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New Jersey Law Against Discrimination: Third Circuit Strikes Down Background Circumstances Rule

In *Massey v. Borough of Bergenfield*, __ F.4th __ (3d Cir. 2026), the U.S. Court of Appeals for the Third Circuit held that a white employee who alleged he was denied a promotion because of his race, in violation of the New Jersey Law Against Discrimination (LAD), was not required to provide evidence that his employer was the unusual employer who discriminates against the majority, the so-called “background circumstances” rule. The New Jersey Supreme Court has long required white employees asserting LAD claims to prove that their employers are the “unusual employers” who discriminate against their white employees.

The Third Circuit, however, predicted the NJ Supreme Court would no longer require such proof in light of the U.S. Supreme Court’s recent opinion in *Ames v. Ohio Dept. of Youth Services*, 605 U.S. 303 (2025). In *Ames*, the U.S. Supreme Court precluded application of the background circumstances rule for purposes of discrimination claims brought under Title VII of the Civil Rights Act of 1964.

Background

In 2019, Christopher Massey, who is white, was the deputy chief of police for the Borough of Bergenfield and had been appointed officer in charge while the chief of police was on medical leave. When the chief resigned while on leave, Massey applied for the position of chief, but the position was awarded to a captain who was Muslim and of Arabian descent. Thereafter, Massey filed claims against the Borough of Bergenfield in federal district court, alleging racial and religious discrimination in violation of the LAD and federal law. The district court dismissed each of Massey’s claims. With regard to the LAD claim, the court relied on the NJ Supreme Court’s 1990 decision in *Erickson v. Marsh & McLennan Co.*, 569 A.2d 793,

799 (N.J. 1990), holding that in “reverse discrimination” cases the plaintiff must demonstrate the employer is the unusual employer that discriminates against white or male employees.

In *Ames*, the U.S. Supreme Court rejected the background circumstances rule for purpose of Title VII. It reasoned that the rule is inconsistent Title VII’s text and its case law construing the statute. It ruled that “the standard for proving disparate treatment under Title VII does not vary based on whether or not the plaintiff is a member of a majority group.” The district court in *Massey* dismissed Massey’s claims before *Ames* was decided.

Third Circuit’s Decision

The NJ Supreme Court has not reconsidered the application of the background circumstances rule for purposes of the LAD in light of *Ames*. In predicting whether New Jersey would follow *Ames* and discard the rule for LAD cases, the Third Circuit noted that New Jersey courts in LAD cases previously have looked to Title VII law as a source of interpretive authority to promote uniformity in the law. It opined the N.J. Supreme Court would find the analysis in *Ames* compelling when interpreting the LAD. The Third Circuit also explained that both the U.S. and NJ Supreme Courts apply the same techniques of statutory interpretation; the pertinent text of Title VII and the LAD are identical in that they prohibit discrimination against “any person”; and neither statute leaves room for courts to impose special requirements on members of majority groups, as with the background circumstances rule. Thus, the Third Circuit concluded that “the Supreme Court of New Jersey would strike down the Background Circumstances Rule much in the same way that the *Ames* Court did.”

Once the Third Circuit jettisoned the background circumstances rule, it found Massey had raised substantial issues of fact disputing the Borough of Bergenfield’s position that Massey was not denied promotion because of his race. As such, Massey’s LAD claim was revived and now heads to trial.

Key Takeaways

The Third Circuit did not seek to certify to the NJ Supreme Court for final resolution regarding the applicability of the background circumstances rule to LAD “reverse discrimination” claims. That certification procedure is unavailable when a controlling New Jersey appellate opinion, such as the NJ Supreme Court’s opinion in *Erickson*, has decided the issue. Thus, the *Massey* decision is binding only in those federal district courts over which the Third Circuit has jurisdiction (*i.e.*, Delaware, New Jersey, Pennsylvania, and the U.S. Virgin Islands). The *Erickson* decision adopting the background circumstances rule will remain dispositive law in the New Jersey state courts unless and until the NJ Supreme Court rules to the contrary.

Please do not hesitate to contact the author or any member of FBT Gibbons’ [Labor and Employment Practice Group](#) if you have any questions about managing “reverse discrimination” claims under the New Jersey LAD.

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