Will the New Jersey Supreme Court Follow Massey v. Borough of Bergenfield on Reverse Discrimination Claims? - Corporate Counsel, American Bar Association Litigation Section

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In March 2026, in *Massey v. Borough of Bergenfield,* the U.S. Court of Appeals for the Third Circuit predicted that the New Jersey Supreme Court would abandon the background circumstances test—a rule that has shaped reverse discrimination claims in New Jersey for more than three decades. *Massey*, 169 F.4th 188 (3d 2026). Under that test, an employee who belongs to a so-called majority group and sues under the New Jersey Law Against Discrimination (NJLAD) faces a unique substantive hurdle. N.J. Rev. Stat. § 10:5-1 *et seq*. Before the case can proceed, the majority-group plaintiff has to show "background circumstances" suggesting the employer is an unusual employer that discriminates against the majority. This test has had the obvious effect of filtering out many would-be "reverse discrimination" claims, and majority-group plaintiffs alleging some form of reverse discrimination have been uncommon.

The NJLAD's background circumstances test is not unique to New Jersey. Majority-group plaintiffs bringing discrimination claims under Title VII in certain federal circuits faced a nearly identical hurdle. That changed in 2025, when the U.S. Supreme Court unanimously held in *Ames v. Ohio Department of Youth Services* that Title VII does not contemplate a heightened standard for majority-group plaintiffs. *Ames*, 605 U.S. 303 (2025). More broadly, it is current policy within the federal executive branch that there is no difference between "reverse discrimination" and "discrimination." Increasingly, and despite social pushback, the idea that majority-group members can face discrimination akin to minority-group members is taking root.

Massey applied that federal shift to state law. Relying largely on *Ames*, the Third Circuit predicted that the New Jersey Supreme Court would follow the federal courts and abandon the background circumstances test for NJLAD claims—and thus rejected application of the test. But a federal court's prediction is not a state court's holding. The Third Circuit chose not to ask the one court that could settle the question, and its prediction may not prove correct. Until the New Jersey Supreme Court speaks, employers face a split system in which the standard can depend on whether a case is heard in federal or state court. Under either standard, the door to majority-group discrimination claims is wider than ever.

The History of the Background Circumstances Test in New Jersey

In *Erickson v. Marsh & McLennan Co.*, the New Jersey Supreme Court modified the prima facie framework for "reverse discrimination" claims. *Erickson*, 569 A.2d 793 (N.J. 1990). The court reasoned that the presumption of discrimination built

into the prima facie framework reflects the nation's history of discrimination against minorities. In its view, that presumption does not apply when the plaintiff belongs to a group that has not historically faced discrimination. The majority-group plaintiff, therefore, had to show that the employer was the unusual employer that discriminated against the majority. The New Jersey Supreme Court did not formulate this standard on its own but borrowed it from federal case law.

The New Jersey Supreme Court reaffirmed the approach in *Bergen Commercial Bank v. Sisler*. *Sisler*, 723 A.2d 944 (N.J. 1999). There it held that the NJLAD protects younger workers from age discrimination, but it required a 25-year-old plaintiff to meet a "heightened" reverse discrimination standard. Ironically, the Third Circuit itself had rejected the background circumstances rule for Title VII claims in *Iadimarco v. Runyon* that same year. *Iadimarco*, 190 F.3d 151 (3d Cir. 1999). It called the rule "irremediably vague and 'ill-defined.'" *Id*. at 161. New Jersey federal courts, therefore, applied two different standards for years: no background circumstances requirement for Title VII claims and the *Erickson* requirement for NJLAD claims.

The U.S. Supreme Court's Unanimous Rejection of the Background Circumstances Test under Title VII

In June 2025, the U.S. Supreme Court resolved a circuit split regarding the background circumstances test in *Ames*. Marlean Ames, a heterosexual woman, alleged that she was denied a promotion that went to a lesbian woman. She also alleged that she was later demoted and replaced by a gay man. The lower courts rejected her claim because she offered no evidence of background circumstances, such as statistics showing a pattern of discrimination or a decision-maker from the relevant minority group.

A unanimous Court, in an opinion by Justice Jackson, held that the rule "cannot be squared with the text of Title VII or [the Court's] longstanding precedents." *Ames*, 605 U.S. at 309. The Court held that Title VII protects "any individual," and Congress "left no room for courts to impose special requirements on majority-group plaintiffs alone." *Id.* at 304. The Court also faulted the background circumstances test for imposing the same rigid evidentiary demand on every majority-group plaintiff in every case.

The Third Circuit's Prediction in *Massey*

As noted, in *Massey* the Third Circuit faced the question of whether to discard the background circumstances test for purposes of NJLAD claims. The case concerned a white police officer who had served in the Bergenfield Police Department since 1995. He rose to the position of deputy chief and served as an officer in charge. In 2019, the borough council promoted a captain, described in the record as an Arab-Muslim man, to chief. The record contained unusually direct evidence. A council member told Massey he did not "look like the people in the town." *Massey*, 169 F.4th at 201. The borough administrator told Massey the decision was "all about race," and a council member testified to the importance of a "minority department head." *Id.* In their summary judgment motion, the defendants conceded that they "considered" the successful candidate's race and religion. *Id.* at 196. The district court nonetheless granted summary judgment, applying *Erickson*.

The Third Circuit reversed, predicting that the New Jersey Supreme Court would rely on *Ames* and abandon the rule. The panel could have, but chose not to, certify the question to the New Jersey Supreme Court for a definitive final answer.

The court offered four reasons for its holding. First, the New Jersey Supreme Court treats federal law as a "key source of interpretive authority." *Id.* at 195. Second, both courts apply plain-meaning statutory interpretation, and the operative text of the NJLAD, like Title VII, protects "any" person. *Id.* Third, the NJLAD's purpose is to eradicate discrimination in all its forms. Fourth, the New Jersey Supreme Court values symmetry with federal law. With the rule removed, the panel held that the plaintiff easily met the "slight" prima facie burden applicable to plaintiffs who are not otherwise required to show background circumstances. *Id.* at 196. It also found triable disputes on every justification the borough offered.

The panel further held that a "naked invocation of a diversity preference is not a legitimate, non-discriminatory reason for an employment decision." *Id.* at 199. Accordingly, a jury could treat diversity rhetoric at the swearing-in ceremony as "code

words" for discriminatory intent. *Id.* The panel rejected the borough's reliance on consent decrees and an Equal Employment Opportunity policy because the record did not show that the decision-makers relied on them.

Why the New Jersey Supreme Court May Not Follow

The Third Circuit's prediction is reasonable and defensible. But it is not inevitable. It is also curious that the panel did not take the guesswork out of its decision by certifying the question to the New Jersey Supreme Court.

The New Jersey Supreme Court has repeatedly said that federal precedent guides but does not bind its reading of the NJLAD. In *Lehmann v. Toys 'R' Us, Inc.*, it noted it has "not hesitated to depart" from federal precedent when rigid application would be inappropriate. *Lehmann*, 132 N.J. 587, 601 (1993). In *Aguas v. State*, it described its reliance on federal law as "not absolute." *Aguas*, 220 N.J. 494, 510 n.4 (2015). For example, it pointed to its decision in *Alexander v. Seton Hall University*, in which it chose to depart from the U.S. Supreme Court's framework for analyzing wage discrimination claims because of settled New Jersey law to the contrary. *Id.* at 539 (citing *Alexander,* 8 A.3d 198 (2010)).

It is also not clear that the New Jersey Supreme Court would see a need to revisit its precedent. *Erickson* has stood for 36 years, and the court reaffirmed it in *Sisler*. New Jersey's statutory interpretation methods are also less mechanical than the Third Circuit suggested. In *Sisler,* the court held that the term age in the NJLAD was not self-evident because the trial court, the appellate division, and courts in other states had read similar language differently. Given that the meaning of the NJLAD was "not apparent on the statute's face," the New Jersey Supreme Court relied on "extrinsic aids such as legislative history, legal commentary and prior precedent." *Sisler,* 723 A.2d at 952.

Erickson was also never as rigid in the application of the background circumstances test as its now-departed federal counterparts. The *Erickson* court expressly acknowledged that discrimination against a "generally favored group" may arise in contexts where it "may not be uncommon." *Erickson*, 569 A.2d at 552. Both *Erickson* and *Sisler* describe the elements for making a prima facie discrimination claim as a general framework that "must be modified where appropriate." *Id.* at 550; *Sisler*, 723 A.2d at 956 (quoting Erickson).

Given New Jersey's jurisprudence on the issue, it is difficult to believe the New Jersey Supreme Court would abandon the background circumstances test wholesale. The most likely outcome—if the court chooses to modify the test at all—may be neither wholesale adoption of *Massey* nor defiance of *Ames*. Instead, the New Jersey Supreme Court may well retire the *unusual employer* language while articulating its own flexible, New Jersey–specific standard.

Moreover, New Jersey generally has not affirmed, adopted, or endorsed the federal government's current policy of skepticism, if not outright hostility, toward diversity initiatives. Beginning in 2025, the federal government issued a slew of executive orders and policy guidance documents that take the position that "reverse discrimination" is not different from any other form of discrimination. Accordingly, current federal policy posits that even mundane commitments to diversity and inclusion could be evidence of discrimination.

New Jersey stands on the opposite end of that issue. The attorney general and the New Jersey Division on Civil Rights have released guidance affirming the state's commitment to diversity initiatives, and reminding employers and others of their obligations under the NJLAD. *See* Commonwealth of Mass. & State of Ill., Multi-State Guidance Concerning Diversity, Equity, Inclusion, and Accessibility Employment Initiatives (Mar. 2025); *see also* Press Release, Matthew J. Platkin, N.J. Attorney General, Attorney General Platkin Issues Multistate Guidance for Schools on Diversity, Equity, Inclusion, and Accessibility Initiatives (Mar. 2025). Given this wider context, it seems unlikely the New Jersey Supreme Court would read the background circumstances test out of the NJLAD and move the law closer to federal policy.

The Question the Third Circuit Did Not Ask

What makes *Massey* unusual is not the prediction itself but the decision to predict rather than ask. Under Rule 2:12A-1 of the New Jersey Court Rules, the New Jersey Supreme Court may answer questions certified by the Third Circuit. The Third

Circuit's own decisions explain when certification is appropriate. In *United States v. Defreitas*, the court identified three factors. *Defreitas*, 29 F.4th 135 (2022). The first is whether the answer is uncertain and controls the case. The second is the question's importance, including whether it involves competing state public policy interests and whether it is "likely to recur" or "could lead to forum shopping." Id. at 142. The third is judicial economy. Questions in the second category, the court said, "should be certified." *Id.*

Massey fits that description closely. The question controlled the NJLAD claim, it will recur in every majority-group case filed in New Jersey, and the split it creates invites forum shopping. Less than a year earlier, in *Chiaccheri v. Zurich American Insurance Co*., a different Third Circuit panel certified a New Jersey insurance statute question. *Chiaccheri*, No. 24-2563, 2025 WL 2467683 (filed July 14, 2025). It explained that it could not "predict confidently" how the state's highest court would rule and acknowledged that "we cannot create binding precedent on this important state-law matter." *Id.* at *6. The only explanation in Massey appears in a separate concurrence by Judge Bove, concluding that certification was unnecessary because the NJLAD's text is not "unclear." *Massey*, 169 F.4th at 206. That explanation is hard to reconcile with *Sisler's* view that conflicting readings render the text less than self-evident.

In fairness, certification is discretionary, and the Third Circuit declines to certify New Jersey questions with some regularity, as it did in *Zanetich v. Wal-Mart Stores East, Inc. Zanetich*, 123 F.4th 128 (3d Cir. 2024). The panel may also have doubted that the New Jersey Supreme Court would accept a question about whether to overrule its own precedent because Rule 2:12A-1 contemplates questions on which there is "no controlling appellate decision." But the precise question of whether *Erickson* survives *Ames* was one no New Jersey court had answered, and the New Jersey Supreme Court may reformulate certified questions. The result is that a federal panel has shaped a central feature of New Jersey civil rights law without any New Jersey court weighing in.

A Wider Door for Majority-Group Claims

Whatever the New Jersey Supreme Court ultimately does, *Massey* increases employers' exposure now. Federal courts in New Jersey must follow it, while state trial and appellate courts remain bound by *Erickson*. That reverses the familiar removal strategy. Removing a majority-group NJLAD claim to federal court now brings in the more plaintiff-friendly standard, while plaintiffs have new reasons to add federal claims that anchor federal jurisdiction. Without the background circumstances rule, a plaintiff passed over for a promotion need only make the "slight" showing that applies to all other plaintiffs. That "slight" showing may in some cases be made by reference to overt and aggressive diversity initiatives.

The stakes are higher under the NJLAD than under Title VII. The NJLAD covers employers of every size and does not cap compensatory or punitive damages. Title VII applies only to employers with 15 or more employees, and it caps combined compensatory and punitive damages at between $50,000 and $300,000, depending on employer size. Reports of an actual surge in filings remain mixed. But claims that once failed at the prima facie stage, or simply were never brought in the first instance, will now reach a jury.

Practical Checklist for In-House Counsel

For New Jersey practitioners:

- Treat the background circumstances defense as endangered. Preserve it in state court, but build defenses on documented, legitimate reasons for personnel decisions.
- Decide forum deliberately. Evaluate whether removing a majority-group NJLAD claim gives up a defense that remains available in state court.
- Monitor the New Jersey courts for the first state appellate decision addressing *Erickson* after *Ames* and *Massey*.

For all practitioners:

- Define selection criteria before reviewing candidates, and record the actual reasons for decisions when they are made. Courts are likely to reject justifications on which decision-makers cannot show they relied.
- Do not cite diversity as the reason for selecting a candidate. A bare diversity preference likely is not a legitimate reason, and diversity language can be read as "code words."
- Audit affirmative action plans and diversity, equity, and inclusion (DEI) programs. Any race-conscious plan will ideally be supported by findings of imbalance, remedial goals, and standards. Inclusive outreach and structured, consistent processes carry less risk than identity-based selection.
- Train decision-makers, HR professionals, and managers on appropriate criteria and talking points for sensitive personnel decisions.
- Public employers should also expect equal protection claims under 42 U.S.C. § 1983, which *Massey* confirmed are available in employment cases.

Conclusion

Ames removed the background circumstances rule from federal law, and *Massey* predicts New Jersey will follow. The New Jersey Supreme Court may well agree with the result. As noted, however, it has a long record of reading the NJLAD on its own terms, and it may reach that result by a different route, or with a standard that differs from what the Third Circuit predicted. Until it speaks, employers will need to operate under two standards in one state. The prudent course is to assume that majority-group claims will be judged by the same standard as every other discrimination claim—and to make employment decisions that can withstand that scrutiny.

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