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ALERT

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Ninth Circuit

Police Chief Not Entitled to Qualified Immunity On Officer's Equal Protection Claims Alleging Sex Discrimination

Plaintiff was a police officer in Vancouver, Washington. She was repeatedly passed over for promotions even when she had scored highest on the list. The Police Chief, who was the deciding official, instigated a series of investigations into the plaintiff that were inconsistent with department practices. She complained that the department was applying a different and higher promotion standard to her because of her sex. She eventually filed a Section 1983 Equal Protection suit in federal court against both the Chief and the City. The department then promoted her. She later added First Amendment claims for retaliation and Title VII claims.

Judge Leighton denied the Police Chief and the City's summary judgment based on qualified immunity. The district court also denied their motion with respect to the plaintiff's disparate treatment claims. The court granted summary judgment on the plaintiff's hostile work environment claims. The Police Chief appealed the denial of qualified immunity.

The Ninth Circuit affirmed the denial of qualified immunity on plaintiff's disparate treatment claims. The central inquiry in an Equal Protection claim is whether the government was motivated by a discriminatory purpose. The panel ruled that the plaintiff had established a prima facie case of disparate treatment. She had also established a genuine issue regarding pretext because it was normal procedure to promote the candidate who had scored highest.

The panel agreed that the plaintiff had introduced evidence of similarly situated male comparators who were promoted. One of the male officers had been investigated for the same alleged misconduct as the plaintiff but was promoted anyway.

The court rejected the Chief's argument that proof of more favorable treatment of an indistinguishable male was necessary for establishing an Equal Protection violation and that proof that had she been a man she would have been promoted earlier is insufficient. The panel emphasized that finding a relevant comparator is not an element of such a claim; rather it is just one way to survive summary judgment. "With or without comparator evidence, courts determine whether a government action was motivated by a discriminatory purpose…."

The court then held that assuming the resolution of all factual disputes in plaintiff's favor, the Chief was not entitled to qualified immunity. It was clearly established that the Equal Protection Clause guarantees equal treatment in government employment without regard to sex. Prior case law established that it was unlawful to encourage and sustain discriminatory investigations into workplace performance.

The panel also affirmed the denial of qualified immunity of plaintiff's Frist Amendment retaliation claim. The First Amendment protects the right to petition the government as to matters of public concern. That right includes the filing of a lawsuit. The panel rejected the argument that plaintiff's discrimination complaints were only of private concern. Complaints about unlawful discrimination in public employment are inherently matters of public concern. In this case, other officers raised concerns about whether plaintiff was subject to discrimination and her case attracted media attention.

Ballou v. McElvain, 14 F.4th 1042 (9th Cir. 9/28/2021) (Berzon, Boggs (6th Cir), Murgia)

Ninth Circuit Withdraws Favorable Opinion on Implicit Bias Evidence; Concurrence Skeptical of Expert Testimony on Implicit Bias Remains

On August 13, 2021, the Ninth Circuit issued an opinion in a Title VI case that contained language very helpful for plaintiffs in employment cases regarding implicit bias and expert testimony. On October 20, 2021, the majority withdrew its prior opinion and issued a new opinion that eliminated most of the discussion of implicit bias. The deleted language included the following:

> Not 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. We have recognized that "racial stereotypes often infect our decision-making processes only subconsciously." *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1450 (9th Cir. 1994). We have noted that a subtle discriminatory attitude does not "make the impact [of an adverse workplace action] less significant or less unlawful [but] serves only to make the courts' task of scrutinizing attitudes and motivation, in order to determine the true reason for employment decisions, more exacting." *Lynn v. Regents of Univ. of Cal.*, 656 F.2d 1337, 1343 n.5 (9th Cir. 1981).

Instead, the majority now declined to address whether implicit bias may be probative or used as evidence of intentional discrimination under Title VI. Judge Miller's concurrence, expressing doubt that implicit bias testimony will "rarely, if ever, be admissible" remains.

Yu v. Idaho State Univ., 15 F.4th 1236 (9th Cir. 10/20/2021) (Gould, Clifton, Miller).

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