

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 B

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APPENDIX PART B

TABLE OF CONTENTS

A.	Excerpts from Trial Transcript.....	31a-58a
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THE COURT: You don't need to refresh his recollection because he hasn't forgotten anything yet.

MS. CHAPMAN: He said he didn't recall the date, Your Honor. That's why I was giving him the document.

THE COURT: The dates for what?

MS. CHAPMAN: His one promotion.

THE COURT: For his --

MS. CHAPMAN: His change in job. He said he thought it was around two years, but he wasn't sure.

So I wanted to refresh his recollection as to --

THE COURT: Well, why are you having it marked as an exhibit then? I'm sorry. Why are you showing it to him? Are you -- are you offering it as an exhibit or what? What are we doing?

MS. CHAPMAN: At this moment I am just trying to

refresh his recollection as to the time frame because he didn't recall the date.

THE COURT: Okay. Specifically what are we -- what position or what --

Case 2:13-cv-00709-JCM-VCF Document 158 Pg 98

MS. CHAPMAN: His promotional position as he testified that he did not recall whether -- and he thought it was approximately two years, I was trying to give him the actual date, to see if it refreshed his recollection looking at this document.

THE COURT: Okay. But the document lays out a lot of different information. What -- what are you referring to? What part of it, then?

Q. And was Mr. Harwell the one who -who did your evaluation and presented it to you, or was it done by someone

Case 2:13-cv-00709-JCM-VCF Document 158 Pg 104

different areas of work that enhanced myself as well as allowing the County to -- to gain more revenue through my efforts. For example, Ardell Jorgenson put me in charge of handling the bankruptcy area which apparently very few people had concentrated on. And by doing this, I would follow what's called proof of claims in a bankruptcy to allow the County to get additional revenue from the bankrupt estate that they were entitled to.

THE COURT: All right. You answered the question.

BY MS. CHAPMAN:

Q. Mr. Schwartz, have you -- if you would, please, I am going to show you what has been previously marked as Exhibit 2A. And can you identify Document 2A for us?

A. This is my Employee Performance Report from the period August of 2002 to August 2003.

Q. And is this a fair and accurate copy based upon your recollection?

A. Yes.

Q. And Michael Harwell was your super -- your immediate supervisor?

A. Correct.

Q. And was Mr. Harwell the one who who did your evaluation and presented it to you, or was it done by someone

Case 2:13-cv-00709-JCM-VCF Document 158 Pg 103

Q. Now, on -- could you explain to us what the alternative work schedule was?

A. Well, what-- what the department allowed was you can --

THE COURT: What's your question? I mean, it speaks for itself, doesn't it or does it not?

MS. CHAPMAN: Well, it there's a question as to

whether it was a department benefit or a benefit for Mr. Schwartz or a benefit for both parties, Your Honor.

THE COURT: I'm sorry. I asked a question. You didn't want to respond to it, but that's all right. You don't have to.

BY MS. CHAPMAN:

Q. Mr. Schwartz, was -- did you go out and seek the alternative work schedule, or was that something that was offered to all of the employees?

A. It was offered to all the employees.

Q. And was there also a benefit to Clark County for employees agreeing to go on the alternative work schedule?

THE COURT: Well, that --

MS. GIVENS: Objection. I don't know if he can speak

to --

THE COURT: Yeah, that's --

MS. GIVENS: -- whether or not it was a benefit for all employees.

Case 2:13-cv-00709-JCM-VCF Document 158 Pg 105

BY MS. CHAPMAN:

Q. Now, Mr. Schwartz, can you tell me how Ms.

Holloway, in your opinion, treated you differently?

A. Okay.

THE COURT: Well, except that assumes facts not in evidence. He hasn't said that she treated him differently, has he?

MS. CHAPMAN: I'll back up, Your Honor.

Case 2:13-cv-00709-JCM-VCF Document 158 Pg 108

for computer repairs. So there was activity. It would be like it was against the wall of the building. So it was pretty much out of the way. And I would like to

add --

THE COURT: Well, no, that's just answer the question.

THE WITNESS: Okay.

THE COURT: You've answered it. Go ahead.

Case 2:13-cv-00709-JCM-VCF Document 158 Pg 109

A. I -- I did taxes part time.

Q. And when you say you did taxes part time, was this for a large number of people or was it a lot of money or -- explain to us what you were doing.

A. It averaged around 12 to 14,000 a year. I -- before I moved to Las Vegas, I had a CPA firm in Hollywood, Florida, for 15 years which I was -- I was a partner of. I had -- we originally had --

THE COURT: Okay. Well, you -- you answered her question, though. All right. Go on.

Case 2:13-cv-00709-JCM-VCF Document 158 Pg 110

(Plaintiff's Exhibit No. 46, received.)

BY MS. CHAPMAN:

Q. Do you recognize what the document is?

A. Yes, it's --

THE COURT: He already testified he did.

MS. CHAPMAN: I'm sorry. I missed it, Your Honor.

I apologize.

BY MS. CHAPMAN:

Q. Now, Mr. Schwartz, you filled this document out?

THE COURT: That's what he said. He testified to that.

BY MS. CHAPMAN:

Q. And do you know why you didn't sign the document?

Case 2:13-cv-00709-JCM-VCF Document 158 Pg 111

A. I have no idea.

Q. Okay. But this is a -- an accurate copy of the

document you completed?

THE COURT: He testified it was.

MS. CHAPMAN: I'd move for the admission of Exhibit 6, Part II, from Bates stamps 373 through -- 368 through 373, Your Honor.

(Plaintiff's Exhibit No. 6, Part II (368 - 374), offered.)

MS. GIVENS: No objection, Your Honor.

Case 2:13-cv-00709-JCM-VCF Document 158 Pg 112

Q. Now, after this Management Analyst Study, did there come a time in business licensing when they were talking about changing job titles or job classifications?

MS. GIVENS: Objection. Question's vague as to "they were talking." I'm not certain who she's speaking of and --

THE COURT: It's also leading, but go ahead.

THE WITNESS: I heard rumors of that as well as --

THE COURT: There's an objection to the question.

THE WITNESS: As well as Mike Harwell --

THE COURT: Wait, wait. There's an objection.

THE WITNESS: Oh. I'm sorry.

MS. CHAPMAN: Your Honor, it's -- it's not vague when you're talking about the persons in business licensing, but I can be more specific, if you would prefer.

Case 2:13-cv-00709-JCM-VCF Document 158 Pg 113

THE COURT: Well, no.

MS. CHAPMAN: And as far as the time period, it was the time period after completion of the survey.

THE COURT: The objection was who's "they."

MS. CHAPMAN: As I said, Your Honor, I can be more specific.

THE COURT: Well, yeah. I mean, that's the objection. I mean, sustained.

BY MS. CHAPMAN:

Q. Mr. Schwartz, were -- did any of the employees in business licensing inform you, after the time period of this survey, that their title was being changed?

A. Yes.

Q. And did you have any discussions or hear any discussions from managers? And when I speak about managers, I'm talking about upper-level managers that would have speaking authority with regard to making decisions on title changes.

THE COURT: These would be hearsay. Right?

MS. GIVENS: Objection. Hearsay.

MS. CHAPMAN: Not if they're management speaking, Your Honor.

THE COURT: Management people, that's not hearsay?

MS. CHAPMAN: Not if it's a statement against

interest but...

THE COURT: Well, no. But management has
nothing to

Case 2:13-cv-00709-JCM-VCF Document 158 Pg 114
do with it, does it?

MS. CHAPMAN: If it's a statement against interest,
it does, Your Honor.

THE COURT: Pardon me?

MS. CHAPMAN: If it's a statement against interest,
it would.

THE COURT: That's your position, this is a
statement against interest? Is that what you're
saying?

MS. CHAPMAN: If it was a statement against
interest, it would be an exception --

THE COURT: Well, there's no question about that.
But that's what you're saying, this is a -- what he's

about to testify to is a statement against interest?

MS. CHAPMAN: No. Actually, you're not, Your Honor. It will now be.

THE COURT: Okay. Now I'm lost.

MS. CHAPMAN: I think I just need to rephrase the question. It would much be -- it would be much better.

THE COURT: Okay.

BY MS. CHAPMAN:

Q. Mr. Schwartz, at some time after the Management Analyst Study was completed, did you find out about employees in business licensing having their job classifications, their titles, changed?

A. Yes.

Case 2:13-cv-00709-JCM-VCF Document 158 Pg 115

Q. Okay. Who specifically did you find out had a title change?

A. Mike Harwell had a title change, and Lynda Smith had a title change, as well as Dan -- Dan Hoffman.

Q. Okay. Now --

THE COURT: Well, what's the foundation for this, though?

MS. CHAPMAN: Your Honor, he was still employed there. He was well aware of whether someone's job title changed.

THE COURT: But, I mean, how would he be aware -- you mean just -- he's just aware of it? It's just in the air or what?

MS. CHAPMAN: Well, yes. He was still employed there and --

THE COURT: He was still employed there --

MS. CHAPMAN: -- he was still working with these people.

THE COURT: How would he know their title had changed? How would he know their title had changed?

MS. CHAPMAN: I -- we can ask him, Your Honor, how he found out about the title change.

THE COURT: No, we don't need to. You need to.

BY MS. CHAPMAN:

Q. Mr. Schwartz, how did you find out that people's titles

Case 2:13-cv-00709-JCM-VCF Document 158 Pg 116
were changed?

A. Through Michael Harwell. He told me.

MS. GIVENS: And that's an objection, Your Honor.
That's hearsay.

BY MS. CHAPMAN:

Q. After --

THE COURT: Sustained.

BY MS. CHAPMAN:

Q. Did you observe Mr. Hoffman have anything change in his daily work duties and assigns from your observations?

THE COURT: Of course that's a leading question. Ask a question. Let him answer it rather than you -- you testifying, he says yes or no.

BY MS. CHAPMAN:

Q. Mr. Schwartz, were there any changes in Mr. -- what did Mr. Hoffman do?

A. From what I gathered, he was the HR liaison.

Q. Did he do other things?

Case 2:13-cv-00709-JCM-VCF Document 158 Pg 117

Q. Okay. Were you aware of a woman by the name of Lynda Smith?

A. Lynda Smith was also a --

THE COURT: Well, wait -- wait. The answer is yes --

THE WITNESS: Oh.

THE COURT: -- or no.

THE WITNESS: Yes.

Case 2:13-cv-00709-JCM-VCF Document 158 Pg 118

Q. Okay. Were -- did you ever see any documentation that showed that anybody had a -- any title changes or any e-mails or any type of notifications placed out to notify you that somebody's title would change?

THE COURT: What?

MS. GIVENS: Objection. Compound. Confusing.

THE COURT: Compound and confusing. Rephrase that.

Q. Okay. Did you ever ask anyone for a title change,

Case 2:13-cv-00709-JCM-VCF Document 158 Pg 119

Mr. Schwartz?

A. No, I didn't because --

THE COURT: That's all right. You've answered the

question.

Case 2:13-cv-00709-JCM-VCF Document 158 Pg 123

A. Only myself and Sherri Mueller.

Q. Now, do you know why, since you said you had the most seniority as the management analyst, you were laid off and not one of the others?

THE COURT: Well, that's, again, a leading question.

MS. GIVENS: Um-hum.

BY MS. CHAPMAN:

Q. Mr. Schwartz, are you aware of how you were selected for layoff?

A. I was selected because I was one of two individuals in that classification remaining as of the layoff date, which I believe was June 18th of 2010.

Q. Now, how did you learn, Mr. Schwartz, that you were one of only two people left in that job classification?

A. Mike Harwell indicated --

MS. GIVENS: Objection. Hearsay.

THE COURT: It is hearsay.

BY MS. CHAPMAN:

Q. In the lay -- other than Mr. Harwell, did you learn in any other way that you were the only one of two people left in that classification?

A. When I spoke to HR shortly after I got my termination notice -- sorry.

THE COURT: What's the question now that's not leading?

Case 2:13-cv-00709-JCM-VCF Document 158 Pg 124

BY MS. CHAPMAN:

Q. Other than Mr. Harwell -- my question was -- is, other than Mr. Harwell, how did you find out that you were only one of two people in that job classification?

A. I observed that the other people had different job titles.

Q. And how did you observe -- how did you come about that knowledge?

A. The office would provide a phone list, as I recall, maybe quarterly, and it would show -- it would show the name, the title, and the extension of the individual. The other people had different job titles.

Q. Okay. Did those titles change at a period of time after the survey and before the layoff?

A. Correct.

Q. And whose titles changed?

THE COURT: He answered all but -- all but himself and one other. Right? Okay.

THE WITNESS: All the --

BY MS. CHAPMAN:

Q. Who was the one other that didn't get a title

change?

A. Myself and Sherri Mueller did not get a title change.

Case 2:13-cv-00709-JCM-VCF Document 158 Pg 127

BY MS. CHAPMAN:

Q. Now, Mr. Schwartz, in this process, did you take other steps believing that your -- your rights had been violated?

A. After I received this letter --

THE COURT: It calls for a yes-or-no answer.

THE WITNESS: Sorry. Yes.

Case 2:13-cv-00709-JCM-VCF Document 158 Pg 130

A. Yes.

Q. And could you look at Exhibit No. 35, please. Do you recognize Exhibit No. 35?

A. Yes.

Q. And could you describe to me what Exhibit No. 35

is.

A. It's a letter from the Office of Diversity at Clark County to the EEOC explaining different things.

Q. And how did you obtain this?

A. Through requesting -- after I received the letter that my complaint was favorable, they sent me the -- their file or what they had -- what they were allowed to send me.

MS. CHAPMAN: I move for the admission of Exhibit 35, Your Honor.

(Plaintiff's Exhibit No. 35, offered.)

MS. GIVENS: I object, Your Honor. This witness cannot testify as to the basis, the content of this document. This was a document from the Office of Diversity. He may have received it, but he can't verify any of its content.

MS. CHAPMAN: Your Honor, it's a Government record received from the EEOC during the course of - during the course of their investigation. It's part of the official EEOC, and is a public record. It is admissible.

THE COURT: It's a public record?

MS. CHAPMAN: It's a public -- well, it's a document from a governmental agency kept in their normal course of

Case 2:13-cv-00709-JCM-VCF Document 158 Pg 131
business in their scope --

THE COURT: I mean, now you're testifying.

MS. GIVENS: I don't think there's any witness here that can testify about that.

THE COURT: Yeah. Somebody who's got knowledge of it that this is how it's generated.

MS. CHAPMAN: Your Honor, he can testify as to

documents he received from the EEOC of -- pursuant to his --his FOIA request.

THE COURT: But, I mean, to verify the -- this is -- the information in this document is --

MS. CHAPMAN: No, Your Honor. I'm only offering it as far as to the extent that it was a document he received from the EEOC.

THE COURT: I understand that. But it's more than that. Because now it's -- is this information correct? I mean, I don't know.

MS. GIVENS: Well, that's the point with our objection, is he can't testify about the content of it.

THE COURT: He can't testify about the contents of it. So if you want to say he got a notice, he got a notice, or whatever, but -- but the document itself contains information that -- that he has no knowledge of. And -- and we -- is it? I don't know. I

don't know where it came from. I don't know -- I don't know what it is. Don't I need a

Case 2:13-cv-00709-JCM-VCF Document 158 Pg 132

witness with a foundation, who can provide a foundation for it?

MS. CHAPMAN: Well, Your Honor, not when you're just admitting it for the purposes -- for the sole purposes of that Clark County, I mean, did respond to the EEOC, and there is evidence in the file.

THE COURT: How can I admit it for that purpose? How am I going to do that?

MS. CHAPMAN: With a limiting instruction, Your Honor.

THE COURT: But give it to the jury and say, "Okay, but all you -- don't -- don't look at the contents of this." I mean, that's -- that's --

MS. CHAPMAN: Well, Your Honor, I think counsel

opened the door in her opening argument when she said that they were never contacted by the EEOC.

MS. GIVENS: First of all, Your Honor, that misstates what I said in opening.

THE COURT: That's fine.

MS. GIVENS: And --

THE COURT: I mean, we need somebody with foundation, you know, to -- to verify this. There are going to be County witnesses, are there not?

MS. GIVENS: Your Honor, with all due respect, it's not our burden to --

Case 2:13-cv-00709-JCM-VCF Document 158 Pg 133

THE COURT: I know it's not. No, it's not.

MS. GIVENS: -- prove their case and --

THE COURT: No.

MS. GIVENS: -- we weren't anticipating --

THE COURT: I'll sustain the objection at this point.

(Plaintiff's Exhibit No. 35 rejected.)

BY MS. CHAPMAN:

Q. Mr. Schwartz, as part of this entire legal process, have you been -- well, let's start with the EEOC.

Were you asked to provide the EEOC with some type of damage calculation?

A. Yes.

THE COURT: Well, again, that calls for a yes-or-no answer, doesn't it? It's suggesting the answer, isn't it?

BY MS. CHAPMAN:

Q. Mr. Schwartz, did you provide -- what information did you provide to the EEOC?

A. I calculated the money I lost by the termination.

Case 2:13-cv-00709-JCM-VCF Document 158Pg 134

Q. Do you recognize Exhibit No. 41?

A. Yes.

Q. And could you please explain to us what Exhibit No. 41 is.

A. Okay.

THE COURT: Well, tell us how you would recognize it, first of all.

THE WITNESS: Because it was the document I prepared.

THE COURT: That's fine. Now go ahead.

THE WITNESS: Okay. I'm sorry, Your Honor.

Okay. This indicates from when I was laid off till when I would have retired, what salary I lost for the period, longevity pay that I lost, vacation/sick hour pay, the additional insurance that I paid, health insurance that I paid personally, the additional PERS benefit that I would have received based on my life expectancy, which, according to