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ALERT

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Ninth Circuit

District Court Erred in Granting Summary Judgment to University on Claims that Faculty Retention Raise Policy Violated Equal Pay Act and had Disparate Gender Impact

Plaintiff was a well-known psychology professor. Several of her male colleagues made thousands of dollars more annually. She claimed that the disparity was department wide and was caused by the University's policy of granting "retention raises" as an incentive once the faculty member received a competing offer. She further claimed that female professors were less likely to engage in retention raise negotiations and less likely to obtain the raises. She filed suit under Title VII, Title IX, the Equal Pay Act and state law. The district court granted summary judgment to the University. A divided panel reversed in part.

The majority held that the plaintiff had met her burden under the Equal Pay Act to show that a jury could find she and her colleagues performed substantially similar work with a common core of tasks. The majority rejected the district court's reliance on the fact that the plaintiff and the male comparators had different areas of research and supervised separate labs. The majority reasoned that it is the overall job and not the individual segments that matters. Because plaintiff and the male comparators were full professors in the Psychology Department who all conducted research, taught classes, and served on committees, the district court erred by ruling as a matter of law the plaintiff and the comparators did not have substantially similar jobs. The court also reversed the district court's grant of summary judgment on the state equal pay act claim.

The majority also reversed on Title VII disparate impact claim. The majority disagreed with the University that the plaintiff challenged the practice of awarding retention raises per se. Instead, she challenged the practice of awarding such raises without increasing the salaries of other professors of comparable merit and seniority. In other words, she argued that once the University was made aware via an offer from a competing university that its salaries were out of step with the market, a retention raise should be given to all comparable faculty and not just the offeree.

There was evidence that for a variety of reasons that female faculty members are less willing to relocate and entertain competing offers, which puts them at a disadvantage with respect to the pay practice at issue. There also was evidence that female faculty members were paid significantly less than male faculty and less likely to obtain retention raises. The majority held that in rejecting the plaintiff's statistical evidence as insufficient the district court had improperly credited the University's expert over the plaintiff's expert. The majority refused to hold that as a matter of law the statistical sample was too small.

The majority also rejected the district court's conclusion that that University had proven a business necessity defense. First, there was conflicting evidence whether retention raises met the standard for the defense. Second, the district court had improperly framed the practice at issue as retention raises generally rather than retention raises without awarding equivalent raises to comparable faculty. Furthermore, the plaintiff had proposed an alternative practice: giving equivalent raises to comparable faculty.

The court unanimously affirmed the district court's grant of summary judgment on the Title VII disparate treatment claims. She failed to establish a prima facie case because she herself had not engaged in retention raise negotiations and the male comparators had. The court also affirmed summary judgment on the plaintiff's IX claim.

Judge Van Dyke filed a lengthy dissent in favor of affirming the district court's judgment except as to the state law Equal Pay Act claim. On the federal Equal Pay Act claim, the dissent argued the majority failed to consider the actual job differences between the plaintiff and her male colleagues. He reasoned that each full professor position was unique.

On the Title VII disparate impact, the dissent disagreed the plaintiff's statistics established a prima facie case. The dissent would have held the University had established as a matter of law that offering retention raises to those given competing offers were a business necessity. The dissent would have held that not providing comparable raises was a business necessity due to lack of financial resources. The dissent rejected the plaintiff's proposed alternative as cost prohibitive.

Freyd v Univ. of OR, 990 F.3d 1211 (9th Cir. 3/15/2021) (Bybee, Van Dyke, Cardone (W.D. Tex.))

Avoidance of Establishment Clause Violation Justified Summary Judgment to School District Regarding Football Coach's Post-Game Team Prayers

The Bremerton School District ("District") employed Kennedy as a football coach at Bremerton High School from 2008 to 2015. Kennedy is a practicing Christian. Kennedy's religious beliefs required him to give thanks through prayer, at the end of each game. Specifically, after the game was over Kennedy felt called to kneel at the 50-yard line and offer a brief, quiet prayer of thanksgiving for player safety, sportsmanship, and spirited competition.

Soon many students and parents joined the praying activity. Eventually, a parent complained that his son felt compelled to participate even though his son was an atheist.

Consistent with school board policy the Superintendent 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." He further advised that "[s]tudent religious activity must be entirely and genuinely student-initiated, and may not be suggested, encouraged (or discouraged), or supervised by any District staff." He stressed that although Kennedy was free to engage in religious activity, it must not interfere with his job responsibilities and must be physically separate from any student activity.

In response, Kennedy's lawyer wrote to the School District and announced that Kennedy would continue to pray at the 50-yard line immediately at the conclusion of the next game and he would allow students to join him in that religious activity if they wished to do so. The lawyer's letter also demanded that the District rescind its prior directive that Kennedy cease his post-game prayers at the fifty-yard line immediately after the game. Kennedy's intention to defy the School District was widely disseminated to the media by Kennedy and his representatives. Despite the School District's effort to restrict access to the field, Kennedy again prayed at the 50-yard line and was joined by numerous members of the public. The School District claimed that it was unable to supervise the religious demonstration. These events were widely publicized in the media.

The School District responded to Kennedy that it "can and will" accommodate "religious exercise

that would not be perceived as District endorsement, and which does not otherwise interfere with the performance of job duties." It offered an opportunity to pray within a school building before or after games and requested a counter proposal as part of an interactive process. Kennedy's response was to inform the media of his intention to continue to defy the school district and pray as before - which he did. Thereafter, he was placed on paid administrative leave. His contract was not renewed because *inter alia* he failed to follow district policy, his actions demonstrated a lack of cooperation with administration, and he contributed to negative relations between parents, students, community members, coaches and the school district.

Kennedy filed suit alleging a violation of the First Amendment rights and Title VII of the 1964 Civil Rights Act. A motion for preliminary injunction was denied and the Ninth Circuit affirmed. *Kennedy I,* 869 F.3d 813 (9th Cir. 2017). Kennedy's petition for certiorari was denied including a "Statement of Justice Alito respecting the denial of certiorari," in which Thomas, Gorsuch and Kavanaugh, joined. *Kennedy II,* 139 S. Ct. 634 (2019). On remand, the District Court granted the School District's motion for summary judgment on grounds that the School District risked an Establishment Clause violation if it allowed Kennedy to continue with his religious conduct. It also found that the risk of constitutional liability was the "sole reason" for its decision. The Ninth Circuit affirmed.

The Ninth Circuit's analysis of Kennedy's First Amendment claim relied upon *Pickering v. Bd. of Educ.,* 391 U.S. 563 (1968). In particular, the Court considered whether he spoke as a public employee when he engaged in demonstrative religious activity at the fifty-yard line and whether the School District had adequate justification for treating Kennedy differently from other members of the public. The Ninth Circuit concluded that Kennedy was speaking as a public employee and not as a private citizen; that "his expression on the field—a location that he only had access to because of his employment—during a time when he was generally tasked with communicating with students, was speech as a government employee." Moreover, the Court held that "a state interest in avoiding an Establishment Clause violation may be characterized as compelling, and therefore may justify content-based discrimination." After examining the related factual context, the Court concluded that "there is no doubt that an objective observer, familiar with the history of Kennedy's practice, would view his demonstrations as [the School District's] endorsement of a particular faith."

In reference to Kennedy's free exercise claim, the Ninth Circuit acknowledged that the District's directive was *not* a neutral regulation of general applicability and therefore can only be justified by "a compelling governmental interest and must be narrowly tailored to advance that interest." The Court concluded that a state's interest in avoiding an establishment clause violation is a compelling interest. Moreover, the regulation was narrowly tailored because the "District tried repeatedly to work with Kennedy to develop an accommodation for him that would avoid violating the Establishment Clause; Kennedy declined to cooperate in that process and insisted that the only acceptable outcome would be praying immediately after the game on the fifty-yard line in view of students and spectators."

In reference to Kennedy's Title VII claims for failure to hire and disparate treatment, the Court ruled that Kennedy was unable to satisfy the components of a prima facie case because he was not adequately performing his job and could not show he was treated differently than similarly situated employees not within the protected class. In reference to his failure to accommodate claim, the Court ruled that although Kennedy succeeded

in establishing a prima facie case, the District was able "to show that it initiated good faith efforts to accommodate reasonably the employee's religious practices or that it could not reasonably accommodate the employee without undue hardship." In reference to the retaliation claim, the Court ruled that Kennedy's insistence that he would continue to pray was a legitimate non-discriminatory reason for adverse action which was not pretextual.

Judges Christen authored and Judge D.W. Nelson joined a concurrence stressing the unique factual circumstances that dictated the result in this case.

Kennedy v Bremerton School District, 991 F.3d 1004 (9th Cir. 3/18/2021) (M. Smith, D.W. Nelson, Christen)

Arbitration Agreement Met the "Knowing Waiver" Standard for Statutory Discrimination Claims by Referencing Employment Disputes

A corporate attorney in the financial industry signed an employment agreement that contained an arbitration clause. She also signed a financial industry form (U4) requiring arbitration. A financial industry rule says that statutory claims of employment discrimination are not subject to arbitration unless the parties have agreed to arbitration. The plaintiff later filed a federal court lawsuit raising employment discrimination and other claims. The district court denied the employer's motion to compel on the basis the plaintiff did not knowingly waive her right to pursue the statutory employment discrimination claims in court.

The Ninth Circuit reversed. The court recognized that the "knowing waiver doctrine" narrows the scope of the Federal Arbitration Act and requires a party to an arbitration agreement to explicitly and knowingly waive the entitlement to a judicial forum for Title VII claims. In previous cases involving financial industry employees, the court had held that the knowing waiver standard was not met because the U4 did not describe the type of claims subject to arbitration. In those cases the employee hadn't been given an opportunity to read the form or the manual containing the terms of the arbitration agreement.

While the appellate court suggested that the circuit's knowing waiver standard might be inconsistent with Supreme Court precedent, the court assumed it was still valid and applied to the federal the Equal Pay Act and 42 U.S.C. § 1985. The panel nevertheless held it was satisfied because the arbitration documents referenced "employment disputes so that … statutory claims are clearly encompassed." The court also reasoned that because the employee here had full access to documents containing the arbitration provisions, prior precedent was distinguishable.

Zoler v. GCA Advisors, LLC, 993 F.3d 1198 (9th Cir. 4/14/2021) (Wallace, M. Smith, Restani (Ct. of Int'l Trade)

Washington Supreme Court

Whether WLAD Allows Discrimination Claim Against Non-Profit Religious Employer Depends on Whether Employee Meets First Amendment Ministerial Exemption

The Seattle Union Gospel Mission ("Mission") is a nonprofit, evangelical Christian organization providing services to Seattle's unsheltered homeless population. The Plaintiff, Matthew Woods, is a professed Christian, and applied for a position as a staff attorney with the Mission to address its guests' many legal issues and facilitate the Mission's rescue work. The Gospel Mission rejected his application because he was Gay and same-sex relationships were contrary to its biblical teaching. Mr. Woods filed a complaint against the Gospel Mission in King County Superior Court, seeking nominal damages and injunctive remedies for violating his right to be

free from discriminatory employment practices under the Washington Law Against Discrimination ("WLAD"). After a limited period of discovery, the Mission moved for summary judgment and relied on the provision of the WLAD which excludes religious nonprofit corporations from the definition of employer. RCW 49.60.040(11) (emphasis added).

The Superior Court granted the Mission's motion for summary judgment and Woods appealed directly to the Supreme Court which reversed and remanded for a factual determination of whether Woods was a "minister" within the meaning of the ministerial exception.

In an opinion by Judge Madsen for six Justices, the Court first reaffirmed that the religious exemption was facially constitutional under article I, section 12 of the state constitution. Although the right to marry whomever one chooses and the concomitant right to sexual orientation are fundamental rights, the Court found reasonable grounds for the WLAD to distinguish religious and secular non-profits. The religious exemption is therefore facially constitutional.

The Court nevertheless ruled that the religious exemption was unconstitutional as applied to non-ministerial employees. The Court's analysis of the ministerial exception relied upon the U.S. Supreme Court cases *Our Lady of Guadalupe School v. Morrissey-Berru*, ___ U.S. ___, 140 S. Ct. 2049 (2020) and *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012). The Court recognized that "[w]hether a position falls within the ambit of the ministerial exception depends on a 'variety' of factors. Importantly, the Court clarified that the factors discussed in *Hosanna-Tabor* were not meant to be a 'checklist.' The 'recognition of the significance of those factors ... did not mean that they must be met—or even that they are necessarily important—in all other cases.'" (Citation omitted). "What matters, at bottom, is what an employee does." (Citation omitted). Whether an employee qualifies as a "minister" is a factual question.

The Court recognized that here there is no evidence that staff attorneys had titles as ministers or training in religious matters, no evidence that they are expected to nurture their converts' development in the Christian faith, the Mission is not a church or religious entity principally responsible for the spiritual lives of its members, employees of the Mission do not lead faith groups and or teach religious doctrine. Moreover, Woods sought employment with the Mission as a lawyer specifically, not as a religious minister or teacher, and there is no indication that religious training is necessary for the staff attorney position. Ultimately, the Court remanded the question of whether Woods was a minister for the trial court to decide in the first instance.

The Court specifically referenced Justice Yu's concurring opinion concerning the criteria to be considered.

Justice Yu, joined by Chief Justice Gonzalez opined that religious institutions should be forewarned that today's decision bars redefining every aspect of work life as "ministerial." "In the case of lawyers licensed by the state, subject to the Rules of Professional Conduct, and obligated to let the client define the goal of the representation, such a claim will likely be difficult to prove."

Justice Stephens joined by Justice Fairhurst dissented in part and concurred in part. Justice Stephens would have held that the religious exemption of the WLAD violates the state constitutional privileges and immunities clause because it favors religious nonprofits over all other employers without reasonable grounds. She concurred with the Court's decision to remand to give the Mission an opportunity "to argue its

affirmative defense to WLAD liability based on the ministerial exception." (Emphasis original).

Woods v. Seattle Union Gospel Mission, -- Wn.2d --, 481 P.3d 1060 (3/4/2021)

Three-Year Statute of Limitations for Claim of Public Pension Impairment Runs from when the Plaintiff Retires and Not when the Legislation at Issue was Enacted

A state statute passed in 2001 excluded certain voluntary overtime from the calculation of the monthly pension benefit granted to Washington state patrol officers. Four officers challenged the constitutionality of the exemption. The Superior Court granted summary judgment to the State. The Supreme Court affirmed in part and vacated in part.

In an opinion by Justice Johnson, the Court unanimously affirmed the Superior Court's ruling that the statute of limitations in a pension impairment case begins to run only upon the plaintiff's retirement and not when the challenged statute was enacted, as the State argued. The Court also ruled that the statute of limitations for such claims was three years and not the six-year statute for written contract claims, as the officers argued.

The Justices divided on how the officers' claim that the 2001 statute unlawfully impaired their pension contracts should be analyzed. All the Justices agreed that there was contractual relationship and a material dispute of fact whether the legislation excluding the overtime substantially impaired the existing contractual relationship. The majority held that because issues of fact remained as to whether the Legislature had provided comparable pension benefits when it enacted the exclusion, the state was not entitled to summary judgment that the exclusion of the overtime was reasonable and necessary to serve a legitimate public purpose.

In a partial dissent written on behalf of three Justices, Chief Justice Gonzalez criticized the majority's analytical framework for the impairment of contract analysis and for conflating the separate issues of comparable benefits and legitimate public purpose.

Hester v. State, --- Wn.2d ---, 483 P.3d 742 (3/25/2021)

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