WELA
WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION
A NELA AFFILIATE

936 NORTH 34TH ST. SUITE 300
SEATTLE, WA 98103
www.welalaw.org

ALERT

Editors: Mike Subit / Jeffrey Needle

U.S. Supreme Court

Certiorari Granted in Praying High School Football Coach Case

The U.S. Supreme Court has granted certiorari in *Kennedy v. Bremerton*, the case of the high school football coach who insisted on praying with students at the 50-yard line at the end of games. The Court could use this case to make major doctrinal revisions to the duty of religious accommodation under Title VII, the Free Exercise Clause, and/or the Establishment Clause.

Kennedy v Bremerton School District, 991 F.3d 1004 (9th Cir. 3/18/2021), *en banc review denied*, 4 F.4th 910 (9th Cir. 7/19/2021), *cert. granted*, 142 S. Ct. 857 (1/14/2022)

Ninth Circuit

Employer Liable for Customer Harassment Where Manager Sent Employee Back to Customer in the Middle of Harassment

Fried worked as a manicurist at a salon in the Wynn hotel in Las Vegas. He complained that female manicurists received more appointments, partly because customers requested them. One day he became so frustrated at this he threw a pencil at a computer and was disciplined. His manager suggested Fried might want to do something else for a living (Fried had talked about wanting to own a food truck) and remarked that Fried was working in a "female job-related environment." Female co-workers told him and other male manicurists that if they wanted to get more clients, they should wear wigs and look like women.

In June 2017 a male customer came in for a pedicure and Fried was assigned to provide the service. The customer then asked Fried to give him a massage in his hotel room, and said he'd supply the massage oil. Fried responded that the salon didn't provide that service. The customer then explicitly propositioned him asking if Fried wanted to have sex and rub the customer's penis. Fried went to the front desk and reported what happened to his manager. The manager told Fried to go back and finish the pedicure. During the 35 to 45-minute pedicure the customer made five or six inappropriate sexual references and grabbed and held Fried's arm.

Fried twice went to his manager and said he wanted to discuss what happened. Both times the manager said she was busy, and they would discuss it another time. A female co-worker later told Fried that he shouldn't be upset at what happened and should take it as a compliment. Another female co-worker suggested that Fried had really wanted to have sex with the customer.

Fried filed suit for sex discrimination, retaliation, and hostile work environment. The district court granted summary judgment to the employer. The Ninth Circuit affirmed as to the disparate treatment claims but reversed as to the hostile work environment claim.

The tribunal agreed with the district court that the manager's and co-workers' comments before the customer's sexual propositions were insufficiently severe or pervasive to be actionable. The panel characterized those comments cumulatively as "infrequent joking or teasing."

The district court had dismissed the customer's propositions as legally insufficient, partially because the incident occurred in public. The circuit court ruled that the district court erred by not focusing on the employer's response to the customer's actions. The tribunal cited several cases both within and without the Ninth Circuit denying summary judgment to the employer where the response to known harassment had

subjected the employee to further harassment. Here, the manager not only failed to take immediate corrective action, but she also directed him to return to the harassing customer. The manager's direction "discounted and effectively condoned the customer's sexual harassment."

The panel held that Fried's testimony that his experience with the customer made him feel "absolutely horrible" and "uncomfortable" was sufficient to create a question of act about subjective unwelcomeness. The customer repeatedly harassed Fried over a 20-minute period. The court ruled that a jury could find that the harassment was objectively severe. A jury could also consider the comments of his co-workers about the harassment.

Fried v. Wynn Las Vegas, LLC, 18 F. 4th 643 (9th Cir. 11/18/2021) (Christen, Bennett, Silver (D. A.Z))

Male Graduate Student/Employee Alleging Gender Biased Discipline States a Title IX Claim

Doe was a Chinese national graduate student months away from completing his Ph.D. in biochemistry. After an interim suspension, he was suspended for two years after a finding that he violated the University's dating violence policy by placing Jane Roe "in fear of bodily injury," As a result, Doe lost his housing, his job as a teaching assistant on campus, his ability to complete his Ph.D., and his student visa. Doe sued the University through the University of California (the "Regents"), alleging that it violated Title IX when it discriminated against him on the basis of sex in the course of his Title IX disciplinary proceeding.

After one out of thirteen Title IX charges were affirmed administratively, Doe filed a petition for writ of mandamus in which he challenged the disciplinary proceedings and decision rendered by the University. On April 3, 2018, Doe's motion to stay the decision and sanction was granted, finding in relevant part that the evidence did not support the University's findings. But this relief came too late, and Doe lost his student visa status.

Doe filed a complaint with the district court stating eight causes of action for violations of Title IX, the Fourteenth Amendment, and state law. All claims were dismissed with leave to amend. In the FAC Doe alleged that external pressures impacted how the claim was handled, there existed an internal pattern and practice of gender related bias against males, and specific instances of bias in Doe's case. The amended complaint was also dismissed, and Doe appealed. The only issue on appeal was whether Doe sufficiently pled that he was discriminated against "on the basis of his sex" during the course of the disciplinary proceeding. The Ninth Circuit reversed.

To survive a motion to dismiss a Title IX complaint, a plaintiff "need only provide '*enough facts* to state a claim for relief that is plausible on its face,'" and second, "[s]ex discrimination need not be the only plausible explanation or even the most plausible explanation for a Title IX claim to proceed," (emphasis original) (Internal citation omitted). After reciting a substantial number of procedural irregularities, the Court ruled "[r]ather, at some point an accumulation of procedural irregularities all disfavoring a male respondent begins to look like a biased proceeding despite the Regents' protests otherwise." The combination of external pressures, an internal pattern and practice of bias, along with allegations concerning Doe's particular disciplinary case, gave rise to a plausible inference that the University discriminated against Doe on the basis of sex.

Doe v. Regents of the University of California, 23 F.4th 930 (9th Cir. 1/11/2022) (Callahan, Forrest, Amon (E.D.N.Y.))

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