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FEATURED CASE:

Employment: Cancellation of open position after identifying preferred candidate can constitute Title IX discrimination

Charlton-Perkins v. University of Cincinnati, No. 21-3840 (6th Cir. June 3, 2022).

When a university eliminated a previously advertised open position after its search committee had recommended hiring a male candidate over two female finalists, that action gave rise to a claim under Title IX; the fact that someone else was never hired to fill the position did not warrant dismissal for lack of ripeness or failure to state a claim.

Facts: In September 2017, the University of Cincinnati (UC) Department of Biological Sciences (Department) determined that it needed an additional assistant professor. A search committee was formed and winnowed 62 applicants down to a group of nine, who were interviewed by members of the search committee, resulting in three finalists--two women and Dr. Mark Charlton-Perkins, a research scientist and U.S. citizen employed by the University of Cambridge (Charlton-Perkins). Although the search committee chair notified other committee members that she had previously done research work with Charlton-Perkins, the committee determined that no conflict of interest existed. The committee took its final vote on those three candidates in February 2018, and Charlton-Perkins was rated the favorite by a vote of three to one.

Behind the scenes, however, the Dean of UC's College of Arts and Sciences expressed to the search committee chair that he had decided to hire two candidates for the position, and that the most appropriate course of action was "to focus on the women candidates first."

The committee chair responded in March 2018 that "[p]utting two lower ranked candidates up first is not only against the recommendation of the committee but also plain discrimination," but that did not dissuade UC leadership. Citing the previous working relationship between the committee chair and Charlton-Perkins, the Dean informed the faculty that he believed an "equitable search" was impossible under the circumstances, and thus that he "was cancelling the search in its entirety."

Litigation: Charlton-Perkins sued in March 2020, alleging that UC, a federally funded institution, failed to hire him "solely on account of his gender." He also alleged that the Dean's actions "were committed intentionally, purposefully, maliciously, and in conscious and deliberate disregard for [his] right to not be subjected to gender discrimination." Against UC, therefore, he asserted a failure-to-hire claim under Title IX, 20 U.S.C. § 1681, seeking compensatory damages for the past violation and either instatement into the position or front pay as well. Against the Dean and another UC leader, he asserted per § 1983 that the pair violated his clearly established equal-protection rights against gender discrimination.

Dismissal at the district court: The defendants moved to dismiss, arguing that sovereign immunity shields UC from the § 1983 action against the university leaders in their official capacities, that qualified immunity shields them in their personal capacities, that Charlton-Perkins had not alleged an adverse employment action under Title IX or § 1983, and, relatedly, his suit was not yet ripe because nobody was ever hired for the position, and "[i]t makes no sense that Plaintiff's failure-to-hire claims could be ripe without any hire at all."
The district court dismissed. It reasoned that Charlton-Perkins had failed to show ripeness—his claims were not yet concrete but instead "dependent on a future event— Defendants hiring a female candidate instead of him." The court therefore lacked subject-matter jurisdiction.

Reversal on appeal: The Sixth Circuit disagreed. It found that the lower court had "oscillated between a true Article III ripeness analysis—whether the asserted injury is sufficiently imminent to warrant judicial intervention—and a Rule 12(b)(6) analysis—whether Charlton-Perkins had plausibly pleaded 'the essential elements of his claims,'" and had failed on both analyses. The district court's conclusion that Charlton-Perkins suffered no "discrete harm" because no other candidate received the position in question was incorrect. "No matter whether somebody else ever got the spot, it has always been the case that Charlton-Perkins was denied the spot. So Charlton-Perkins has always had that de facto injury—he has always been stuck with the denial—no matter whether someone else got the position instead." Because the completed past denial of the position to Charlton-Perkins satisfies the injury test, the district court had Article III jurisdiction.

The district court also erred in concluding that Charlton-Perkins failed to state a claim. "At the outset, we note the district court's apparent assumption that to even state a claim, Charlton-Perkins's complaint had to plead a prima facie case of discrimination under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–03 (1973). To the contrary, the Supreme Court has held that plaintiffs are not required 'to plead facts establishing a prima facie case,' given that the McDonnell Douglas framework 'is an evidentiary standard, not a pleading requirement. '"

Instead, to state an employment discrimination claim, Charlton-Perkins only needed to plead sufficient facts from which the court could plausibly conclude that defendants failed to hire him because of his gender. He had done so, because there is no requirement to show that somebody else filled the position. See, e.g*., Moore v. Abbott Labs*., 780 F. Supp. 2d 600, 613 (S.D. Ohio 2011) ("Cancellation does not bar a discrimination claim, however, if the plaintiff can establish that the defendant cancelled the position specifically to unlawfully discriminate against the plaintiff." The defendants also attempted to re-case Charlton-Perkin's argument, arguing "the discriminatory act he is alleging in this lawsuit is Appellees' refusal to follow the search committee's recommendation, not the decision to cancel the job search." This was ineffective: "One need not be a metaphysician to recognize that what Defendants did to Dr. Charlton-Perkins when they refused to hire him was an adverse employment action . . . . Charlton-Perkins did not waive the argument that defendants' cancellation of the search was itself part of defendants' alleged discriminatory scheme."

Given the facts of this case, it made no sense to require a showing that someone else had been given the job: "When the plaintiff alleges that defendants canceled the position itself as a pretext to conceal a discriminatory failure to hire, it would be nonsensical to say the plaintiff suffered no adverse employment action unless he could also show that someone else was hired for the nonexistent position."

The Circuit held that Charlton-Perkins plausibly alleged both a de facto injury sufficient to confer Article III jurisdiction and a ripened employment-discrimination claim under Title IX and 42 U.S.C. § 1983. It declined to consider the various affirmative defenses raised below, such as sovereign and qualified immunity, which were never addressed by the district court.

22a0121p-06.pdf (uscourts.gov)

Short Summaries:

4th Circuit – Employment Law – Discrimination – Burden of Proof

A firefighter sought to become a paramedic. The firefighter passed all the required tests and only needed to serve a one year internship to become fully certified to be hired as a paramedic. The city offered the internships on a first come first served basis but how it offered those internships became the crux of this discrimination complaint. The firefighter alleged that the internships were usually offered on a strict first come first served basis, while the city claimed that they were offered on that basis by shift. The city's claim persuaded the court below and on appeal. The firefighter asserted that a Captain had described the policy which the firefighter took to understand was not shift limited, but the firefighter failed to depose the Captain, so at most what the firefighter offered was a hearsay statement that was non-conclusive as to the policy. Sometimes you hope that Plaintiffs' counsel are operating strictly on a contingency, don't you?

Lyons v. City of Alexandria **(corrected opinion)**
201656.P.pdf (uscourts.gov)

4th Circuit – Condemnation- substitute facilities doctrine

This case involves a foray into the rules regulating federal condemnations. The case involves the need to expand Arlington Cemetery and land owned by Arlington County. The government sought to condemn the land (mostly streets) and sought to offer substitute facilities as just compensation as allowed by law. The county asserted with expert testimony that one parcel was a potentially very valuable piece of land and that it could close the road and sell the land for development and receive far more than the government was offering. The lower court resolved the case on summary judgment rejecting the county's view but the panel reversed. Instead, the panel concluded that the court at the summary judgment stage had made factual decisions based on disputed facts. The case offers quite a bit of information on the regulatory framework for federal takings of local government property and can serve as a primer for those defending those actions. Congratulations to Arlington County for a great win. The victory may be limited however, as the court seems to suggest that had the court acted under Rule 71.1 rather than Rule 56 the result would favor the federal government.

United States v. 8.929 Acres of Land in Arlington County, Virginia
211352.P.pdf (uscourts.gov)

8th Circuit – Qualified Immunity – Excessive Force – Municipal Liability

I read recently that "Thompson" is the 23rd most common name in the U.S. - down 4 notches since 2019 when it was number 19. So, when I read a case with a party named Thompson, I guess I shouldn't be surprised, nor should you think it's one of my many relatives. In this tragic case, a young man stole a cell phone and ran; chased by a police officer, he got into a car and closed the door and then faced the officer. Officer Thompson, who also responded to the dispatch, arrived at the car and saw the suspect make what Officer Thompson thought to be a threatening gesture towards the original officer and immediately fired at the suspect killing him. The case went to the 8th Circuit a couple years ago, where the court returned it to the lower court to review the Plaintiff friendly facts and decide whether to grant immunity (state and federal) or allow the case to go forward. On remand the lower court found no constitutional violation and as to the state law claim, only simple negligence for which immunity applied. This time the panel affirmed the result finding that qualified immunity applied under the circumstances because there was no clearly established law that required an officer to wait until a

suspect pulls a gun and shoots another officer before deadly force can be applied. The court affirmed the finding that no municipal liability existed for the city's policy of allowing non-patrol officers to occasionally work the streets as the policy was not deliberately indifferent to the suspect's rights.

N.S. v. Kansas City Board of Police Commissioners
201526P.pdf (uscourts.gov)

You may also want to read *Moses-El vs. City and County of Denver* **010110690693.pdf (uscourts.gov)**. This is a wrongful conviction case with some really bad facts but one that is unreported and one in which Denver prevailed on the basis that the Plaintiff failed to offer plausible claims in his pleadings. I couldn't tell if the Plaintiff was pro se, but as best I could tell he was represented. Hmmmmm!

This Just In:

Boulder Bans Assault Weapons, Limits Magazine Size, and Raises Firearms Possession Age to 21

Following the Colorado legislature's repeal of laws that had preempted local action on firearms, the Boulder City Council has passed sweeping reforms. As Deborah Swearingen reported in the *Boulder Camera* on June 7, 2022:

> A little more than a year after 10 people were killed in a mass shooting at the King Soopers on Table Mesa Drive, the Boulder City Council unanimously approved six gun violence prevention ordinances, including an assault weapons ban.
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> The legislation repeals Boulder's older ordinances governing assault weapons and large-capacity magazines, instead replacing them with new regulations that will do much of the same.
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> In addition to barring the sale and possession of assault weapons, the ordinance approved Tuesday limits magazines to 10 rounds or fewer, bans bump stocks and other rapid-fire trigger activators and raises the age of firearms possession to 21.
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> Other ordinances include one that prohibits carrying firearms in city properties, at demonstrations or near polling locations; another that bans ghost guns, or those that lack serial numbers, and another that requires signage warning of the dangers of gun ownership at gun shops as well as a 10-day waiting period before delivery of a firearm.
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> Boulder originally instituted its assault weapons ban in 2018 in response to the mass shooting at Marjory Stoneman Douglas High School.
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> However, in March 2021 Boulder District Judge Andrew Hartman deemed the ban invalid, ruling that only state or federal laws can prohibit the possession, sale and transfer of assault weapons and large-capacity magazines.
>
> Colorado had passed laws "that are effectively a scheme preempting local governments from enacting municipal firearms and magazine possession ordinances," according to court documents.

Hartman's ruling came down 10 days before a gunman killed 10 people at the south Boulder King Soopers. At least partially in response to the shooting, the state Legislature repealed the preemption statute.

Boulder City Council unanimously supports gun violence prevention legislation (dailycamera.com)