IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

TERESA R. WAGNER, Plaintiff, vs. CAROLYN JONES, Dean Iowa College of Law (In her official and individual capacities), Defendant.	:	Case No. 3:09-cv-00010 HEARING TRANSCRIPT

Telephone Conference
Monday, February 8, 2010
10:00 a.m.

BEFORE: The Honorable CHARLES R. WOLLE, Senior Judge.

APPEARANCES:

For the Plaintiff:
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For the Defendant:
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EILEEN HICKS - CERTIFIED SHORTHAND REPORTER

P R O C E E D I N G S

THE COURT: Good morning, and I'll have the arguments on the qualified immunity issue. Mr. Carroll.

MR. CARROLL: Yes.

THE COURT: And we have a reporter.

Mr. Carroll.

MR. CARROLL: Just a minute, Your Honor.

I'm sorry.

THE COURT: When you're ready, the first issue is whether to grant or deny the request to extend the record with deposition testimony. Mr. Carroll.

MR. CARROLL: Yes. Actually I had that on the top of my list. I filed that motion mostly because when I filed the summary judgment, discovery was closed. Once I filed it, then actually Magistrate Shields extended it, and we had with plaintiffs counsel agreed to do some depositions, so I had simply filed I think Friday pages of the only named defendants.

THE COURT: All right. Mr. Fieweger, you may reply to that request.

MR. FIEWEGER: Judge, I don't have any objections to it so long as plaintiff has the opportunity to submit what she believes is in support of her position on this.

THE COURT: And how much time do you need to supplement the record on your behalf?

MR. FIEWEGER: Seven days.

THE COURT: All right.

MR. FIEWEGER: After I have the transcripts and sections already outlined.

THE COURT: Fine. At this point it seems to me fair that the record should be supplemented, and we'll do it simultaneously. Anyone wishing to supplement, including what the defendant already has supplemented, may do so within seven days from today. I guess that would make it the 15th.

And then if there's a request that something surprising has come in and you need additional filing, you may make that request in making your filing, or within three days after that.

I'll consider the whole matter submitted on the 18th. But at this point of course both of you know what was in the depositions, so you may argue as though that's already in the record.

And now, Mr. Carroll, you may make your argument on the merits of your claim for qualified immunity.

MR. CARROLL: Yeah, thank you.

You know, obviously the only named defendant is the dean of the law school, Carolyn Jones, and the constitutional violations require an intentional violation, so we start with that premise. Unlike other claims, where you don't have to intend to violate a statute or the Constitution, this requires an intentional violation.

And our request for qualified immunity is based on the fact that, one, it's a matter of law for the Court, although there clearly are Eighth Circuit cases and other circuits that say if there's underlying facts, maybe it shouldn't be as a matter of law, but it's not based on the qualified immunity issue.

And so in this case what I truly believe is uncontroverted is the dean of the law school, and any other position, she depends on the faculty to recommend names to her, and not only depends on it but that is the faculty policy with the affidavit of Dean Hines since the 1960's.

So in fact the dean of the law school at Iowa cannot offer a job to somebody if the faculty does not recommend that person to be offered a job.

And so that's what Dean Jones works with. I mean she was hired in 2004. She's actually a graduate from the University of Iowa. But when she was hired as dean, she came into that existing policy system.

Plaintiff in this case applied for a job and was not recommended by the faculty. So Dean Jones--and significant to qualified immunity is, she didn't have a name to appoint Teresa Wagner. Despite Wagner's claim, "Well, this must have been based on my First Amendment rights or political affiliation," Dean Jones did not have her name to appoint her.

Dean Hines' affidavit, Professor Burton's affidavit

says, "You can't hire her." I mean this has been the policy for many, many years.

And so from a qualified immunity point of view is, here's Dean Jones, "I don't have her name. I can't hire her."

With respect to--I think there was a comment in the resistance brief that all jobs weren't at issue; but they are. If you look at Professor Eric Andersen's affidavit, Wagner's name never was forwarded to the dean of the law school.

The first position, the writing instructor, which I think everybody will call like a permanent job, her name did not surface, and then the adjunct jobs that showed up shortly thereafter in the spring of '07, her name didn't surface, so Dean Jones had--you know, she had nothing to react to.

Another point that they've made in their resistance is the Jonathan Carlson e-mail, Professor Carlson at the law school, and I believe he wrote the e-mail the day after the faculty vote, basically brought up political affiliations. I mean the e-mail is in the record. Dean Jones, a part of what I supplemented last Friday was, she read the e-mail. She walked down the hall, and she talked to Professor Carlson, and said, "Well, what do you mean by this?"

There was nothing there for Dean Jones to react to.

It's no different than somebody else--and I cite in our brief several Eighth Circuit cases--where somebody may have said something, "Oh, I don't think this was fair," and the dean

of the law school reacted to it.

And she reacted to it that day that she got the e-mail, and then later the record will show she forwarded the other names to be hired in this position.

And so two things on this Carlson e-mail: One, she reacted to it. And, two, it doesn't really do anything to Dean Jones. So she knew of this information, and she reacted to it.

I mean the whole purpose of qualified immunity is what did this defendant do under constitutional analysis?

She reacted to it, and she did what the policy then allowed her to do.

THE COURT: Initially you argue that there is no clear constitutional rule that would be violated. Do you still stand on that position?

MR. CARROLL: Well, you know, I'm not sure I'm going to argue that, Your Honor. I mean the First Amendment--I mean there's a clear constitutional right to be protected from discrimination, you know, based on political association or affiliation.

But I think what we're relying on is she has to have intentionally violated that right, you know, based on what she had in front of her.

THE COURT: And is it significant that before she actually chose, based on the recommendations, she knew of the e-mail in which it was suggested that there may be a political

affiliation problem?

MR. CARROLL: Well, I think it's significant in the fact that that e-mail exists, and that takes us to the stray remark comments in cases in the Eighth Circuit; and one of them is the school board member saying, you know, "I think this was discriminatory," and the Eighth Circuit said, "Yes, that fact existed."

So in this case for qualified immunity, she knew that fact, and she addressed it, you know, with the professor that wrote the e-mail; but I think more importantly, what was she supposed to do with it?

I mean one professor wrote an e-mail. You know, the faculty did not recommend plaintiff.

THE COURT: I'll now turn to Steve Fieweger, and then give you a chance to reply, it's your motion.

Mr. Fieweger, your response.

MR. FIEWEGER: Thank you, Your Honor. Judge, it is a question of fact of what was she supposed to do with this.

Not only that, but there was facts developed in the deposition of Professor Bezanson, who was part of the faculty that voted on turning down Ms. Wagner, that he admitted that politics were discussed--her politics, meaning Ms. Wagner's politics, were discussed during the meeting of January 25th, 2007. That's the date in which they had voted to turn her down.

So you've got--and the fact of the matter is

Ms. Jones, Dean Jones, was part of that meeting. She was part of that process.

So what we have here, first, we have an associate dean, Eric Andersen, informing the dean of the law school that Teresa Jones came to him to express concern that she may not be considered for this position on her merit because of her conservative political affiliations.

Ms. Jones admits in her answers to interrogatories, which we'll supplement, and I think maybe we have it here, that she knew that going into the faculty vote.

Then we have Professor Bezanson saying, "Yeah, we talked about her politics on the day of the vote." Then 24 hours after the vote we have Jon Carlson, another associate dean of the law school, saying, "I'm concerned that she's not getting this at least adjunct position from the faculty because they so despise her politics."

All of that raises a question of fact of what a reasonable dean of the law school would do with that situation. And she says, "Well, I don't have to do anything. I talked to Carlson, and he couldn't identify in particular anybody, so I'm done with it."

That's not the test.

THE COURT: And your position under the Iowa process, I guess it's a culture, maybe it's administrative rules, that her duty was to do what, to return to a new faculty group?

MR. FIEWEGER: Oh, to inquire of the faculty as a whole to find out if that's really what is holding up at least an appointment to the adjunct position.

THE COURT: What do you mean by the faculty as a whole? There's a lot of professors.

MR. FIEWEGER: The ones that voted at the January 25th, 2007 meeting turning her down.

THE COURT: All right. And then if she learned what is in this record, then what is she to do?

MR. FIEWEGER: I think she's to redo the appointment.

There is no written policy, Judge, that requires a dean of the law school only accept the recommendation of the faculty. We'll point that out in our supplementation.

THE COURT: All right. But if it's a culture and that's done, how can you claim it's intentional discrimination based on political views?

MR. FIEWEGER: Well, because of the Carlson e-mail, saying, "Hey, it doesn't matter how qualified she is, this faculty despises her politics so much that she's never going to get a fair shake."

THE COURT: Is it also your contention that Jones, herself, had discriminatory motive or that it's simply the faculty discrimination that she accepted?

MR. FIEWEGER: I think there's a question of fact as to whether Dean Jones herself has a discriminatory intent,

Judge. She's a Democrat. She admits she's a long-term Democrat. She attributes answers to my client in the faculty presentation which are totally disputed by my client and are also refuted by e-mails from other professors.

Ms. Jones has taken the position in her deposition, Teresa Wagner had abysmally failed her faculty interview on January 24th by stating that she would refuse to teach analysis to these students, which is one of the requirements of the LAWR position.

My client says, "I didn't say that at all. I was questioned in detail by Professor Bezanson and another professor," who's name I can't remember right now, "about what is more important, teaching these people how to write legally or teaching them the tools to do legal analysis?"

And she felt that that was not a fair question, because it was required to do both in this class. She said she would do both, and then when pressed, said, "Well, I think we need to teach writing over analysis more because that's what we're here to do."

THE COURT: Is it still your position that there's a spoliation issue--

MR. FIEWEGER: Oh, absolutely.

THE COURT: --in the erasing of tapes? But doesn't the record show without dispute that that was standard procedure?

MR. FIEWEGER: Nobody knows that, other than--nobody's

given that testimony. It's a conclusory statement by people who didn't do that work, and they knew that there was a dispute right away.

I mean, Judge, none of these professors or the deans know what the statute of limitations is for a claim under Section 1983.

It's our position that an employer is required to preserve evidence to show what happened in the hiring process for the length of the time that's necessary, whether a claim can rise or not. Here we'd say two years.

THE COURT: What is the relief that she has requested that it would be in your view a jury's decision to make?

MR. FIEWEGER: To the monetary damages for the loss of income from the full-time position versus what she's earning now as a legal writing instructor.

She's also entitled to compensatory damages based on damages to her emotional distress, et cetera, as the result of incurring this loss of job opportunity.

THE COURT: And attorneys fees, I'll bet.

MR. FIEWEGER: 1988.

THE COURT: Are the adjunct positions, it's unclear to me, are they full time as well?

MR. FIEWEGER: No. They are a part-time position that teaches two classes each semester.

THE COURT: So if it goes to a jury, that would have

to be separate interrogatories for the jury about which position, if either, she was denied by reason of First Amendment?

MR. FIEWEGER: Correct.

THE COURT: All right. You may wind up your argument and then I'll give Mr. Carroll a chance to respond.

MR. FIEWEGER: Judge, I'd like to also cite the Court to the Hafer versus Melo case, which is a U.S. Supreme Court case from 1991, 112 Supreme Court 358.

THE COURT: 112, 358?

MR. FIEWEGER: Yes, Corp., 358. In that case there's a discussion about individual versus official capacity and the application of qualified immunity.

And in that case the auditor general of Pennsylvania discharged a number of persons based on the fact that they were allegedly Democrats.

The auditor general pled qualified immunity. She was carrying out official acts which entitled her to immunity from personal liability, according to her.

The Third District Court of Appeals and the U.S. Supreme Court rejected that, stating, "Requirement of action under color of state law means that Hafer," meaning the auditor general, "may be liable for discharging respondents precisely because of her authority as auditor general. We cannot accept the novel proposition that this same official authority

insulates Hafer from suit."

Immunity from suit under section 1983 is predicated upon considered inquiry into the immunity historically accorded the relevant official at common-law and the interest behind it.

And officials seeking absolute immunity must show that such immunity is justified for the governmental function at issue.

My point of citing that is hiring and firing decisions for a public law school is not a governmental function. It's an employer function that both private and public employees perform.

So the question of the applicability of the qualified immunity, I think, is a question at whole in this case based on the decision of Hafer.

THE COURT: I've always been confused somewhat, maybe more than somewhat, about the difference between individual liability and official liability, because really unless you were acting as dean, there was nothing she could do in this case.

MR. FIEWEGER: Correct.

THE COURT: So how can she have any individual liability? It would have to be in her official capacity.

MR. FIEWEGER: Well, I understand, but what they're saying is there's no liability under the Hafer decision. They're saying you can't raise the immunity defense for a decision you make in your position as the governmental official.

THE COURT: Thank you.

Mr. Carroll, you may make a final argument, and then I'll wait for further factual material before deciding the case.

MR. CARROLL: All right. Well, thank you.

I guess a couple of comments, Your Honor. On this record--and I know Steve called it like an unwritten policy, but in fact you have the dean of the law school, the former dean, William Hines, saying this has been the process since the 1960's.

So that's undisputed that the faculty has to vote to recommend a hire.

Dean Jones had nothing to do with that process. In fact, if you look at Dean Hines' affidavit, it started from Dean Mason Ladd's tenure at Iowa, and so that process has been in place for a long time.

So she sits here today, or in '07, "I didn't get a name recommended to me. What am I supposed to do?"

And I think that's important. I mean I don't think it's an unwritten policy. Dean Hines didn't assert in his affidavit that it's written somewhere, but I'm sure it is, but I think 40 years, if not 60 years, of a law school saying this is how we do it, I think it's important for Dean Jones to say, "How did I discriminate against this woman?" You know, "What is it I did?"

Now, she in fact was at the job talk or job

interview--Dean Jones; but the fact of the matter is, nothing was forwarded to her. She could not under Dean Hines' affidavit hire the woman.

And to assert on this record, "Well, you could have done something else," I mean Dean Hines is saying, "No, no, you really can't." And Professor Burton's affidavit saying "I've never seen in 32 years"--I mean these are people that have been at Iowa for a long, long time, so Dean Jones is sitting there, and plaintiff has the right to file a claim against us, but also she's asserting, oh, because she's a Democrat you voted against me.

I mean, Your Honor, to be a little blunt here, it's like saying because you're white, you didn't hire an African American.

I mean it is so unfair to say to Dean Jones, "Oh, you're a Democrat." Well, maybe she is. I think she answered the question she was. Well, so what?

She wasn't presented anybody.

Then with respect to quickly, Your Honor, on the spoliation of the videotape, you know, while the lawsuit is against Dean Jones, ultimately the University of Iowa, we have a lot of employment interviews, and to suggest that we're somehow supposed to keep every videotape or every document from every hire for the statute of limitations, which varies, is just unfair.

I mean--and there is in fact in this record an affidavit by the person in charge of the videotape that said, "I just recycle them. I wasn't doing anything. We simply recycle these things."

And so I think it's unfair to accuse the University of Iowa, particularly the college of law, of destroying evidence on purpose when in fact plaintiff in his brief--I mean the attorney's brief had pointed out we turned over 9,000 pages of documents. We weren't destroying anything, Your Honor. That's the process.

Thank you.

THE COURT: I want each of you to make a final comment about what I see as conflict in the Eighth Circuit and other circuit cases about how a district judge like myself makes factual determinations on qualified immunity issues when the facts are in dispute.

Steve Fieweger.

MR. FIEWEGER: Again, I think it is a factual question then for the trier of fact.

THE COURT: And then the jury gets the question of qualified immunity?

MR. FIEWEGER: Yeah.

THE COURT: And George Carol?

MR. CARROLL: Well, two things: He have cited in a reply brief O'Neil versus City of Iowa City.

THE COURT: My case, yes.

MR. CARROLL: Yes. Which basically said, you can't look at the--you cannot look at the underlying constitutional violation for qualified immunity. Qualified immunity is something else.

And then I guess more pointed to your question, Your Honor, is, it doesn't have to be a special interrogatory. If there's a question of law, it has to be a question of law.

THE COURT: So in your position, Mr. Carroll, if I deny qualified immunity because there are fact issues, and we get to trial in June, is it still a question of fact for the judge rather than the jury based on the entire record at trial?

MR. CARROLL: Well, and I'm working this on another case, Your Honor, so I don't know. I mean I think you can't look at the underlying constitutional violation. You have to look at what Dean Jones did.

So if in fact--so it's a matter of--is it a question for the trier of fact that Dean Jones got that affidavit--or, excuse me, e-mail from Professor Carlson?

I mean that's undisputed.

So what did she do--and it's undisputed the law school policy.

THE COURT: All right. But that's kind of begging the question about what the judge does if you say, "Well, it's really not in dispute."

But assuming that there are disputes in the documented records here about the facts, does the judge still make determinations of questions like Dean Jones' intent?

MR. CARROLL: I think it has to be a special interrogatory, like interestingly enough a First Amendment question, and the one I've used to assist the Court is, "Answer this interrogatory or verdict form,." And then it's advisory.

THE COURT: Advisory jury issue.

Okay. Steve Fieweger, do you want to comment on that?

MR. FIEWEGER: No. I've seen it done that way, Judge; but in my opinion, I still think it's a question of fact once--once there are disputed issues of material fact on that issue. I still think that then the jury still should be submitted that special interrogatory.

THE COURT: Finally, really my comment is that I'll try to get out a ruling by the end of the month.

You've got a week to file any additional documents, plus three days if you have replies to those documents.

So by about February 20 I'll have the case ready for decision, and assuming I decide, one of the problems in a case like this, I think qualified immunity can be appealed to the Court of Appeals either way; but do you still look to June 1 as your trial date, Steve Fieweger?

MR. FIEWEGER: Yes, I do.

THE COURT: And Mr. Carroll?

MR. CARROLL: Yes, absolutely.

THE COURT: I would think both sides would want it decided as soon as possible.

And, second question, is it a problem for you if we go to trial that it's a backup? Because we have an older case that's ahead of it.

MR. FIEWEGER: It could be for me, Judge, because I'm set June 12th, and I'm also set for June 20th. It's going to be a busy June.

THE COURT: All right. But I would think this would be a fairly short case.

MR. FIEWEGER: Yeah, I would think so.

THE COURT: Two or three days, maybe; but I don't want to rock your boat by telling you you have to move it that fast.

Thank you for your presentations. Well done. I'll get out a ruling as soon as you've filed your final documents. Have a nice day.

MR. FIEWEGER: Thanks, Judge.

THE COURT: Bye.

(Hearing concluded at 10:30 a.m.)

C E R T I F I C A T E

I, the undersigned, a Certified Shorthand Reporter of the State of Iowa, do hereby certify that I acted as the official court reporter at the hearing in the above-entitled matter at the time and place indicated;

That I took in shorthand all of the proceedings had at the said time and place and that said shorthand notes were reduced to typewriting under my direction and supervision, and that the foregoing typewritten pages are a full and complete transcript of the shorthand notes so taken.

Dated at Des Moines, Iowa, this 27th day of July, 2010.

/s/ Eileen Hicks
CERTIFIED SHORTHAND REPORTER