



February 7, 2018

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SERIOUS CONCERNS ABOUT THE NOMINATION OF KURT ENGELHARDT TO THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

Dear Senator:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition of more than 200 national organizations committed to promoting and protecting the civil and human rights of all persons in the United States, I write to express serious concerns about the nomination of Kurt Engelhardt to the U.S. Court of Appeals for the Fifth Circuit.

Kurt Engelhardt serves as a U.S. District Judge in the Eastern District of Louisiana. He has dismissed several sexual harassment cases despite severe or pervasive evidence of a hostile work environment. He also dismissed the convictions of five police officers who were prosecuted for killing unarmed African-American civilians in the wake of Hurricane Katrina and then staging a cover-up. The Senate should carefully consider whether Judge Engelhardt should be elevated to the Fifth Circuit, where his rulings would affect millions more people across three different states.

Sexual Harassment and Discrimination Cases: Judge Engelhardt has a record of dismissing compelling claims by sexual harassment victims. Although plaintiffs in such cases have the burden of proof, judges have the discretion to determine whether the harassment was severe or pervasive enough to constitute unlawful conduct. Under binding Supreme Court precedent, at the summary judgment stage, the facts are to be viewed in the light most favorable to the nonmoving party.

In *EEOC v. Rite Aid Corp.*,¹ the victim, Tiffany Blackmon, suffered deeply disturbing sexual harassment during her six months of employment as a security guard at a New Orleans Rite Aid store. The Equal Employment Opportunity Commission filed this lawsuit on behalf of Ms. Blackmon in 2003. On numerous occasions, her male colleagues rubbed their hands or bodies against her in store aisles and in the most troubling encounter, a male colleague “cupped” her breast: “Blackmon stated that Washington came up to her in the store and said ‘your radio shouldn’t be up like this,’ *i.e.*, on her left breast pocket; grabbed her breast; and stated ‘it should be down here.’”² In addition, there was evidence that her male colleagues routinely commented to her about her physical appearance and body parts, ogled her, pinched her thigh, rubbed the back of her neck, tried to kiss her in a storeroom, backed her into a corner of the store on three different occasions and asked for her phone number, discussed sexual exploits in her presence, asked her what she slept in at night, and threatened

¹2004 WL 1488578 (E.D. La. July 1, 2004).

²Id. at *8.

to go to her house. She also witnessed her male co-workers use undercover security cameras to zoom in on the chests and buttocks of women customers. But this compelling evidence was not sufficient for Judge Engelhardt to conclude that Ms. Blackmon had been sexually harassed, and he granted summary judgment for the employer on that claim. He wrote that “the six to seven alleged instances where Perkins brushed up against Blackmon in the aisles, the three times that Washington allegedly cornered Blackmon in the store, and any other unwelcomed physical touching – allegations of which are relatively few in number over several months – were neither severe nor physically threatening, though quite unwelcome.”³

In *Ellzey v. Catholic Charities Archdiocese*,⁴ Judge Engelhardt again granted summary judgment to the employer and dismissed the plaintiff’s sexual harassment claim. In this case, plaintiff Sharon Ellzey alleged that her immediate supervisor subjected her to “hugs with sensual back rubs” once every 1-2 weeks with “observations about her clothes, buttocks, weight (she was losing weight) and hairstyles in relation to her looking sexy allegedly occurring once every week.”⁵ However, Judge Engelhardt concluded: “Assuming the truth of these allegations, the Court finds that, under existing case law, these alleged instances and any other unwelcomed physical touching-allegations were neither severe nor physically threatening, though quite unwelcome and indeed inappropriate.”⁶ The existing case law that Judge Engelhardt cited to justify his dismissal of the plaintiff’s claims were two cases, neither of which were in the Fifth Circuit, so they did not constitute binding precedent.

In *Matherne v. Cytec Corp.*,⁷ Judge Engelhardt also granted summary judgment for an employer sued for sexual harassment by a female employee. In this case, plaintiff Cynthia Matherne, an employee at a chemical manufacturer, alleged that a male co-worker “commented on her buttocks and then pressed her against a wall, kissed or pecked her on the lips, and said, ‘now you ain’t never going to get married.’”⁸ This event was so traumatic for Ms. Matherne that she locked herself in a room for two hours and then voluntarily admitted herself to the psychiatric ward of a local hospital for two days. She also complained that during a five-year period, between 1995 and 2000, her male co-workers “requested sexual favors and had used pornographic movies and websites in the break room and work area.”⁹ But none of this conduct was unlawful in the eyes of Judge Engelhardt, who concluded: “The Court agrees with defendant that the conduct alleged here does not rise to the level of an objectively abusive environment, as required under Title VII.”¹⁰

Contrary to Judge Engelhardt’s dismissals, the fact patterns in these cases strongly suggest the existence of a hostile work environment, and the plaintiffs should have been permitted to get past the summary judgment stage and have their cases heard by a jury. As the Equal Employment Opportunity Commission sets forth in its guidance: “Harassment becomes unlawful where 1) enduring the offensive conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive enough to create a

³Id. at *19.

⁴833 F. Supp. 2d 595 (E.D. La. 2011)

⁵Id. at 603.

⁶Id.

⁷2002 U.S. Dist. LEXIS 6304 (E.D. La. Mar. 28, 2002).

⁸Id. at *2.

⁹Id.

¹⁰Id. at *13.

work environment that a reasonable person would consider intimidating, hostile, or abusive.”¹¹ Under this reasonable person standard, it is troubling that Judge Engelhardt did not conclude that the harassment endured by the women in these cases was severe or pervasive. It suggests that he does not have a fair grasp of what is intimidating, hostile, or abusive. It also indicates that as a judge he has incorrectly applied the proper legal standard at the summary judgment phase of these lawsuits, because he clearly did not view the facts in these cases in the light most favorable to the women who were brave enough to file suit.

In addition, Judge Engelhardt granted summary judgment for an employer in a pregnancy discrimination case, *Taylor v. Jotun Paints, Inc.*,¹² where an office assistant at a paint company, Brandi Taylor, was fired two weeks after giving birth. Before having the baby, Ms. Taylor was unable to work for several months because her obstetrician placed her on bedrest. Judge Engelhardt dismissed the case, noting: “The fact that Plaintiff’s absences were caused by pregnancy does not dispense with the general requirement that employees must show up for work.”¹³ This decision, like the sexual harassment decisions discussed above, reveals a judge who has interpreted the law in ways to restrict the rights of women to be free from workplace discrimination and harassment.

Danziger Bridge Case: In 2012, five New Orleans police officers were given lengthy prison sentences after being convicted of police brutality for killing two unarmed African-American civilians and severely injuring four others on the Danziger Bridge in New Orleans in the aftermath of Hurricane Katrina, and then engaging in a cover-up designed to make the shootings look justified. Tom Perez, the Assistant Attorney General of Civil Rights at the U.S. Department of Justice at the time, called the case “the most significant police misconduct prosecution since Rodney King.”¹⁴ But Judge Engelhardt threw out the convictions in 2013, based on evidence that three federal prosecutors had written anonymous blog posts about case proceedings. Although such blog posts were inappropriate, Judge Engelhardt’s decision was very troubling, and, as a *Washington Post* editorial put it, “a dereliction of justice far greater than the prosecutorial abuses he cited in his order.”¹⁵ The editorial continued:

As the judge himself acknowledged, there is no evidence that members of the jury saw the online postings in question or any online postings about the case. (Once chosen as jurors for the trial, they were all under the judge’s orders not to read anything about the case.) In the howling wind of pre-trial publicity about the case – in print, online, on television and in social media – it is far-fetched to believe that the online rants of the prosecutors, while blatantly improper, were anything more than a speck of dust. Judge Engelhardt’s emotional 129-page ruling is unconvincing in the extreme. It gives the impression that he is so exasperated and infuriated with prosecutors, for a host of reasons not confined to the online postings that he has thrown out the officers’ convictions

¹¹<https://www.eeoc.gov/laws/types/harassment.cfm>.

¹²2010 WL 3720435 (E.D. La. Sept. 15, 2010).

¹³Id. at *12-13.

¹⁴<https://www.reuters.com/article/us-katrina-police-sentencing/prison-time-for-new-orleans-ex-cops-in-post-katrina-killings-idUSBRE8331A920120405>.

¹⁵https://www.washingtonpost.com/opinions/no-justice-in-new-orleans-danziger-bridge-case/2013/09/21/e8977754-2239-11e3-b73c-aab60bf735d0_story.html?utm_term=.ac99d66e7a83.

in a fit of pique. The result is to restore what many people in New Orleans surely wished had receded along with Katrina's floodwaters: an abiding sense that justice has not been done.¹⁶

Although the Fifth Circuit affirmed Judge Engelhardt's ruling in a 2-1 decision, Judge Edward Prado dissented and stated that "the defendants advance no credible argument that the newly discovered evidence in this case – the identity of the commenters on NOLA.com – would likely produce an acquittal."¹⁷ The five police officers ultimately entered guilty pleas, but they received sentences far less severe than the original sentences.

While Judge Engelhardt was highly critical of what he determined to be "grotesque prosecutorial misconduct" in the Danziger Bridge case, he took a different approach to prosecutorial misconduct in the 2012 case, *Truvia v. Julien*. In that case, two African-American plaintiffs sued the Orleans Parish (New Orleans) district attorney's office for constitutional violations, after Louisiana state courts vacated their convictions due to *Brady v. Maryland* violations. Judge Engelhardt granted defendants' summary judgment motions and dismissed the case after concluding there was no policy, custom, or practice of constitutional violations by the Orleans Parish district attorney's office. Four members of the U.S. Supreme Court recognized a different reality in a related case that involved misconduct by that very same office. Writing for the dissent, Justice Ginsburg stated:

From the top down, the evidence showed, members of the District Attorney's Office, including the District Attorney himself, misperceived *Brady's* compass and therefore inadequately attended to their disclosure obligations.... Based on the prosecutors' conduct relating to Thompson's trials, a fact trier could reasonably conclude that inattention to *Brady* was standard operating procedure at the District Attorney's Office. What happened here, the Court's opinion obscures, was no momentary oversight, no single incident of a lone officer's misconduct. Instead, the evidence demonstrated that misperception and disregard of *Brady's* disclosure requirements were pervasive in Orleans Parish.¹⁸

A *New York Times* editorial asked, more pointedly, "How many constitutional violations will it take before the New Orleans district attorney's office is held to account for the culture of negligence and outright dishonesty that has pervaded it for decades?"¹⁹

In short, in the *Truvia* case involving African-American plaintiffs who sought a measure of justice after their wrongful convictions, Judge Engelhardt failed to credit a long and ignominious record of constitutional violations by the DA's office. But in the Danziger Bridge case, when the defendants were police officers charged with police brutality, Judge Engelhardt readily found prosecutorial misconduct and constitutional violations for some online comments.

¹⁶Id.

¹⁷*United States v. Bowen*, 799 F.3d 336, 362 (5th Cir. 2015) (Prado, J., dissenting).

¹⁸*Connick v. Thompson*, 563 U.S. 51, 79-80 (2011) (Ginsburg, J., dissenting).

¹⁹<https://www.nytimes.com/2015/10/20/opinion/justice-gone-wrong-in-new-orleans.html>.



Controversial Memberships: Judge Engelhardt has been a member of the Federalist Society since 2002 and serves on the advisory board of the New Orleans Federalist Society chapter. This out-of-the-mainstream legal organization represents a sliver of America’s legal profession – just 4 percent – yet nearly 95 percent of Trump’s circuit court nominees, and a significant number of his district court nominees, have been Federalist Society members. In addition, from 1994 to 2001, Judge Engelhardt was a member of an anti-abortion group called Louisiana Lawyers for Life, whose mission is “to join Louisiana attorneys and law school students together to support the legal protection of human life, born and unborn, from abortion, euthanasia, and infanticide through legal, legislative, and educational means.”²⁰ Membership in extreme organizations like these helps explain why President Trump decided to nominate Judge Engelhardt for the Fifth Circuit, but it raises serious concerns because our constitutional system of government relies on judges who will uphold long established precedent, are open-minded, and do not bring an ideological agenda to the bench.

For the foregoing reasons, The Leadership Conference recommends that you carefully scrutinize Judge Engelhardt’s record before confirming him to the U.S. Court of Appeals for the Fifth Circuit. Thank you for your consideration of our views. If you have any questions or would like to discuss this matter further, I can be reached at (202) 466-3311.

Sincerely,

Mike Zubrensky
Chief Counsel and Legal Director

²⁰<http://www.prolifelouisiana.org/resources/lalawyersforlife.html>.