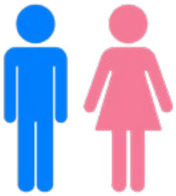
Labor & Employment Newsletter

June 2025

U.S. Supreme Court Unanimously Holds "Reverse Discrimination" Claims Not Held to Higher Standard of Proof

On 6/5/25, in *Ames v. Ohio Department of Youth Services,* No. 23–1039 (6/5/25), the U.S. Supreme Court unanimously rejected that "reverse discrimination" claims (discrimination claims brought by a member of the majority race, gender or other protected characteristic) are subject to a higher standard of proof. Previously, several circuit courts, including the Seventh Circuit, applied a heightened standard for such cases, which required a majority-group plaintiff to show additional "background circumstances" to support a claim of discrimination.



In *Ames*, the former employee is a heterosexual woman who was employed by the Ohio Department of Youth Services. She was hired in 2004 to serve as an executive secretary. She was eventually promoted to program administrator and, in 2019, applied for a newly created management position in the agency's Office of Quality and Improvement. Although the agency interviewed her for the position, it ultimately hired a different candidate—a lesbian woman—to fill the role. A few days after she interviewed for the management position, Ames' supervisors removed her from her role as program administrator. Ames accepted a demotion to the secretarial role she had held when she first joined the agency— a move that resulted in a significant pay cut. The agency then hired a gay man to fill the vacant program administrator position.

Ames sued the Ohio Department of Youth Services, pursuant to Title VII, and asserted claims of discrimination based on her sexual orientation. The United States District Court for the District of Ohio granted summary judgment in favor of the employer and the Sixth Circuit affirmed. Like the lower court, the Sixth Circuit held that Ames had failed to meet her prima facie burden because she had not shown "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority.'" The court reasoned that Ames, as a straight woman, was required to make this showing "in addition to the usual ones for establishing a prima facie case."

The Sixth Circuit found that Ames failed to satisfy the additional "background circumstances" requirement because she was terminated by heterosexuals and there was no evidence of a pattern of discrimination.

In a unanimous opinion, the Supreme Court held that majority-group plaintiffs bringing "reverse discrimination" claims under Title VII are not required to show "background circumstances" because the requirement is not consistent with Title VII's text or the Supreme Court's case law interpreting the statute. The Supreme Court therefore rejected the heightened standard and confirmed that all Title VII discrimination claims must be evaluated under the same burden-shifting framework established by the Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Accordingly, the Supreme Court vacated the judgment and remanded to the Sixth Circuit for application of the proper standard of proof.

Practice Tip:
This decision by the Supreme Court clarifies that all plaintiffs will be held to the same standard of proof regardless of whether they are considered a "majority group." As such, there is no longer a different standard of proof for so-called "reverse discrimination" claims. For example, prior to this decision, reverse discrimination was thought to occur when someone from a historically advantaged group (like a white male) experienced discrimination based on their race or gender, typically in favor of a minority or female. Before this ruling, the Sixth, Seventh, Eighth, Tenth, and D.C. Circuits all applied the "background circumstances" requirement. Accordingly, employers in the Seventh Circuit (Illinois, Indiana and Wisconsin) may expect that there could be an uptick in the filing of discrimination claims by majority group members. Employers should continue to carefully review all employment decisions regardless of an employee's protected class and should ensure that all employment decisions are supported by legitimate business reasons.

7th Circuit Rules in Favor of Non-Disabled Employee in ADA Claim

The Seventh Circuit recently ruled in favor of a non-disabled employee who was subjected to an unlawful medical exam in violation of the ADA (*Nawara v. Cook County Municipality*, 22-2451 (7th Cir. 2025)). The employee, a correctional officer, was placed on unpaid leave pending his submission to a fitness to return to duty mental health examination because of heated altercations with other staff. The employee provided the requested medical information and was reinstated. He then sued claiming that the reinstatement requirement was an unlawful medical exam under the ADA. A federal jury agreed, but the district court did not award back pay on the basis that the jury did not find that the Plaintiff was disabled or perceived as disabled.

On appeal, the Seventh Circuit disagreed and remanded the case for consideration of appropriate damages. The court found that subjecting an employee to an unlawful medical examination is a form of disability discrimination under the ADA even if the individual is not qualified with a disability. The ADA prohibits employers from requiring employee medical examinations absent business necessity. The ADA provides a back pay remedy for violations but limits these damages to discrimination on the basis of a disability. Despite this language, the Seventh Circuit concluded that a non-disabled employee could collect back wages if they are subjected to an unlawful medical exam.

Practice Tip: The Seventh Circuit's interpretation of the ADA appears to contradict the plain language of the ADA and has the effect of proving a remedy for non-disabled persons to collect damages for disability discrimination. This case appears to be the first federal appellate decision to directly address this issue. As such, employers within the Seventh Circuit (including Illinois, Indiana and Wisconsin) should be mindful about requiring medical exams without first consulting legal counsel.

Highly Compensated Employee Still Owed Overtime

The Sixth Circuit Court of Appeals recently ruled in favor an employee for claims of unpaid overtime even though he earned $270,400 a year. The case, *Pickens v. Hamilton-Ryker IT Solutions*, No. 24-5407 (6th Cir. 2025), showcases the importance of paying employees classified as exempt on a salary basis or risk unpaid overtime violations.

The employee was a pipeline inspector. He was paid a guaranteed $800 a week for any week in which he worked and $100 an hour for all hours worked over 8 in any workweek. He averaged 52 hours per week, or the equivalent of $270,400 a year. He was classified as salaried-exempt and was therefore not paid overtime for any hours worked over 40 per workweek.

The employee claimed he was owed overtime because he was an hourly worker and sued the company for violations of the FLSA. The lower court granted summary judgment to the company, and the employee appealed to the U.S. Court of Appeals for the Sixth Circuit.

On appeal, the court held that the employee was not paid a salary under the FLSA and was instead paid on an hourly basis. According to the court, under the FLSA, being paid on a salary basis means receiving a fixed, predetermined amount for each pay period regardless of the quantity of work performed. The court interpreted this as meaning the guaranteed amount must serve as the fundamental payment for a week's worth of work. The court said, "Unlike a weekly rate, which compensates an employee for a week's work, no matter the number of hours worked, the [$800] rate Pickens received compensated him for either an hour's work or eight hours' work," and "[this] . . . 'salary' did not come close to compensating him for his regular 52-hour work week."

Because the employee's total weekly pay varied depending on his hours worked beyond the initial 8 hours, the court found that the pay structure did not operate as a true salary.

Practice Tip: Although this decision is not binding on employers located within the Seventh Circuit (including Illinois, Indiana and Wisconsin), it is a stark reminder to employers that even highly compensated employees may be entitled to overtime if they are not properly meeting the "salary basis test" under the FLSA. Employers should review the compensation structures of their exempt employees to ensure compliance with the "salary basis test" and assess potential risk for unpaid overtime claims.

EEOC/DOJ Joint Guidance: What You Should Know About DEI-Related Discrimination at Work

In the wake of the Trump Administration's anti-DEI Executive Orders issued in January, the EEOC and DOJ jointly issued guidance in late March including a document regarding "What You Should Know About DEI-Related Discrimination at Work." This guidance provides a review of Title VII's prohibitions against employment discrimination on the basis of protected characteristics such as race and sex. It further explains that Diversity, Equity and Inclusion (DEI) is a broad term that is not defined in Title VII. The guidance states that under Title VII, DEI initiatives, policies, programs, or practices may be unlawful if they involve an employer or other covered entity taking an employment action motivated—in whole or in part—by an employee's or applicant's race, sex, or another protected characteristic.

The guidance confirms that Title VII's protections apply equally to all workers and not just minority employees. Different treatment based on race, sex or another protected characteristic can be unlawful discrimination, no matter which employees or applicants are harmed.

Accordingly, it makes clear that Title VII protects all employees, not just those traditionally identified as minority groups or underrepresented groups. To that end, it explains that the EEOC does not require a higher showing of proof for so-called "reverse" discrimination claims. The EEOC's position is that there is no such thing as "reverse" discrimination; there is only discrimination. The EEOC applies the same standard of proof to all race discrimination claims, regardless of the victim's race.

The guidance further provides that under Title VII, an employer initiative, policy, program or practice may be unlawful if it involves an employer or other covered entity taking an employment action motivated—in whole or in part—by race, sex, or another protected characteristic. Title VII also prohibits employers from limiting, segregating or classifying employees or applicants based on race, sex or other protected characteristics in a way that affects their status or deprives them of employment opportunities. Employers instead should provide "training and mentoring that provides workers of all backgrounds the opportunity, skill, experience and information necessary to perform well, and to ascend to upper-level jobs." Employers also should ensure that "employees of all backgrounds . . . have equal access to workplace networks."

Additionally, the guidance clarifies that an employer cannot justify taking any employment action based on race, sex or another protected characteristic because the employer has a business necessity or interest in "diversity," including preferences or requests by the employer's clients or customers. It clarifies that Title VII explicitly provides that a "demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination."

Practice Tip: The guidance warns that employers that engage in DEI practices could be liable under Title VII. Although this guidance is not law, it can signal the agencies' enforcement policies and priorities. As such, employers covered by Title VII (with 15 or more employees) should review their current policies and practices related to DEI practices.

DOL Issues Guidance on Independent Contractor Misclassification Enforcement

On 5/1/25, the U.S. Department of Labor (DOL) issued guidance on how employers should determine employee or independent contractor status when enforcing the Fair Labor Standards Act (FLSA).

The DOL is currently reviewing the 2024 Biden-era final rule which is also being challenged in federal court. The 2024 final rule took effect on 3/11/24 and applies a multi-factor "economic realities" test, which made it more likely a worker would be classified as an employee rather than an independent contractor under the FLSA. The test concentrates on whether the worker is economically dependent on the employer, and, if so, the worker would likely be classified as an employee.

While the DOL is reviewing the 2024 final rule and light of the pending legal challenges, DOL investigators have been directed not to apply the 2024 rule's analysis in current enforcement matters. Instead, the DOL will rely on principles outlined in Fact Sheet #13 and by the reinstated Opinion Letter FLSA2019-6, which addresses classification in the context of virtual marketplace platforms. The test that will be applied during this review period focuses on whether the worker is economically dependent on the employer for work or a worker in business for themselves. Several factors should be analyzed and no one factor is considered more important than another. The following factors should guide the assessment of whether a worker is an employee under the FLSA or an independent contractor in business for themself:

1. Opportunity for profit or loss depending on managerial skill
2. Investments by the worker and the employer
3. Permanence of the work relationship
4. Nature and degree of control
5. Whether the work performed is integral to the employer's business
6. Skill and initiative

Additional factors may be considered if they assist in assessing whether the worker is in business for themself or is economically dependent on the employer for work.

If a worker is an employee under these factors and the employee is performing work that is covered under the FLSA, the employee must be paid not less than the federal minimum wage ($7.25 per hour) and overtime pay that is not less than one and one-half the regular rate of pay for all hours worked over 40 per week unless a relevant exemption applies. The FLSA also has recordkeeping requirements, retaliation protections, and child labor provisions.

Practice Tip: The DOL's guidance does not change existing regulations at the moment and only applies to FLSA determinations. States are not bound to use the DOL tests in state law contexts. We will monitor the pending litigation and further developments with the 2024 final rule. In the meantime, employers should exercise caution when determining employee vs. independent contractor status and should consult with experienced counsel before reclassifying workers during this review period.

Wisconsin Employee Terminated Because of Prior Convictions Was Improper

In *Natural Landscapes, Inc. v. LIRC*, 2024 App.1314 (Wis. App.2025), the Wisconsin Court of Appeals considered a case involving the termination of a former physician who was previously convicted of possession of cocaine with intent to distribute. The former physician was hired to do vegetation management, which involved weed whacking while working alone on various rural properties. After he was hired, the employer discovered the employee's prior conviction, including the employee's agreement to not practice medicine for a period of two years in light of these convictions. The employer terminated the employee because he had misled the employer from his perspective based on his criminal history.

In Wisconsin, generally, it is considered discrimination to terminate an employee based on a prior conviction record. Under Wisconsin law, an exception to this rule is that an employee may terminate an employee if the employee is convicted of a crime "substantially related" to the particular job. The burden is on the employer to establish this substantial relationship.

The Appeals Court in this case considered whether the employer had performed the required "detailed inquiry" as to whether the convictions related to the job responsibilities of the employee. It is the employer's responsibility to establish that the prior conviction is materially related to the facts, events and convictions surrounding the job for which the employee was hired. The court found that because the employee worked alone, had no specific opportunity to distribute drugs given his job responsibilities, his low likelihood of re-offending because he attended rehab and generally had no access to money with which he could purchase and distribute drugs, the termination of the employee in this case did not meet the exception required under Wisconsin law. As a result, the LIRC determined that the employee was terminated in violation of the Wisconsin Fair Employment Law.

Practice Tip: In Wisconsin, when an employer discovers that an employee has a prior conviction record after hiring, and considers whether that individual should be terminated, the burden is substantial upon the employer. They should scrutinize the nature of the conviction and whether the job responsibilities of the employee would allow them to re-offend or otherwise commit the same or similar crime if the job was maintained. We recommend consulting with counsel to determine whether this "detailed inquiry" has appropriately been addressed under Wisconsin law.

Attorney's Use of Social Media During Trial Costs Illinois Plaintiff Her *Second* $43,000,000 Verdict

Although not an employment court decision the matter is worthy of discussion.

In *Kroft v. Viper Transportation, Inc.*, 2025 IL App (1st) 240220 (3/31/25), the Illinois Appellate Court confronted targeted social media posts made by Plaintiff's attorney during trial as improper, violative of the Rules of Professional Conduct, and necessitating a third trial.

In *Kroft*, Plaintiff sustained significant and severely life-altering injuries in a motor vehicle accident. Her case originally went to trial in 2021 and the jury awarded her $43,000,000. However, due to her attorney's violation of several orders in *limine* and improper attacks on the Defendant and their attorneys, the verdict was set aside and a new trial was ordered.

On 7/6/23, the case was again called for trial. Voir dire took place on 7/7/23 and several of the jurors acknowledged their recognition of Plaintiff's attorney, Ken Allen from his prolific television ads. As the Appellate Court recognized, Attorney Ken Allen "invested heavily in his own name recognition through television advertising."

In the course of the jury selection process, the jurors were admonished not to view outside outlets, such as social media.

At the same time that this was going on, on 7/7/23, Ken Allen posted on his website content entitled "What Jurors Should Know But Don't."

In that post, Mr. Allen wrote: "Jurors are never told about appeals or when a new trial is ordered. For example, a new trial was recently ordered in the case of Kroft v. Viper Trans, Inc., PR Rental, Inc., 2016-L-009466. 'While it's sad the former Judge rejected the first jury's verdict and threw out all their hard work, the case has been reassigned to a new, tremendous trial judge and we're confident the new trial will be a fair one,' said Kenneth Allen, the lead trial lawyer representing Cindy Kroft. 'Actually, this decision is a blessing as Cindy's condition has gotten much worse since the first trial,' he said. '$43 million now doesn't come close to making up for the grievous human losses and economic harms caused by defendants' inexcusable negligence.'

Mr. Allen also included in the post an explanation of how jurors are not advised that any recovery is shared with an attorney and that liens such as Medicare and Medicaid must be satisfied from any recovery.

As it would happen, during the course of the trial, an adjuster for Defendant's carrier overheard one juror mention "retrial" to another juror. This information was conveyed to counsel and was then brought to the court's attention. Obviously, the jury should not have been advised that the case was brought to them on a retrial. The implication was that at least one juror had, in fact, read or knew of the 7/7/23 post about the very case that was before them.

The trial court denied two successive motions for mistrial. After being presented with evidence of the website content, the court spoke to the jury as a whole and again admonished them that they were not to have considered any outside materials such as social media content. Of course, with this admonishment, no juror acknowledged that they knew of the website material. Accordingly, the trial court denied the motions for mistrial as well as post-trial motions predicated on the unusual and targeted website material.

Not surprisingly, the jury returned a verdict of $43,825,000; remarkably close to the first verdict. Defendant appealed several issues in the case including the trial court's ruling with regard to the claim that Plaintiff's counsel attempted to interfere with the jury by targeting a website post directly about the case and presenting matters would never have been allowed at trial.

In a very scathing opinion chastising Ken Allen for violating the Rules of Professional Conduct, the court found that the website post constituted intentional interference with the jury. First, the court noted that Mr. Allen's argument that he was merely expressing his opinion was belied by the fact that he included the full case citation to the very case being presented to the jury. It was also significant that the post was made during trial and not during the two-year hiatus between the first and second trial.

The court also found it significant that Mr. Allen, again referring to him as "invested heavily in his own name recognition" should have known that jurors or juror families might feel compelled to look at his website. Finally, the court found that the headline and text was "blatantly directed toward grabbing the attention specifically as persons serving as jurors."

The Appellate Court minced no words in finding that Mr. Allen had violated Rule 3.6(a) of the Illinois Rules of Professional Conduct which prohibits a lawyer from making any extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and would pose a serious and imminent threat to the fairness of an adjudicated proceeding.

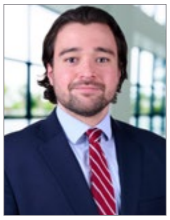
Mr. Allen's improper conduct was not salvaged by the fact that the trial court conducted an investigation into the matter and asked the jury as a whole whether anyone had violated the rule regarding looking at extraneous materials. As the Appellate Court noted, the trial court's inquiry should not have been on whether the *jurors* had improperly investigated the matter, but whether prejudice resulted from *attorney misconduct* by tampering with a jury. In this regard, assembling the jury, admonishing them again of their obligation not to look at any extraneous materials and then accepting the fact that none of the jurors would admit to looking at the material was not the appropriate method of investigation.

Practice Tip: Clients and practitioners should be cautious when using social media during the course of pending or threatened litigation. Not only can social media activity be used as evidence in litigation, but it can also impact the outcomes of claims, and therefore it should always be used responsibly.

Firm **News**

Welcome to the Team

Please join us in welcoming our new Illinois Associate attorney [Benjamin DiBlasi].



Benjamin is an accomplished attorney with extensive experience handling general liability matters. His diverse legal background includes condominium law, products liability, real estate, construction law, professional liability and business law. Throughout his career, Benjamin has demonstrated a strong commitment to providing strategic counsel and effective representation across various industries.

Celebrating International Women's Day

We continue to honor the incredible women whose talent, hard work and dedication help drive Downey & Lenkov forward. Your contributions are invaluable, shaping our success and inspiring those around you. Thank you for all that you do!

Downey & Lenkov Bids a Fond Farewell to Capital Member Jeanne Hoffman

After more than two decades with Downey & Lenkov, Capital Member Jeanne Hoffman has departed the firm to take on new challenges. She was an integral part of our team, shaping both our success and the culture that defines us.

As a trusted colleague, mentor and leader, Jeanne's expertise and dedication made a lasting impact on our firm, colleagues and clients alike. While we will miss her presence, we are deeply grateful for her many contributions and the legacy she leaves behind.

Downey & Lenkov Sponsors Valparaiso Pop Warner

Downey & Lenkov is a proud Gold Sponsor of Valparaiso Pop Warner, an incredible organization, led by Capital Member Kirsten Kaiser Kus as President, that provides young athletes in Northwest Indiana with football and cheer experience. Through active participation, the program teaches fundamental values, skills and knowledge that can be used throughout their lives.

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Our attorneys provide free seminars on a wide range of general liability topics regularly. We speak to individuals and companies of all sizes. Some national conferences that we've presented at are:

- Illinois Employer Liability in Personal Injury Cases: Kotecki Doctrine and Insurance Coverage for Such Claims
- American Conference Institute's National Conference on Employment Practices Liability Insurance
- Claims and Litigation Management Alliance Annual Conference
- CLM Retail, Restaurant & Hospitality Committee Mini-Conference
- Employment Practices Liability Insurance ExecuSummit
- National Workers' Compensation and Disability Conference & Expo
- National Workers' Compensation & Disability Conference
- RIMS Annual Conference

Newsletter **Contributors**

Storrs Downey, Jessica Jackler, Ryan Danahey, and Jeffery Kehl contributed to this newsletter.

View more information on our
Labor and Employment practice.
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