

No. 19-

In The
SUPREME COURT of the UNITED STATES

MARK J. SCHWARTZ,

Petitioner

v.

CLARK COUNTY and JACQUELINE R.
HOLLOWAY,

Respondents

On Petition For Writ Of Certiorari
to the United States Court of Appeals for the Ninth
Circuit

PETITION FOR WRIT OF CERTIORARI
APPENDIX PART D

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THE COURT: You're not what?

MS. CHAPMAN: I'm not trying to be disrespectful,
Your Honor.

THE COURT: Well, you're succeeding, though.

MS. CHAPMAN: Well, my apologies, Your Honor.

THE COURT: But you're -- this is not relevant,
though. It's not relevant to him.

MS. CHAPMAN: It is, Your Honor, when he was the
only --

THE COURT: You keep saying, "Oh, it is. It is. It
is." It's not.

MS. CHAPMAN: Your Honor --

THE COURT: How does it show that he was
discriminated against? How does it show that Mr.
Schwartz was discriminated against?

MS. CHAPMAN: It shows that he was isolated and

targeted for layoff.

THE COURT: Not necessarily. You want them to draw -- you want the jury to draw that inference, and they may draw it. Who knows. But to -- but to sit here and go over this, which we've been over before with Ms. Powell -- we heard from her today -- it's -- it's -- we're wasting time.

MS. CHAPMAN: I think it is relevant when Ms. Holloway originally, in her deposition, had denied Case 2:13-cv-00709-JCM-VCF Document 159 Pg 132

knowledge of this information and then it comes to light.

THE COURT: But where is that? I mean, if you want to bring out something, bring it out. But we sit here going over the same thing again and again and again. I mean, I've given you a lot of leeway. I'm

going to give you some more. Go ahead. Keep going.

Keep going.

You were talking about HR asking for supporting documentation for a title change for Ms. Powell.

BY MS. CHAPMAN:

Q. Now, Ms. Holloway, in your deposition did you admit that there was any interaction between your office and HR -- or when you were specifically asked about a title change for Ms. Powell?

THE COURT: That's not a proper question. You want to ask her a question and then say -- and then she says, "No, I was in New York that day," and you got deposition testimony that says, no, she was in St. Louis that day. But -- but to ask her a question like that, she's not going to remember. Do you remember everything you said in your deposition, ma'am?

Maybe I'm -- maybe I'm --

THE WITNESS: No, sir, Your Honor.

THE COURT: No.

BY MS. CHAPMAN:

Q. Ms. Holloway, do you recall me specifically asking you about an offer of a title change to Ms. Powell in your

Case 2:13-cv-00709-JCM-VCF Document 159 Pg 133 deposition?

A. I don't recall.

Q. Would you please turn to page 37. Now, on page 37 I ask you a direct question advising you that we had taken the deposition of Sherri Powell and that she had testified that she was offered a title change, which she turned down, and then I asked you if you had -- could explain because her name wasn't on the title change list. And your response was?

A. "I don't have any knowledge of that. So I don't

have any knowledge that Ms. Powell was offered a title change."

Q. And so, then I followed up and reiterated that you were not aware that somebody had offered Sherri Powell a title change.

A. Correct, no.

Q. So you do know -- you have testified that you are aware that there was a -- supporting documentation to support a potential title change for Ms. Powell sent to HR; is that correct?

A. Yes.

Q. And Exhibit 17, Part IV, has already been admitted. And was this the supporting documentation that your office transmitted to human resources?

A. Yes.

Q. And who in your office sent this information to

human

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MS. CHAPMAN: It does if the County didn't correct an error.

THE COURT: Pardon me?

MS. CHAPMAN: It does if the County didn't correct an error.

THE COURT: If the County didn't correct what?

MS. CHAPMAN: Correct an error that was brought to their attention on a title change.

THE COURT: Well, how does that affect his -- that he was laid off because of his disability or his -- his age?

MS. CHAPMAN: Mr. Hoffman had the same job title as Mr. Schwartz prior to his title change. The union brought it to the County's attention that the title change -- that they had questions and reservations

about the title change because the title was changed because he was doing HR functions. Then he was -- had his HR functions removed, but then his title wasn't placed back. This e-mail chain is the correspondence between the union and human resources and labor relations with regard to that question.

THE COURT: Maybe you didn't understand my question. What does that have to do with Mr. Schwartz's claims?

MS. CHAPMAN: If Mr. Hoffman would not have --

THE COURT: So -- so what? It's not whether Hoffman was treated differently. That's a different case.

MS. CHAPMAN: No, Your Honor. Mr. Hoffman --

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THE COURT: Yes, it is. It's a different case. What

does that have to do with -- with his being -- being discriminated against because of age or disability?

MS. CHAPMAN: Because Mr. Schwartz had more seniority, and under the Collective Bargaining Agreement, Mr. Hoffman should have been laid off prior to him had his title not been changed.

THE COURT: But the union -- the union could be responsible for that, but that has nothing to do with his -his discrimination case.

MS. CHAPMAN: Yes, it does, Your Honor. If you -- if you're saying, "I was laid off because of my disability and my age, and I was targeted and they manipulated the title changes so that they could isolate me and get rid of me because they didn't want me" --

THE COURT: I understand that's your -- that's your argument, but that's --

MS. CHAPMAN: Yes, Your Honor.

THE COURT: -- that's attenuated -- I mean, it has -- it's not -- he's claiming age and -- and disability.

Right?

MS. CHAPMAN: That's correct, Your Honor.

THE COURT: Okay. But there's -- we need evidence of that. We don't need evidence that what happened later was that the County did this and that they played fast and loose. I mean, that -- why -- why did the County do that? What's the

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motivation?

MS. CHAPMAN: Yes. Motivation.

THE COURT: No, no. No, no. What's the motivation? I'm asking you. Why did the County do what they did here --

MS. CHAPMAN: Mr. Schwartz's disability and age

and to get rid of --

THE COURT: Why did they do that? Or was it

because

Mr. Hoffman is my dad and we wanted to take care of him or -or because of Mr. Davis' -- Mr. Davis' uncle and they're fishing buddies or something. Who knows what the motivation was, but it doesn't show anything about discrimination.

MS. CHAPMAN: As Mr. Schwartz testified, he believed that the title change manipulation --

THE COURT: I understand that. But -- but it's not what people believed; it's what happened.

MS. CHAPMAN: I understand that, Your Honor. And there was a title change manipulation that shouldn't have occurred.

THE COURT: That occurred after -- after Mr. Schwartz was laid off.

MS. CHAPMAN: No, sir. It occurred before
Mr. Schwartz was laid off.

THE COURT: Before? Okay. So -- so they -- they
took care of him; they didn't take care of Mr.
Schwartz. But -- but to say that shows -- that shows
discrimination --

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yeah, you can go ahead and smirk at me all you want
to.

MS. CHAPMAN: Your Honor, it does --

THE COURT: I know I'm funny. I'm a comedian.
Okay. That's fine. Go ahead and laugh. All right.
Wrap it up. Go ahead.

MS. CHAPMAN: Your Honor, I would move for the
admission of the e-mail that Ms. King has identified,
Exhibit 20.

(Plaintiff's Exhibit No. 20, offered.)

MS. GIVENS: Objection. Relevance.

THE COURT: That -- that's the problem.

MS. CHAPMAN: Again, Your Honor, it is relevant.

The union brought forward --

THE COURT: No, it's not relevant. How does it show discrimination against Mr. Schwartz? I mean, it could show any number of things, couldn't it?

What's the motivation for the County? The County said, "We want to get Mr. Schwartz. So, by golly, let's do everything we possibly can," and they manipulate this all around. I mean, it's like -- you know, like, there's a communist hiding under the bed. There's a communist under every bed or something. Every -- every action the County takes is related to Mr. Schwartz. But what was the motivation for this?

MS. CHAPMAN: Again, Your Honor --

THE COURT: Now, who -- now, who wanted -- the County hated -- so hated Mr. Schwartz they said, "Hey, let's take care of Mr. Hoffman and the heck with Mr. Schwartz." Is that -- that your position? That's what you're saying.

MS. CHAPMAN: We're saying that they wanted to get rid of Mr. Schwartz because of his age and his disability and they made --

THE COURT: So they --

MS. CHAPMAN: -- altercations [sic] and title changes to be able to accomplish that so they could circumvent his rights under the Collective Bargaining Agreement.

THE COURT: Why not just get rid of him? That's what they did.

MS. CHAPMAN: Yes, Your Honor. And we've sued them for it.

THE COURT: You sued the County?

MS. CHAPMAN: Yes, Your Honor. Mr. Schwartz has

THE COURT: For this manipulation, this title
manipulation?

MS. CHAPMAN: We sued them for the
discrimination.

THE COURT: Pardon me?

MS. CHAPMAN: We sued them for age and
disability discrimination.

THE COURT: You're talking about this lawsuit?

MS. CHAPMAN: Yes, Your Honor.

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THE COURT: Yeah, but that -- that's -- that has
nothing to do with Mr. Hoffman.

MS. CHAPMAN: It does, Your Honor, when they
made sure that Mr. Hoffman had a different title so
that they were clear to lay off Mr. Schwartz instead

of Mr. Hoffman since Mr. Schwartz had more seniority. Mr. Hoffman, had he stayed in his title --

(Simultaneous crosstalk.)

THE COURT: -- they ran all this layoff stuff -- layoff stuff by the -- by the union, did they not?

MS. CHAPMAN: Yes, Your Honor. And the union brought it to the department's attention, and they --

BY MS. CHAPMAN:

Q. Ms. King, did you conduct an --

THE COURT: Go ahead. Go ahead. I'll give you some latitude. Go ahead. Go ahead with this, with your conspiracy.

MS. CHAPMAN: Again, Your Honor, I would request that Exhibit 20 be admitted.

THE COURT: It will be admitted. What is it? Exhibit what?

MS. CHAPMAN: 20, Your Honor.

THE COURT: It will be admitted.

MS. CHAPMAN: Thank you, Your Honor.

THE COURT: You're welcome.

BY MS. CHAPMAN:

Q. Ms. King, did you or anyone, to your knowledge, in your workforce do an investigation or look into the concerns about the title change manipulation that was brought to your attention in this e-mail?

MS. GIVENS: Objection to the form of the question.

Title change manipulation, I don't believe that that's

THE COURT: Oh, no, no. Overruled. That's -- that's

fine. That's -- that's what you want to call it, that's

fine. Go ahead.

THE WITNESS: Is the question did I do an

investigation? The answer is no.

MS. CHAPMAN: Nothing further, Your Honor.

29 U.S.C.A. § 623

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer--

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

29 U.S.C.A. § 630

§ 630. Definitions

For the purposes of this chapter--

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: Provided, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political

subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

(f) The term “employee” means an individual employed by any employer except that the term “employee” shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the

(g) The term “commerce” means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United

States; or between points in the same State but through a point outside thereof.

(h) The term “industry affecting commerce” means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry “affecting commerce” within the meaning of the Labor-Management Reporting and Disclosure Act of 1959.

(i) The term “State” includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

(l) The term “compensation, terms, conditions, or privileges of employment” encompasses all employee

benefits, including such benefits provided pursuant to a bona fide employee benefit plan.

29 U.S.C.A. § 631

§ 631. Age limits

(a) Individuals at least 40 years of age

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.

(b) Employees or applicants for employment in Federal Government

In the case of any personnel action affecting employees or applicants for employment which is subject to the provisions of section 633a of this title, the prohibitions established in section 633a of this title shall be limited to individuals who are at least 40 years of age.

(c) Bona fide executives or high policymakers

(1) Nothing in this chapter shall be construed to

prohibit compulsory retirement of any employee who has attained 65 years of age and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least \$44,000.

(2) In applying the retirement benefit test of paragraph (1) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in accordance with regulations prescribed by the

Equal Employment Opportunity Commission, after consultation with the Secretary of the Treasury, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions are made.

42 U.S.C.A. § 12111

§ 12111. Definitions

As used in this subchapter:

(1) Commission

The term “Commission” means the Equal Employment Opportunity Commission established by section 2000e-4 of this title.

(2) Covered entity

The term “covered entity” means an employer, employment agency, labor organization, or joint labor-management committee.

(3) Direct threat

The term “direct threat” means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(4) Employee

The term “employee” means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(5) Employer

(A) In general

The term “employer” means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this

subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) Exceptions

The term “employer” does not include--

- (i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or
- (ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of Title 26.

(6) Illegal use of drugs

(A) In general

The term “illegal use of drugs” means the use of drugs, the possession or distribution of which is

unlawful under the Controlled Substances Act. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(B) Drugs

The term “drug” means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act.

(7) Person, etc.

The terms “person”, “labor organization”, “employment agency”, “commerce”, and “industry affecting commerce”, shall have the same meaning given such terms in section 2000e of this title.

(8) Qualified individual

The term “qualified individual” means an individual who, with or without reasonable accommodation, can

perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation

The term "reasonable accommodation" may include--

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices,

appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10) Undue hardship

(A) In general

The term “undue hardship” means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered

In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include--

- (i) the nature and cost of the accommodation needed under this chapter;

- (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
- (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
- (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.