

NINTH CIRCUIT

Mortgage Underwriters are Non-Exempt under the FLSA

The issue in this case was whether mortgage underwriters were exempt or non-exempt under the Fair Labor Standards Act. The district court held the employees were administratively exempt because their primary duty was quality control. The circuit court reversed on the grounds that their primary job duty does not relate to the bank's management or general business operations. Instead, the workers were production workers who helped produce the employer's marketplace offerings. The underwriter's job is not to decide whether the bank should take on risk but to decide whether a particular loan falls within the range of risk the employer has decided to take. The appellate court held the district court's "quality control" finding was a legal conclusion not supported by the undisputed facts. The Ninth Circuit's opinion is in accord with the Second Circuit. The Sixth Circuit had reached the opposite conclusion.

McKeen-Chaplin v. Provident Savings Bank, FSB, 862 F.3d 847 (9th Cir. 7/5/17) (Thomas, Murguia, Baylson (E.D. Pa.)).

Employee Raped Off-Site by Co-Worker Has a Hostile Work Environment Claim against Employer Based on its Condoning of the Misconduct

The plaintiff was raped by a co-worker. Prior to the assault the co-worker had been the subject of several complaints by female employees. The employer had put the co-worker on leave because he was under investigation for another rape. A supervisor, however, told the co-worker that the

agency "looked forward" to his return. After the plaintiff reported the rape, the supervisor told her the perpetrator "had a history of this kind of behavior." The supervisor then sent an email to agency employees suggesting they give the perpetrator "some encouragement." The plaintiff requested but was denied paid leave. The agency gave paid leave to the perpetrator. The plaintiff resigned because she did not feel safe in the workplace, given the possibility of the perpetrator's return. The perpetrator ultimately resigned after being informed of the agency's intention to terminate.

The plaintiff filed Title VII claims for discrimination and hostile work environment, an Equal Protection claim, and state law claims for intentional/negligent infliction of emotional distress. The parties filed cross-motions for summary judgment. The district court granted defendant's motion on all claims. With respect to the hostile work environment claim, the court ruled that the rape had occurred off-property and the employer took adequate remedial action. The plaintiff appealed.

The circuit reversed the hostile environment ruling, 2-1. The majority ruled that the agency's reaction to the rape essentially condoned the co-worker's conduct and in and of itself created a hostile work environment. This included the supervisor's comments and the agency's refusal to put her on paid leave while giving that benefit to the perpetrator. The agency was responsible for the supervisor's actions.

The majority criticized the dissent for failing to take all of the evidence in the light most favorable to the plaintiff. "[T]hat is precisely our judicial duty at the summary judgment stage." The majority sharply disagreed with the dissent's conclusion that the plaintiff had failed to prove

the agency’s reaction to her rape allegations was “because of” sex.

Judge Ikuta would have affirmed the dismissal because there was no evidence that the agency treated any female employee differently because of sex. She also noted that the plaintiff and the perpetrator had previously had a consensual romantic relationship. Judge Ikuta distinguished precedent on the basis that the rape at issue hadn’t occurred in the workplace so it was unrelated to the plaintiff’s employment.

Fuller v. Idaho Dep’t of Corrections, 865 F.3d 1154 (9th Cir. 7/31/17) (Hurwitz, Graber, Ikuta).

High School Football Coach Who Prayed on the Field after Games Spoke as a Government Employee Rather than as a Private Citizen

The School District employed Kennedy as a football coach at Bremerton High School from 2008 to 2015. Kennedy is a practicing Christian. His religious beliefs require him to give thanks through prayer at the end of each game for the players’ accomplishments and the opportunity to be a part of their lives through football. Specifically, “[a]fter the game is over, and after the players and coaches from both teams have met to shake hands at midfield,” Kennedy feels called to “take a knee at the 50-yard line and offer a brief, quiet prayer of thanksgiving for player safety, sportsmanship, and spirited competition.” Kennedy’s prayer usually lasts about thirty seconds. He wears a shirt or jacket bearing a School District logo when he prays at midfield. The majority of players were allowed to join in the prayer at their request. Eventually, he began giving short motivational speeches with religious content at midfield after the games. Kennedy subsequently acknowledged that these motivational speeches likely constituted prayers.

Kennedy’s contract provided that the School District “entrusted” him “to be a coach, mentor

and role model for the student athletes.” The School District advised Kennedy that he could continue to give inspirational talks, but “[t]hey must remain entirely secular in nature, so as to avoid alienation of any team member.” “If students engage in religious activity, school staff may not take any action likely to be perceived by a reasonable observer, . . . as endorsement of that activity.” The School District told Kennedy that he was free to engage in religious activity, but that it must be separate from any student activity, and students may not be allowed to join in the activity.

Through his attorney, Kennedy requested a religious accommodation under Title VII of the Civil Rights Act of 1964 that would allow him to “continue his practice of saying a private, post-game prayer at the 50-yard line” immediately following football games, and he announced that he would continue his practice. Kennedy’s intention to pray on the field following the October 16th game “was widely publicized, including through [Kennedy’s] own media appearances.” At the conclusion of the game, he knelt on the 50-yard line, bowed his head, closed his eyes, “and prayed a brief, silent prayer.” According to Kennedy, while he was kneeling with his eyes closed, “coaches and players from the opposing team, as well as members of the general public and media, spontaneously joined [him] on the field and knelt beside [him].” In the days after the game, pictures were “published in various media” depicting Kennedy praying while surrounded by players and members of the public.

The School District informed Kennedy that he was still performing his duties as a coach after the game, and the public prayers on the field must stop. Kennedy refused to stop and his religious conduct on field continued. Kennedy was placed on administrative leave. He received a poor performance evaluation based upon his refusal to comply with District directives, and he did not reapply for a coaching position at the expiration of his contract.

Kennedy filed suit under the First Amendment and Title VII, and sought a preliminary injunction which was denied. Kennedy appealed.

The Ninth Circuit concluded that Kennedy was speaking as a public employee and not a private citizen which foreclosed his claim for retaliation under the First Amendment. The Court relied significantly on the fact that Kennedy was akin to teacher and was responsible for instilling values to his players: “In sum, Kennedy’s job was multi-faceted, but among other things it entailed both teaching and serving as a role model and moral exemplar.” The mere fact that Kennedy spoke in contravention of his superiors was insufficient to transform his conduct to that of citizen speech. “Because his demonstrative speech fell within the scope of his typical job responsibilities, he spoke as a public employee, and the District was permitted to order Kennedy not to speak in the manner that he did.”

Judge Milan Smith, who wrote the majority opinion, filed a separate concurrence to share his view that the School District’s actions were also justified to avoid violating the Establishment Clause, which provided sufficient grounds to restrict Kennedy’s speech.

Kennedy v. Bremerton School District, --- F.3d --- (9th Cir. 8/23/17) (M. Smith, Nelson, Christen)

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