority group include statistical analysis of the employer's unlawful consideration of protected characteristics in past

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gender-based discrimination. Similarly, *Bostock*, which Ames cites for the proposition that a gender-based discrimination claim may be based on sexual orientation, actually discussed sex-based discrimination. *Bostock*, 140 S. Ct. at 1737 (noting, in explaining the holding, that "[s]ex plays a necessary and undisguisable role in the decision [to fire an individual for being homosexual or transgender], exactly what Title VII forbids"). Accordingly, the Court refers to Ames's claims as rooted in allegations of sex-based discrimination, not gender-based discrimination, throughout this Opinion & Order.

[8] In contrast to Ames's claim regarding the revocation of her appointment as PREA administrator, this incident does not state a claim for discrimination against Ames as a woman because Frierson is also a woman.

employment decisions, *see Sutherland v. Mich. Dep't of Treasury*, 344 F.3d 603, 614 (6th Cir. 2003), the fact that a minority employer replaced the plaintiff with another employee of the same minority group, *see Zambetti v. Cuyahoga Cmty. Coll.*, 314 F.3d 249, 257 (6th Cir. 2002), and evidence of "organizational preference" for hiring members of a minority group. *Nelson v. Ball Corp.*, 656 F. App'x 131, 136–37 (6th Cir. 2016) (quoting *Sampson v. Sec'y of Transp.*, 182 F.3d 918, 1999 WL 455399, at *1 (6th Cir. June 23, 1999) (unpublished)); *see also Romans*, 668 F.3d at 837 (noting that evidence of past hiring policies favoring minority applicants may demonstrate the necessary "background circumstances" of reverse discrimination (internal citations omitted)).

Ames is unable to meet this threshold requirement. She has not "present[ed] significant evidence in the form of statistical data tending to show in the years prior to the employment decisions at issue, the [] Department considered [sexual orientation] in making employment decisions." *Sutherland*, 344 F.3d at 615. She has not "submitted a large number of [Department] policies and procedures which reflect an organizational preference for establishing a diverse group of employees," or in fact any such Department policies or procedures to that affect. *Sampson*, 1999 WL 455399, at *1. And, perhaps most importantly, she has not demonstrated that her adverse employment action was authorized by or involved any individuals who were also members of the same minority group as Frierson (that is, the LGBTI community);[9] in

[9] The Court adopts Ames's use of the label "LGBTI," which stands for "lesbian, gay, bisexual, transgender, and intersex" and is the term used by the Officer of the United Nations High Commissioner of Human Rights (as compared to the terms "LGBTQ" or "LGBTQ+," which are more commonly used in the United States).

fact, the undisputed evidence in this case is that Walburn and Gies, both of whom Ames believes are heterosexual, made the decision not to promote her and to select Frierson instead. *See Nelson*, 656 F. App'x at 137 ("Most fatal to Nelson's prima facie case [of reverse race discrimination] is the undisputed fact that all of the employees involved in the investigation and subsequent termination of Nelson were Caucasian."). Moreover, neither Gies nor Walburn had personal knowledge about Frierson's or Ames's sexual orientation.

The only support Ames can provide for a finding of "background circumstances" is that she has allegedly suffered two adverse employment decisions on account of her sex—which, Ames argues, "constitutes a pattern." (Pl.'s Resp. at 5, ECF No. 72). But two data points are not enough to establish a pattern. *Cf.* IAN FLEMING, GOLDFINGER (1959) ("Mr. Bond, they have a saying in Chicago: 'Once is happenstance. Twice is coincidence. The third time, it's enemy action.'"). Compare, for example, the statistical evidence presented in *Sutherland*: there, plaintiffs provided a statistical analysis of the percentage of auditor positions at the employer held by different demographics across a twenty-year span. *Sutherland*, 344 F.3d at 615–16. In *Zambetti*, plaintiff's allegations included evidence of the employer's hiring practices over a six (6) year span. *Zambetti*, 314 F.3d at 256; *see also id.* at 257 (noting the difficulty of drawing inferences from hiring data without knowing the "composition of the applicant pools for those positions"). These cases demonstrate that extensive, rigorous evidence is required to establish a pattern for the purposes of "background circumstances," given the unusual form of discrimination at issue. Moreover, the two incidents that comprise the "pattern" alleged by Ames are her own (as yet unproven) allegations in the case *sub judice*. *See id.* at 256 (describing

evidence produced by plaintiff of past employment decisions relating to third parties); *cf. Brooks v. Am. Broad. Cos., Inc.*, 999 F.2d 167, 172 (6th Cir. 1993) ("[T]he district court was not required to accept unsupported, self-serving testimony as evidence sufficient to create a jury question." (*citing Comfort Trane Air Conditioning Co. v. Trane Co.*, 592 F.2d 1373, 1383 (5th Cir. 1979)). Therefore, the Court concludes that Ames's own allegations of two discriminatory adverse events are, on their own, clearly insufficient to establish the "background circumstances" necessary for a plaintiff to make a *prima facie* case of reverse discrimination.

Where a plaintiff is unable to satisfy the first prong of the *prima facie* case of employment discrimination, the Court is not required to reach the second and third steps of the *McDonnell Douglas* burden-shifting framework. *Zambetti*, 314 F.3d at 257 (citing *Murray*, 770 F.2d at 68; *Jamison v. Storer*, 830 F.2d 194, 1987 WL 44901, at *3 (6th Cir. Sept. 30, 1987) (unpublished)). As Ames has failed to demonstrate "background circumstances support[ing] the suspicion that [DYS] is that unusual employer who discriminates against the majority," *Murray*, 770 F.2d at 68 (quoting *Parker*, 652 F.2d at 1017), the Court finds that she has failed to satisfy her burden of establishing a *prima facie* case of sex-based employment discrimination for her failure-to-promote claim. Accordingly, the Court **GRANTS** Defendant's Motion for Summary Judgment (ECF No. 71) as to the failure to promote claim.

B. Revocation from PREA Administrator Position

The decision to demote Ames from the PREA Administrator position presents a more complicated analysis, as she was replaced with Stojsavljevic, a gay man; this claim, in other words, presents allegations of discrimination on the basis that Ames is heterosexual and

also on the basis that Ames is a woman.[10] The Court addresses each alleged basis for discrimination in turn, starting with the allegation of discrimination based on sexual orientation.

As noted previously with respect to Ames's failure to protect claim, a plaintiff alleging reverse discrimination in the employment context must establish the existence of "background circumstances" in order to carry her burden of making out a *prima facie* case of discrimination. Ames alleges the same form of reverse discrimination here as she did regarding the decision not to promote her to Bureau Chief: that is, Ames claims that she was replaced as PREA Administrator on account of being heterosexual. But the same deficiencies that plagued Ames's failure to promote claim crop up here too. She has neglected to provide any statistical evidence of past reverse discrimination, any indication of policies or procedures indicating organizational preferences for minority applicants, or any suggestion that the decisionmakers behind her demotion (and the subsequent promotion of Stojsavljevic) were members of the LGBTI community. *See supra* Part III.A. Without such evidence, the Court concluded that Ames could not establish a *prima facie* case of discrimination based on sexual orientation for her failure to protect claim; similarly, the Court concludes that she is also unable to establish a *prima facie* case of reverse discrimination based on sexual orientation for her demotion claim.

The Court next considers Ames's claim that she was demoted and replaced by Stojsavljevic because she is a woman. The Department acknowledges that Ames can carry her burden of establishing a *prima facie* claim with

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[10] DYS phrases this as a "revocation" of Ames's unclassified status; as the decision effectively demoted Ames, the Court variously refers to the May 2019 decision as a revocation or a demotion.

respect to this issue. (*See* Memo. in Supp. at 29, ECF No. 71). It is undisputed, after all, that Ames is a member of a protected class (as a female), was qualified for her role as PREA Administrator, was terminated (i.e., an adverse employment action), and was replaced by a male employee. *See Briggs*, 11 F.4th at 508. The Department suggests, however, that the decision to revoke Ames's position as PREA Administrator was based on legitimate, nondiscriminatory business reasons. (Memo. in Supp. at 29–30, ECF No. 71). These reasons include Gies' desire to revamp the Department's PREA strategy into a more proactive approach, based in part on the Governor's concern with sexual victimization in juvenile correctional facilities, and Walburn's concerns that Ames did not have the vision, ability, or leadership skills to carry out Gies' vision. (*See id.*). The reasons also included the negative feedback that Gies had received about Ames being abrasive and a difficult person with whom to work. *See Thompson v. Bd. of Educ.*, No. 3:12-cv-00327, 2013 WL 6001626, at *7 (S.D. Ohio Nov. 12, 2013) (finding that the employer's determination that plaintiff employee would not be a good fit because he was "arrogant, a know-it-all, and an overly-assertive person" was a "honest, legitimate, and non-discriminatory" rationale). Gies explicitly noted in his testimony that the question of who would replace Ames in the PREA Administrator role was not a consideration in the decision to remove Ames and, in fact, was not discussed until after the removal decision had already been made.

As to the final step in the burden-shifting framework, the Department argues that Ames is unable to demonstrate that the proffered rationale has no basis in fact, did not actually motivate Gies and Walburn's decision, or was insufficient to motivate Gies and Walburn — in short, that Ames is unable to show pretext.

(*See* Memo. in Supp. at 31–36, ECF No. 71). First, DYS suggests that Gies and Walburn both believed that Ames lacked the ability to revamp the PREA program and administer funds in a more proactive manner. *See Smith v. Chrysler Corp.*, 155 F.3d 799, 807 (6th Cir. 1998) (noting that "the employer must be able to establish its reasonable reliance on the particularized facts before it at the time the decision was made"). The testimony provided by DYS leadership supports the inference that they made a "reasonably informed and considered decision" to demote Ames: Gies and Walburn both testified about the Department's vision for the role and the specific issues they had with Ames's prior work performance (including her communication style and slow deployment of PREA grant funds). Second, DYS argues that these concerns truly did motivate the decision to remove Ames. The positive performance reviews Gies had written about Ames in 2011–13 do not demonstrate that the proffered explanation is a post-hoc rationalization, according to DYS, because Gies later received negative feedback about Ames that undermined his earlier impression of her work. (*See* Memo. in Supp. at 32, ECF No. 72). And it certainly is true that impressions and attitudes regarding an employee's work product and skills can shift over the course of six (6) years.

Nor is the fact that Stojsavljevic told other employees and his former supervisors that he wanted the PREA Administrator job enough to create a genuine issue about whether the valid business concerns set out by Gies and Walburn actually motivated their decision to remove Ames. There is little indication that they were aware of the comments or of Stojsavljevic's interest. Ames suggests that Sagle, who was friendly with Gies, went to Gies to inform him of Stojsavljevic's desire for the PREA Administrator job, but Stojsavljevic claims that Sagle was

not receptive towards his expression of interest, told him to look elsewhere for a new job, and encouraged him to get more PREA experience; Gies makes no mention of a discussion with Sagle (or with Groff) about Stojsavljevic as a candidate for the PREA Administrator position, and neither Gies nor Walburn mentioned any awareness of Stojsavljevic's comments leading up to their decision to promote him to PREA Administrator. In other words, there is no genuine dispute that the record lacks evidence that Stojsavljevic's comments had any influence on Gies and Walburn—or that his interest in the job was the real motivator behind their decision to revoke Ames's unclassified appointment.

DYS asserts that the proffered reasoning was sufficient to motivate the demotion decision, by pointing out that Ames has failed to adduce evidence demonstrating that intentional discrimination was the actual motivating factor. (*See id.* at 33–36). Finally, DYS argues that Ames has failed to put forward "evidence that employees outside the protected class engaged in 'substantially identical conduct' and fared better than [she] did." *Roseman v. Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am.*, No. 20-2151, 2021 WL 4931959, at *4 (6th Cir. July 14, 2021) (quoting *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994)). Ames testified as to seven individuals that she believes were treated more favorably than her.[11] (*See* Memo. in Supp. at 34, ECF No. 71). But Ames has not provided evidence of how they have engaged in substantially identical conduct or have fared better than she did; in fact, as DYS points out, Ames is unable to

[11] She mentions only three individuals, Frierson, Stojsavljevic, and Trim, in her opposition to DYS's motion for summary judgment. (Pl.'s Resp. at 9, ECF No. 72).

establish similarities with the individuals or explain how they have been treated more favorably.[12]

The same is true of Ames's attempts to demonstrate pretext. She baldly asserts that the nondiscriminatory rationale proffered by DYS is overly vague, is "precisely the sort of factually baseless justification that employers have been using for years to justify their own bigotry and discrimination," and "is unworthy of credence," but does not provide any evidence that that is the case. (Pl.'s Resp. at 9, ECF No. 72) (quoting *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 143 (2000) (internal citations omitted)). Under the *McDonnell Douglas* burden-shifting framework, once an employer has provided a nondiscriminatory reason, the burden of production shifts back to the plaintiff, to show that the proffered reason is pretextual — that it is without basis in fact, did not actually motivate the decision, or was insufficient to motivate the decision. *See Burdine*, 450 U.S. at 256–57 (noting that a Title VII defendant need not "persuad[e] the court that it had convincing objective reasons for preferring the chosen applicant above the plaintiff" but must only "produce evidence of legitimate nondiscriminatory reasons"

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[12] The seven individuals were: Ginine Trim, Yolonda Frierson, Nathan Lawson, Chris Freeman, Jeff Spears, Kenya Brown, and Michael Garret. In the first instance, Ames did not work in the same divisions or under the same supervisors at DYS as Kenya Brown, Nathan Lawson, or Chris Freeman. (Memo. in Supp. at 35–36, ECF No. 71). She cannot show that Michael Garret received more favorable treatment than her. (*See id.* at 35). Trim was her supervisor and was not similarly situated. Her allegations about Frierson have been discussed already. And finally, she alleges that Spears received a cake and party by the gay supervisors on his 30th work anniversary, whereas Ames did not receive cake or party for the same occasion, but is unable to name any of the supervisors who allegedly threw the party. (*See* Ames Dep. 202:11–14, ECF No. 62). DYS suggests instead that the party may actually have been to celebrate Spears' return to work after some time away. (*See id.* at 203:15–24).

(quoting *Bd. of Trs. of Keene State Coll. v. Sweeney*, 439 U.S. 24, 29 (1978) (Stevens, J., dissenting))).

Ames has not done so here: she points to no facts in the record tending to suggest that the explanation is without a factual basis, did not motivate the decision, or was insufficient to do so; instead, she suggests only that "the other evidence of discrimination—see the promotions of Frierson, Stojsavljevic, and Trim" — demonstrate that the proffered rationale is not credible. (Pl.'s Resp. at 9, ECF No. 72). But the promotions of Frierson and Stojsavljevic are the *alleged* instances of discrimination made in this case; they do not constitute stand-alone evidence of discrimination. *See also Manzer*, 29 F.3d at 1084 (holding that a "plaintiff may not rely simply upon his prima facie evidence but must, instead, introduce additional evidence of age discrimination" to rebut a proffered nondiscriminatory reason for the adverse employment action). As to the promotion of Trim, Ames has provided no proof that that employment decision was rooted in bias or discrimination, nor is it alleged in Ames's Complaint, Amended Complaint, or deposition testimony that Trim was promoted because she is gay. (*See generally* Compl., ECF No. 1; Am. Compl., ECF No. 28). To the contrary, Ames's assertion in her memo contra that Trim's promotion is "evidence of discrimination" is entirely unsupported by any citations to the record, detailed factual allegations, or further explanation. Conclusory statements without a factual basis are insufficient to create a genuine issue and withstand a motion for summary judgment.

In short, Ames has failed to provide "background circumstances" sufficient to establish a *prima facie* case of sexual orientation-based discrimination; she has also failed to provide evidence creating a genuine dispute of material fact as to whether Defendant DYS's proffered

legitimate, nondiscriminatory reasons for revoking her appointment as PREA Administrator was pretext. Accordingly, the Court **GRANTS** Defendant's Motion for Summary Judgment (ECF No. 71) on Ames's discrimination claim about her demotion.

IV. CONCLUSION

For the reasons stated more fully above, this Court **GRANTS** Defendant's Motion for Summary Judgment (ECF No. 71). Plaintiff's Title VII sex-based discrimination claims are **DISMISSED WITH PREJUDICE**.

IT IS SO ORDERED.

/s/ Algenon L. Marbley
ALGENON L. MARBLEY
CHIEF UNITED STATES DISTRICT JUDGE

Date: March 16, 2023

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

MARLEAN A. AMES, Plaintiff, v. STATE OF OHIO DEPARTMENT OF YOUTH SERVICES, Defendant.	:	Case No. 2:20-cv-05935 CHIEF JUDGE ALGENON L. MARBLEY Magistrate Judge Deavers

OPINION & ORDER

This matter comes before the Court on Defendant's Motion for Judgment on the Pleadings. (ECF No. 31). For the following reasons, this Court **GRANTS** Defendant's Motion for Judgment on the Pleadings. (*Id.*).

I. BACKGROUND

A. Facts

This case arises from the alleged discrimination experienced by Marlean Ames in her employment. (ECF No. 28). Plaintiff alleges that such discrimination took place on the basis of her gender, sexual preference, and age. (*Id.* at 1). Ames is a female who identifies as heterosexual and is over forty years old. (*Id.* at 2). Ames has worked for the State of Ohio's Department of Youth Services ("DYS") since 2004. (*Id.*). DYS is a state agency that oversees the rehabilitation and confinement of juveniles in Ohio. (*Id.*). DYS hired Ames initially as an Executive Secretary within the Parole Division. (*Id.*). After starting her tenure with DYS in Akron, Ames soon transferred to the Indian River Juvenile Corrections

Facility ("IRJCF") in Massillon. (*Id.* at 3). There, she worked as an Executive Secretary for approximately four years. (*Id.*).

In 2009, DYS offered Ames a new assignment as an "Administrative Assistant 2 or Program Administrator 2" in its Central Office in Columbus. (*Id.*). There, Ames worked in this role just over five years. (*Id.*). After receiving positive reviews and salary raises, DYS promoted Ames to Prison Rape Elimination Act Administrator ("PREAA") in 2014. (*Id.*). In May of 2017, Ginine Trim became Ames's supervisor. (*Id.*). Trim is a female who identifies as a member of the Lesbian, Gay, Bisexual, Transgender, Intersex, and Questioning ("LGBTIQ") community. (*Id.*). Trim made Ames aware that she was a member of this community. (*Id.*).

Meanwhile, DYS hired Alexander Stoksavljevic at IRJCF as a social worker. (*Id.*). Stoksavljevic is a male who identifies as a member of the LGBTIQ community and was twenty-five in May of 2017. (*Id.*). In October of the same year, DYS promoted Stoksavljevic to Client Advocate/PREA Compliance Manager ("PCM"). (*Id.* at 4). Notably, because Stoksavljevic was still on probationary status, he was not eligible for this promotion. (*Id.*). To circumvent this obstacle, the Superintendent of IRJCF suggested that Stoksavljevic resign his current position so that he may be hired as a PCM the following day. (*Id.*). According to Plaintiff, this conduct violated the agency's hiring processes. (*Id.*). Stoksavljevic then began pushing for Plaintiff's position. (*Id.*). He told Trim—in front of Plaintiff—that Plaintiff should retire. (*Id.*).

On May 6, 2019, Trim paid Ames a visit at her desk. (*Id.*). After congratulating Ames for 30 years of public service, Trim suggested that Ames retire. (*Id.*). Alternatively, Trim suggested, Ames should return to the Akron facility where she started her career with DYS.

(*Id.*). Indeed, Trim encouraged Plaintiff to apply for the now open position Stojsavljevic just left; this would result, however, in a significant pay reduction. (*Id.*). Plaintiff rebuffed both suggestions. (*Id.*).

Four days later, Plaintiff was required to report to Director Ryan Gies's conference room. (*Id.* at 4-5). There, HR Bureau Chief Robin Gee and Assistant Director of DYS Julie Walburn waited for Ames. (*Id.* at 5). Walburn told Ames she was being demoted and transferred and that she needed to sign an agreement reflecting such or risk termination. (*Id.*). In response, Ames fled the room crying. (*Id.*). Gee and Trim followed Ames and renewed Walburn's request. (*Id.*). Plaintiff relented, signed the paper agreeing to a demotion and transfer, and involuntarily vacated the premises. (*Id.*). Shortly thereafter, DYS required Plaintiff to report for her new position at IRJCF. (*Id.*). On May 13, 2019, DYS hired Stoksavljevic as a PREA—the role Plaintiff held immediately prior. (*Id.*). Further, DYS hired Stoksavljevic despite being neither qualified nor having formally applied. (*Id.*). Further, Plaintiff alleges that this was not the only instance of impropriety she faced. (*See id.* at 6).

In April 2019, Ames applied and interviewed for the role of Bureau Chief of the Quality Assurance Department. (*Id.*). Despite being qualified and fulfilling the application requirements, DYS declined to hire Ames, opting instead for Yolanda Frierson. (*Id.*). Frierson, a member of the LGBTIQ community, is under forty years old. (*Id.*). Despite neither applying for the position when it was originally posted nor being qualified, DYS selected Frierson instead of Ames. (*Id.*).

Finally, Plaintiff alleges that DYS behaved improperly in other ways. Unlike when Plaintiff received her 30-year service certificate, Jeffrey Spears—a male who identifies as a member of the LGBTIQ community—was thrown a

party replete with cake and published announcements by Trim "and other gay supervisors." (*Id.*). Plaintiff maintains that the all of the above events were motivative by Plaintiff's heterosexual preference, gender and age. (*Id.*).

B. Procedural

On April 20, 2020 the United States Equal Employment Opportunity Commission ("EEOC") reached a determination of probable cause and issued a 90-day right to sue letter on September 9, 2020. (ECF No. 1-2). On November 18, 2020, Plaintiff filed her initial Complaint against DYS. (ECF No. 1). Plaintiff alleged eight causes of action under federal and state law arising from her employment with DYS. (*Id.*). Defendant Answered (ECF No. 4), filed its first Motion for Judgment on the Pleadings (ECF No. 11), before Plaintiff ultimately filed her Amended Complaint on May 21, 2021. (ECF No. 28).

In the Amended Complaint, Plaintiff also asserted eight claims. (*Id.*). These causes of action include gender and sexual orientation discrimination under 42 U.S.C. § 2000e, et seq. (Title VII) (Count 1); Hostile work environment based on sexual orientation and age under Title VII (Count 2); Retaliation under Title VII (Count 3); Age discrimination under 29 U.S.C. § 623, et seq. (ADEA) (Count 4); Fourteenth Amendment due process rights under 42 U.S.C. § 1983 (Count 5); Age discrimination under Ohio Rev. Code Chapter 4112 (Count 6); Gender discrimination under Ohio Rev. Code Chapter 4112 (Count 7); and Hostile work environment under Ohio Rev. Code Chapter 4112 (Count 8). Defendant timely filed its Answer. (ECF No. 29).

On June 23, 2021, Defendant filed its Motion for Judgment on the Pleadings. (ECF No. 31). Plaintiff timely

filed her Response (ECF No. 36), and Defendant timely filed its Reply (ECF No. 37). This motion is now ripe for review.

II. STANDARD OF REVIEW

When a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) is based on the argument that the complaint fails to state a claim upon which relief may be granted, the Court employs the same legal standard as a Rule 12(b)(6) motion. *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 11 (6th Cir. 1987) ("Where the Rule 12(b)(6) defense is raised by a Rule 12(c) motion for judgment on the pleadings, we must apply the standard for a Rule 12(b)(6) motion"). The Court will grant the Rule 12(c) motion "when no material issue of fact exists and the party making the motion is entitled to judgment as a matter of law." *JPMorgan Chase Bank, N.A. v. Winget*, 510 F.3d 577, 582 (6th Cir. 2007) (internal quotation marks omitted). The Court must construe "all well-pleaded material allegations of the pleadings of the opposing party . . . as true, and the motion may be granted only if the moving party is nevertheless clearly entitled to judgment." *Id.* at 581 (internal quotation marks omitted). The Court is not required, however, to accept as true mere legal conclusions unsupported by factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

III. LAW & ANALYSIS

Defendant moves for judgment on the pleadings on two bases: (1) the Court lacks subject-matter jurisdiction as to Counts 4 (ADEA), 6, 7, and 8 (the state law claims); and (2) Plaintiff fails to state a claim with regard to Counts 2 (Federal Hostile Work environment), 3 (Retaliation under Title VII), and 5 (42 U.S.C. § 1983). The Court will address each argument in turn beginning with Defendant's argument against subject-matter jurisdiction.

A. Subject-Matter Jurisdiction

1. Count 4: ADEA

Defendants argue that the Court lacks subject matter jurisdiction over Plaintiff's claim brought under the Age Discrimination in Employment Act (ADEA). (ECF No. 31 at 3). Relying on the Supreme Court's decision in *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 92 (2000), Defendants contend that Congress has not validly abrogated state immunity under the ADEA. (*Id.*). Additionally, Defendant, relying on *Cameron v. Ohio*, No. 2:06-CV-871, 2007 U.S. Dist. LEXIS 76774, at *5-6 (S.D. Ohio Oct. 16, 2007), argues that the State of Ohio has not waived its immunity. (*Id.*). Accordingly, argues Defendant, this Court lacks subject matter jurisdiction over this claim. (*Id.*). Plaintiff begrudgingly concedes this argument. (ECF No. 36 at 2). Accordingly, Defendant's Motion on this basis is **GRANTED**.

2. Counts 6, 7, 8: State Law Claims

Defendant also argues that Counts 6, 7 and 8—all alleged violations of Ohio Revised Code section 4112—cannot be prosecuted in federal court. (ECF No. 31 at 4). Defendant, relying on *Dendinger v. Ohio*, contends that the "Eleventh Amendment deprives federal courts of jurisdiction" regarding actions brought pursuant to Ohio revised code chapter 4112. (*Id.*) (citing 207 F. App'x 521, 529 (6th Cir. 2006)). Moreover, according to Defendant, because the State of Ohio did not consent to being sued in federal court under this state statute, this Court may not adjudicate these claims. (*Id.*). As such, Plaintiff's claims against DYS, a state administrative agency, pursued under Ohio Revised Code section 4112 should be dismissed for lack of subject matter jurisdiction. (*Id.*).

Plaintiff responds that the authority cited by Defendant is persuasive rather than mandatory. (ECF

No. 36 at 2). Instead of conceding this claim outright, Plaintiff argues that the Court, if it finds it is without jurisdiction, should transfer these claims "to the Ohio Court of Claims to determine whether immunity applies." (*Id.*). Plaintiff then argues that Ohio Revised Code Sections 4112.02 and 2743.03 do not require that such suits be exclusively brought in the Ohio Court of Claims. (*Id.* at 3). This, Plaintiff says, is true despite her arguing that the state waived its sovereign immunity as to such claims. (*Id.*).

As Plaintiff concedes, case law weighs heavily against her argument. Here, as in *Robertson v. Rosol*, "Plaintiff['s] argument is not well taken." No. 2:06CV1087, 2007 WL 2123764, at *4 (S.D. Ohio July 20, 2007); *Donahoo v. Ohio Dep't of Youth Servs.*, 237 F. Supp. 2d 844, 874 (N.D. Ohio 2002) (District Court finding that it lacked subject matter jurisdiction to hear Ohio state law claims under R.C. 4112). Even assuming, as Plaintiff argues, that the State of Ohio waived its sovereign immunity as to claims under R.C. 4112 et. seq., that does not give this Court subject matter jurisdiction. Indeed, "a State does not consent to suit in federal court merely by consenting to suit in the courts of its own creation . . . [n]or . . . does it consent . . . by authorizing suits against it "in any court of competent jurisdiction." *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676 (1999) (citing *Smith v. Reeves*, 178 U.S. 436, 441–445 (1900) and *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 577–579 (1946)); see also *Donahoo*, 237 F. Supp. 2d at 874 (finding "State of Ohio has waived its immunity from suit and consented to having its liability determined by the state Court of Claims" despite the federal court finding it lacked jurisdiction).

Thus, even if the state courts of Ohio decide such actions do not need to be exclusively adjudicated in its

Court of Claims, that decision is neither this Court's concern nor dispositive of the issue of whether this Court has jurisdiction. Instead, it is "the State's Eleventh Amendment immunity that answers this question." *Rosol*, 2007 WL 2123764, at *4 (citing *Hall v. Med. Coll. of Ohio at Toledo*, 742 F.2d 299, 301 (6th Cir. 1984)). Moreover, this rule extends to that state's agencies. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993) ("Absent waiver, neither a State nor agencies acting under its control may be subject to suit in federal court.") (internal quotations omitted). Absent an ***explicit*** waiver of that immunity—and the Sixth Circuit held in *McCormick v. Miami University*, 693 F.3d 654, 664 (6th Cir. 2012) that Ohio has not invoked that waiver, this Court has no power to hear this claim.

Accordingly, Defendant's Motion for Judgment on the Pleadings as to state law claims 6, 7 and 8 is **GRANTED**.

B. Failure to State a Claim

Next, Defendant argues that Plaintiff fails to state a claim upon which relief can be granted with regard to Counts 2, 3, and 5. The Court addresses these arguments beginning with Count 5, continuing with Count 3, and concluding with Count 2.

1. Count 5: Fourteenth Amendment Due Process Rights Under 42 U.S.C. § 1983

Defendant argues that Plaintiff's claim under section 1983 fails because DYS is an improper defendant. (ECF No. 31 at 4). Defendant, relying on *Will v. Michigan Dept. of State Police,* contends that a § 1983 claim is properly asserted against a "person" acting under color of state law. (*Id.*) (citing 491 U.S. 58, 71). Because neither the state nor its officials acting in their official capacities are persons under section 1983, Plaintiff's claim against DYS—a state administrative agency—fails as a matter of law. (*Id.*).

Plaintiff concedes this issue and requests that she be able to amend her complaint. (ECF No. 36 at 4). Because Plaintiff concedes this issue, the Court will not address whether this claim would fail for another independent reason. (*Id.*).

Accordingly, Defendant's Motion on this basis is **GRANTED**.

2. Count 3: Retaliation under Title VII

Next, Defendant contends that Plaintiff fails to allege a necessary element of a Retaliation claim under Title VII. (ECF No. 31 at 5). Specifically, Defendant argues that Plaintiff failed to allege that she was engaging in a protected activity as defined by that statute. (*Id.* at 6). Indeed, according to Defendant, such vague charges of discrimination are routinely rejected. (*Id.* at 7). Additionally, Defendant argues that Plaintiff also fails to demonstrate a causal connection between the alleged protected activity and the alleged adverse employment action. (*Id.* at 8). According to Defendant, by Plaintiff's own words "she only refused to retire or accept a lesser position when it was allegedly presented to her." (*Id.*). Consequently, DYS made the allegedly adverse employment action before she engaged in the protected activity. As such, her claim must fail.

Plaintiff responds that Defendant mischaracterizes the issue. It was Plaintiff's resistance to discriminatory conduct that was protected by Title VII. (ECF No. 36 at 5). As a result of her resistance, DYS demoted her. (*Id.* at 6). In other words, Plaintiff insists there is a distinction between her supervisors demanding she voluntarily retire or take a lesser position and doing so involuntarily. (*Id.*). Further, Plaintiff disputes that her allegations regarding the causal connection between her resistance and her demotion are clear. (*See id.*). Plaintiff reiterates that she

was punished by being forced to do something involuntarily that she would not do voluntarily. (*Id.* at 7). For these reasons, she says Defendant's argument must fail.

To assert "a prima facie case of retaliation under Title VII . . . the plaintiff bears the initial burden of establishing that (1) [s]he . . . engaged in protected activity, (2) the employer knew of the exercise of the protected right, (3) an adverse employment action was subsequently taken against the employee, and (4) there was a causal connection between the protected activity and the adverse employment action." *Khalaf v. Ford Motor Co.*, 973 F.3d 469, 488–89 (6th Cir. 2020), cert. denied, 141 S. Ct. 1743, 209 L. Ed. 2d 508 (2021) (quoting *Beard v. AAA of Mich.*, 593 F. App'x 447, 451 (6th Cir. 2014)).

A plaintiff may satisfy the pleading requirement for protected activity by "alleging conduct that falls within one of two clauses in the statute, which says it is an:

> unlawful employment practice for an employer to discriminate against any of his employees . . . [1] because [the employee] has opposed any practice made an unlawful employment practice by this subchapter, or [2] because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Hamade v. Valiant Gov't Servs., LLC, 807 F. App'x 546, 549 (6th Cir. 2020) (quoting 42 U.S.C. § 2000e–3(a)). Accordingly, "[t]he first clause is known as the "opposition clause," and the second as the "participation clause." *Id.* The opposition clause, of the two, is the more expansive route. Specifically, "[t]he Supreme Court has held that the term "oppose" should be interpreted based on its ordinary meaning: "[t]o resist or antagonize . . . ; to contend against; to confront; resist; withstand." *Jackson v. Genesee Cty.*

Rd. Comm'n, 999 F.3d 333, 344 (6th Cir. 2021) (citing *Crawford v. Metro. Gov't of Nashville & Davidson Cnty.*, 555 U.S. 271, 276, 129 S.Ct. 846, 172 L.Ed.2d 650 (2009)). Additionally, "[e]xamples of opposition activity protected under Title VII include complaining to anyone (management, unions, other employees, or newspapers) about allegedly unlawful practices; [and] refusing to obey an order because the worker thinks it is unlawful under Title VII." *Id.* (citing *Niswander v. Cincinnati Ins. Co.*, 529 F.3d 714, 721 (6th Cir. 2008) (internal quotations omitted)).

That said, there are limits to what satisfies the opposition clause. And "[w]hile the plaintiff's allegations of protected activity do not need to be lodged with absolute formality, clarity, or precision, the plaintiff must allege more than a vague charge of discrimination." *Id.* (citing *Yazdian v. ConMed Endoscopic Techs., Inc.*, 793 F.3d 634, 645 (6th Cir. 2015)). Indeed, a Plaintiff must put the defendant "on notice that her complaint concern[ed] statutory rights." *Brown v. VHS of Mich., Inc.*, 545 F. App'x 368, 373 (6th Cir. 2013).

Here, Plaintiff attempts to plead this element by asserting that she resisted her supervisors' insistence that she retire or accept a demotion on several occasions. When a co-worker expressed to Plaintiff's supervisor that he "wanted Plaintiff's job and that Plaintiff should retire," she responded, in her words, by "continu[ing] to resist and indicat[ing[that she intended to work until she was 65 years of age." On May 6, 2019, Plaintiff said "no" when her supervisor suggested that she should retire or in the alternative, consider seeking a lower-paying position at a different location.

Although Plaintiff asserts that "she advised her supervisors that demanded her to retire, or take a lesser position, because of her gender, age and/or sexual

orientation was discriminatory," this allegation only appears in the Complaint as quoted above and not in the factual allegation section. This is the precise type of "legal conclusion couched as a factual allegation" that this Court "is not bound to accept as true." *Long v. Insight Commc'ns of Cent. Ohio, LLC*, 804 F.3d 791, 794 (6th Cir. 2015) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Although Plaintiff provides no authority for the proposition that either saying "no," she intended to continue working until age 65, or asking why she was being demoted constitutes opposition under Title VII, she urges this Court to accept her view of the law. Although opposition is the more expansive pathway to satisfy the protected activity requirement, vague resistance, much like vague charges of discrimination, do not satisfy this element. *See Jackson*, 999 F.3d at 344.

Taken together, Plaintiff has neither pleaded activity under the participation clause nor the opposition clause. Because a failure to plead protected activity obviates the need to consider whether Plaintiff adequately pled a causal connection, this Court does not address that argument. As such, her Retaliation claim under Title VII is **DISMISSED.**

3. Count 2: Hostile Work Environment

Finally, Defendant argues that Plaintiff's claim for a Hostile Work environment under Title VII similarly fails. (ECF No. 31 at 9). First, to the extent she attempts to assert a claim based on age, it fails because age is not a protected class under Title VII.[1] (*Id.* at 8). Secondly,

[1] This argument is mirrored for the Retaliation Claim under Title VII. Because age is not a protected class under Title VII, to the extent Plaintiff attempts to assert an age-based claim, this claims fails. *See Crawford v. Medina Gen. Hosp.*, 96 F.3d 830, 834 (6th Cir. 1996) (Title

Defendant maintains that Plaintiff failed to allege any discriminatory behavior that constituted harassment. (*Id.* at 9). For example, the absence of a celebration for a workplace milestone is simply not sufficient to support the conclusion that she worked in an abusive environment. (*Id.*). Even if she did feel unwelcome that is not enough to support the inference of severe or pervasive harassment. (*Id.* at 9–10). Furthermore, courts have dismissed such claims when plaintiffs assert only a few instances of harassing or offensive behavior. (*Id.*) (citing *Woodson v. Holiday Inn Express*, No. 18-1468, 2018 WL 5008719, at *2) (6th Cir. Oct. 4, 2018)). Because Plaintiff's complaint fails to reference even one instance of harassing or offensive behavior due to her sex or sexual orientation," this claim must fail. (ECF No. 37 at 5).

Plaintiff responds by noting that denial of a promotion and a demotion is evidence of a hostile work environment. (ECF No. 36 at 7). Moreover, she insists that these actions were motivated by her sexual orientation. (*Id.*). Plaintiff notes that her superiors were "friends and supporters of the LGBTIQ community." (*Id.* at 8). Importantly, according to Plaintiff, people outside of this group were excluded and unwelcome. (*Id.*). Plaintiff urges that this allegation can support her hostile work environment claim. (*Id.*). The Sixth Circuit has "broken this claim into five elements:

> (1) [The plaintiff] belonged to a protected group, (2) she was subject to unwelcome harassment, (3) the harassment was based on [sex], (4) the harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working

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VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1988 ed. and Supp. V) (race, color, sex, national origin, and religion).

> environment, and (5) the defendant knew or should have known about the harassment and failed to act.

Nathan v. Great Lakes Water Auth., 992 F.3d 557, 565 (6th Cir. 2021) (citations omitted). Further, "[s]exual harassment in the workplace constitutes discrimination in violation of these provisions [w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Id.* at 564 (citing *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 78 (1998)). "[S]imple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms of employment." *Brown v. Bd. of Educ. of Shelby Cty. Sch.*, 47 F. Supp. 3d 665, 682–83 (W.D. Tenn. 2014)).

The Sixth Circuit has recognized three ways to demonstrate that the harassment complained of was based on sex or sexual orientation: "(1) by showing that the harasser making sexual advances acted out of a sexual desire; (2) by showing that the harasser was motivated by general hostility to the presence of [women] in the workplace; or (3) by offering "direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace." *Kalich v. AT & T Mobility, LLC*, 679 F.3d 464, 471 (6th Cir. 2012) (citing *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 765 (6th Cir. 2006) and *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998)).

Here, Plaintiff asserts that the constant demands for her to leave the office (by either retiring or taking another position), among other things, are sufficient to allege a claim of hostile work environment. Yet, despite Plaintiff's characterization of the demands for her to leave as being constant, she only asserts two isolated incidents in her

Complaint: one on May 6th and another on May 10th. The balance of the "demands" to leave were apparently perpetrated by a co-worker, Mr. Alexander Stojsavljevic. She alleges that Stojsavljevic, in the presence of Plaintiff and her supervisor, made comments that "he wanted Plaintiff's job and that Plaintiff should retire."

Even if the above could ever be sufficient to support a claim of hostile work environment, Plaintiff has not adequately pled that this occurred because she is either a woman or because she is heterosexual. Instead, she makes the bald assertion that "her heterosexual status caused her to be discriminated against by the LGBTIQ community of supervisors and employees." To support her conclusion, Plaintiff further states that "[o]thers outside of Plaintiff's protected groups were either not demoted or did not receive such a significant decrease in their compensation when moved to another position, or demoted due to discipline."

This conclusory allegation does not allow the Court to infer that complained of acts took place because of either her sex or sexual orientation. Even taking all of her factual assertions as true, the fact that some of her colleagues were rude to her (the man claiming that he wanted her job and that she should retire), did not throw her appreciation parties, or pressured her to retire or be transferred is not indicative of ***gender-based*** or ***sexual-orientation based*** bias. Moreover, her conclusory claims that these instances were motivated by such bias are without support. Instead, it appears that Plaintiff in presenting a collection of loosely related data points, expects this Court to draw the conclusion she did: that her colleagues singled her out because she was a heterosexual woman. But there is a sizable gap between what she has alleged and a cognizable claim of gender or sexual orientation-based discrimination.

Because she fails to allege an essential element of the hostile work environment cause of action—that the harassment she experienced was based on sex or sexual orientation—her claim necessarily fails and this claim is **DISMISSED**.

IV. CONCLUSION

For the reasons set forth above, Defendant's Motion for Judgment on the Pleadings (ECF No. 31) is **GRANTED**. Count 4 is **DISMISSED WITH PREJUDICE.** Counts 2, 3, and 5 as well as Counts 6, 7, and 8 (the state law claims) are **DISMISSED WITHOUT PREJUDICE**.

IT IS SO ORDERED.

/s/ Algenon L. Marbley
ALGENON L. MARBLEY
CHIEF UNITED STATES DISTRICT JUDGE

DATED: March 29, 2022