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ALERT
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Ninth Circuit

En Banc Review Again Denied in Case of Football Coach Who Prayed on the Field with Students After Games

For the second time, the Ninth Circuit denied en banc review of a panel decision rejecting the First Amendment claims of a Bremerton football coach who was terminated after he refused to stop praying on the 50-yard line with students after games.

In 2016, Judge Leighton denied the coach's motion to reinstate him and allow him to pray at the 50-yard line. The Ninth Circuit affirmed. 869 F.3d 813 (9th Cir. 2017). En banc review (880 F.3d 1097 (9th Cir. 2018), and certiorari (139 S. Ct. 634 (2019) were both denied. Four Justices (Alito, Thomas, Gorsuch, and Kavanaugh) suggested that the case might be ripe for certiorari at some later date.

In 2020 Judge Leighton granted summary judgment to the school district and earlier this year the Ninth Circuit affirmed. 991 F.3d 1004 (9th Cir. 2021). In July the full court denied en banc review with seven out of 27 judges dissenting in slip opinions spanning 92 pages.

Judge Milan Smith, who authored both the 2017 and 2021 panel opinions, accused Judge O'Scannlain (who as a senior judge didn't have a vote but authored the primary "dissent") of having "succumbed the Siren song of a deceitful narrative of this case spun by counsel for Appellant…." Judge Smith emphasized that the school district did not discipline Kennedy for holding silent, private prayers. Instead, the school disciplined him only after he advertised in the media that he would hold prayers on the 50-yard line with his players on the field and while the crowd was still in the stands, and did so.

Kennedy v. Bremerton School Dist., 4 F.4th 910 (9th Cir. 7/19/2021), *pet. for cert. filed.*

Uber Drivers Do Not Fall Within Interstate Commerce and Do Not Qualify for Transportation Worker Exception to Federal Arbitration Act

Uber drivers in Massachusetts filed a federal court lawsuit challenging their status as independent contractors. The drivers had signed arbitration agreements. The case was transferred to the Northern District of California. The district court granted Uber's motion to compel arbitration and the Ninth Circuit affirmed.

The panel first decided that it should examine the work performed by Uber drivers nationwide to decide the applicability of the transportation worker exception to the Federal Arbitration Act. The court then ruled that Uber drivers are not engaged in interstate commerce. Precedent had determined that local taxicab drivers are not within interstate commerce. Uber drivers' service is primarily local and intrastate with only 2.5% of trips crossing state lines.

The panel noted that the Ninth Circuit had recently held that contracted Amazon delivery drivers were transportation workers in interstate commerce and fell within the FAA exception. The contrast between the interstate nature of the deliveries made by the Amazon drivers and the intrastate nature of the Uber drivers' work supported the different outcomes.

Capriole v. Uber Technologies, Inc., 7 F.4th 854 (9th Cir. 8/2/2021) (Wardlaw, Nguyen, Eaton (Ct. Int'l Trade).

Delivery Drivers of Goods in Interstate Commerce Fall within Transportation Worker Exception to Federal Arbitration Act Even if Their Goods Do Not Cross States Lines

Romero was a delivery truck driver employed by Watkins & Shepard Trucking from 1997 to 2019. Watkins operated an interstate trucking business, and Romero's job was to deliver furniture and carpet to retail stores in California. The product often originated from outside of the state, but Romero made deliveries only within California. Romero agreed to a stand-alone arbitration agreement which requires that "all employment-related disputes" be resolved through individual arbitration and waives any right to bring or participate in a class action. The agreement also purports to "waive the application or enforcement of any provision of the FAA which would otherwise exclude [the agreement] from its coverage." In August 2019, Watkins announced it would cease operations and informed Romero that he, among other employees, would be laid off. Romero was terminated on August 23, 2019.

In September 2019, Romero filed a putative class action against Watkins asserting claims under the California WARN Act and the federal WARN Act, 29 U.S.C. § 2101 *et seq.*, which require advance notice to be given to employees before being laid off. He sought to represent both a California and a nationwide class of similarly situated ex-Watkins employees who were terminated in August 2019. After the case was removed to federal court, the district court granted the employer's motion to compel arbitration. Romero appealed.

The Court ruled that the FAA exempts from the Act's coverage all "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. Delivery drivers "who are engaged in the movement of goods in interstate commerce" fall within the FAA's transportation worker exemption, even if the drivers themselves "do not cross state lines." Under § 1's plain text, the FAA's transportation worker exemption cannot be waived by the terms of a private contract.

For reasons stated in an unpublished memorandum, the district court's grant to the motion to compel arbitration was affirmed.

Romero v. Watkins & Shepard Trucking, 9 F.4th 107 (9th Cir. 8/19/2021) (Fisher, J. Watford, Bumatay).

Even After Bostock, Employer Does Not Violate Title VII by Supervisor's Favoritism Towards Romantic or Sexual Partner

The plaintiff worked as an engineer in an OBGYN lab, originally in Texas. His supervisor and a female co-worker were in a long-term romantic relationship. In 2008, the supervisor decided to relocate the lab to Arizona. In 2010, the plaintiff had to return to Texas to comply with the terms of his probation for sexually assaulting his seven-year-old daughter. The employer eventually eliminated the plaintiff's position. He filed a lawsuit in federal court alleging that the supervisor had terminated him to protect his paramour's job. The district court granted summary judgment to the employer in 2018. The plaintiff filed a pro se appeal. The Ninth Circuit appointed counsel to brief whether romantic favoritism violates Title VII.

Every circuit that had considered the issue prior to *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), had ruled that paramour preference did not violate Title VII. The EEOC itself distinguishes an isolated instance of paramour favoritism from a pattern creating quid pro quo sexual harassment.

The Ninth Circuit had never addressed the question before.

The panel concluded that *Bostock* does not change the analysis because even if the plaintiff were of a different sex, he still would not have been the recipient of the favoritism at issue. The panel rejected the plaintiff's argument that *Bostock* forbids any discrimination correlated with sex even though protecting a favored employee of one sex automatically makes adverse treatment of employees of the other sex more probable. The panel also held that existence of a consensual relationship between a supervisor and an employee is insufficient as a matter of law to establish a claim that favorable treatment was conditioned on the receipt of sexual favors from the employee or that the favored employee was coerced.

Maner v. Dignity Health, 9 F.4th 1114 (9th Cir. 8/20/2021) (Bea, Fletcher, Friedland).

Government Scientist's Supervisors Entitled to Qualified Immunity Because It was Not Clearly Established His Court Testimony was Constitutionally Protected

The plaintiff, Greg Ohlson, was a forensic scientist employed by the state of Arizona in the Arizona Department of Public Safety, Scientific Analysis Bureau ("Department"), an agency that analyzes blood samples for alcohol content. His job was to test the samples and report the findings, and to testify about those findings in court proceedings. Samples were analyzed in batches that included samples from several different defendants.

When a report on an individual's blood sample was requested, the Department policy was to report the result for that individual. Ohlson, however, believed defense attorneys could better evaluate the accuracy of the result if the samples of the individual in question were reported along with the results for the entire batch of samples with which that individual's samples were tested. Contrary to his superiors' orders, he said so repeatedly, both in communications within the Department and with defense attorneys, and in court hearings. Contrary to Department policy, Ohlson then began creating a private PDF file of all the data within batches.

As part of his job, Ohlson regularly conducted pre-trial interviews with defense attorneys. In those interviews, he began instructing them to request the production of data for the entire batch. Also, as part of Ohlson's job as an analyst, he regularly testified in state court proceedings. Ohlson testified that he felt the disclosure of the entire batch was necessary to ensure accuracy of the result and testified further that he had a PDF of the batch results that he could send to the parties if permitted to do so. As a result of this testimony, Ohlson's supervisors told him he had violated Department policy, and counseled him to bring his future testimony in line with that of laboratory policy and to delete the PDF files. In a subsequent case, he disobeyed his supervisor's explicit instructions. He was disciplined and eventually forced to retire.

Ohlson filed suit alleging retaliation in violation of the First Amendment for "testifying truthfully and completely under oath, and in advocating within the [Department] for a change in the manner in which the department responds to requests in criminal cases for entire batch runs." The district court ruled that Ohlson's First Amendment rights had been violated but because those rights were not clearly established the Defendant was entitled to qualified immunity. The Ninth Circuit disagreed with parts of the district court's reasoning but affirmed on the basis of qualified immunity

The Ninth Circuit readily acknowledged that Ohlson's advocacy was a "motivating factor" in the decision to discipline, and that he was speaking on an issue of public concern.

The Court ruled, however, that when Ohlson contravened orders, he was at all times speaking in the course of his employment duties–whether conducting pretrial interviews with attorneys, advocating within the Department for different procedures, or speaking more publicly as a witness called to testify on behalf of the Department. *See Garcetti v. Ceballos*, 547 U.S. 410 (2006) *(*deputy prosecutor was not speaking as a citizen but pursuant to his duties in the district attorney's office).

Distinguishing *Dahlia v. Rodriguez*, 735 F.3d 1060 (9th Cir. 2013) (en banc), the Court ruled that speech in defiance of orders is not always a strong indication that an employee is speaking as a private citizen and the speech protected. "This would incentivize insubordination and make government administration more difficult." Because Ohlson testified as part of his job duties, and not as a subpoenaed fact witness, the Court ruled there was no clearly established law protecting his testimony.

Relying on *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205*, 391 U.S. 563 (1968), the Court concluded that the interests of the government agency in orderly administration must be considered and weighed against the First Amendment interests of the speaker. "Speaking in defiance of orders does not, by itself, trigger First Amendment protection. . . ." The Court ruled that "orderly government administration requires there to be some rules about employee conduct and misconduct. Insubordination cannot be regarded as per se protected activity."

The appellate disagreed with the district court that the balancing of interests clearly favored Ohlson's speech over government interests. The panel did not reach the question given its qualified immunity ruling.

Ohlson v. Brady, 9 F.4th 1156 (9th Cir. 8/23/2021) (Schroeder, J, Rawlinson and Bade).

Evidence of Unconscious Bias Is Probative of Intentional Discrimination

Title VI of the Civil Rights Act, which prohibits discrimination in programs that receive federal funding, largely follows Title VII law including the *McDonnell Douglas Burdine* framework. In this case a Chinese International student claimed he was discriminated against based on race and national origin when he failed his doctoral program. He filed suit. The district court ruled against him after a bench trial. The Ninth Circuit affirmed.

The majority reiterated that "[n]ot only are race-based stereotypes relevant to the discrimination inquiry, but such stereotypes need not be overt or even fully conscious to constitute intentional discrimination." Jointing at least two other circuits, the court held that "evidence of unconscious bias may be probative of the factual question of intentional discrimination…although it will not necessarily be controlling in a totality of circumstances evaluation whether intentional discrimination occurred." The court further held that "intentional discrimination does not necessarily require evidence of conscious bias." The panel noted that a decision out of the Eastern District of Washington had held that "testimony that educates a jury on the concepts of implicit bias and stereotypes is relevant to the issue of intentional discrimination."

On appeal the plaintiff challenged the district court's criticism of his expert witness on aversive racism for suggesting that "even the most egalitarian of individuals, of whatever race, can be unaware of their unconscious bias (as the name describes) but still be intentionally racist." The

plaintiff claimed this comment shows the district court misunderstood the meaning of intentional discrimination. The majority decided that this was a "stray comment" that when considered in light of the court's entire opinion did not show the trial judge applied the wrong legal standard. The majority noted that the district court had admitted the expert's testimony as relevant.

The plaintiff relied on comments made about his lack of English fluency. The panel deferred to the district court's findings that the criticisms were based in fact. The majority reasoned that in the field of clinical psychology the ability to communicate effectively is imperative.

Concurring Judge Miller opined that expert testimony on unconscious bias should rarely, if ever, be admissible. He dismissed such testimony as expert testimony on credibility. He suggested that such testimony could be admissible "to the extent that it tells the jury something beyond the obvious, commonsense fact that people's stated motives are not always their true motives." He claimed that the aversive racism testimony admitted here does not rest on scientific principles. He also dismissed the particular expert's reliance on post-hoc justifications as evidence of unconscious racism as usurping the function of the trial itself.

Yu v. Idaho State Univ., - F.4th --- (9th Cir. 8/31/2021) (Gould, Clifton, Miller).

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