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COURT OF APPEALS

STATE OF NEW YORK

SANDIFORD,

Respondent,

-against-

No. 157

CITY OF NEW YORK DEPARTMENT
OF EDUCATION,

Appellant.

20 Eagle Street
Albany, New York 12207
September 10, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Penina Wolicki
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 157, Sandiford?

2 Go ahead, counselor. How - - - do you want
3 any rebuttal time?

4 MS. GREENBERG: Two minutes, please, Your
5 Honor.

6 CHIEF JUDGE LIPPMAN: Two minutes, sure.
7 Go ahead.

8 MS. GREENBERG: The principle at the core
9 of the Department of Education's appeal here is that
10 where an educator is disciplined based on a well-
11 substantiated instance of inappropriate conduct
12 towards a student, a discrimination claim should not
13 lie absent actual evidence, specific evidence, that
14 the particular decision at issue was actually
15 motivated by discrimination.

16 JUDGE PIGOTT: Ms. Greenberg, was there an
17 answer filed in this case?

18 MS. GREENBERG: An answer. I'm not - - -
19 I'm not certain, Your Honor. I'd have to double-
20 check - - -

21 JUDGE PIGOTT: Don't - - -

22 MS. GREENBERG: - - - my - - -

23 JUDGE PIGOTT: - - - don't you have to file
24 an answer before you can bring a motion for summary
25 judgment?

1 MS. GREENBERG: Your Honor, I'm - - - I'm
2 just not certain - - -

3 JUDGE PIGOTT: Okay.

4 MS. GREENBERG: - - - on the record here.

5 In this case - - - the Supreme Court in
6 Reeves said that once the defendant proffers a
7 legitimate reason, a nondiscriminatory reason for
8 their decision, that the application - - -

9 CHIEF JUDGE LIPPMAN: How do we know - - -
10 or aren't - - - isn't a little bit fuzzy here as to
11 what went on? I mean, can we really - - - how do we
12 know what - - - what's happening? Is there - - - is
13 there a basis in the record to know exactly what
14 happened?

15 MS. GREENBERG: Your Honor, for the
16 purposes of a discrimination claim, the question is
17 what evidence did the defendant have? So here, the
18 evidence that they had was - - -

19 JUDGE GRAFFEO: It sounds like you're
20 asking for a collateral estoppel effect. But it
21 really wasn't a hearing and an opportunity to be
22 heard, was it?

23 MS. GREENBERG: We - - - with respect to
24 the collateral estoppel, after - - - I believe we
25 sent a letter of correction to the court - - - after

1 we filed the briefs, it did come to our attention
2 that plaintiff's union requested an arbitration; an
3 arbitration was scheduled. The plaintiff's attorney
4 representing her for purposes of that proceeding
5 asked the arbitration not to go forward at that point
6 in time.

7 We acknowledge that the record is sparse on
8 that issue. We don't contend that an arbitration
9 occurred, but rather that - - -

10 JUDGE GRAFFEO: I'm just saying - - -

11 MS. GREENBERG: - - - it was an
12 opportunity.

13 JUDGE GRAFFEO: - - - you're looking to
14 give a similar type effect to something that maybe
15 there needs to be more fact finding on.

16 MS. GREENBERG: I'm - - - I'm speaking
17 specifically to the discrimination claim, leaving
18 aside - - - let's assume for purposes of this
19 argument that the collateral estoppel doesn't apply.
20 The evidence in front of the defendant at the time
21 that they made the decision, the statements by the
22 two students, the corroborating evidence from the
23 other students, the fact that the plaintiff's account
24 didn't make sense, the fact that there was an OSI
25 investigation, which doesn't necessarily - - -

1 CHIEF JUDGE LIPPMAN: That is - - - you're
2 saying the plaintiff's account doesn't make any
3 sense. How so?

4 MS. GREENBERG: Your Honor - - -

5 CHIEF JUDGE LIPPMAN: Weren't there a lot
6 of indicators about - - - that could at least
7 conceivably make this a valid claim?

8 MS. GREENBERG: My understanding is that
9 the plaintiff denies that she spoke with Student A,
10 but admits that she called Student B, Ms. Cadel
11 (ph.), to say that she hopes that Student A isn't
12 saying - - -

13 JUDGE SMITH: But wouldn't it - - - I mean,
14 granted that she - - - there's evidence that she
15 acted inappropriately or even maybe she admits - - -
16 maybe what she admits to is inappropriate. Could a
17 jury find that - - - that your client - - - Mr. Coleman
18 overreacted?

19 MS. GREENBERG: Your Honor, the - - - this
20 court has actually held in City School District v.
21 McGraham that the fact that reasonable people might
22 disagree about the exact punishment, doesn't make it
23 arbitrary and capricious.

24 JUDGE SMITH: Well, I mean - - - well, I
25 mean, I guess isn't the question whether a rational

1 fact-finder could say that anti-gay bias was part of
2 the motive for Mr. Coleman's decision?

3 MS. GREENBERG: Your Honor, and this is
4 where the OSI investi - - -

5 JUDGE SMITH: Do you agree that that's the
6 question?

7 MS. GREENBERG: I agree that could be one
8 of the questions. But we would respectfully submit
9 that in this particular type of case, where you have
10 the public policies that animate protecting children
11 from misconduct, wherein there is at least a
12 reasonable - - -

13 JUDGE SMITH: You're talking about a
14 special rule protecting - - - it's almost a privilege
15 to discipline a - - - to discipline a teacher for
16 sexual misconduct, even though this one wasn't with a
17 child and it wasn't very sexual.

18 MS. GREENBERG: No, what I'm saying, Your
19 Honor, is that - - - is that the application under
20 Reeves is not formulaic. It depends on the
21 particular conduct - - -

22 CHIEF JUDGE LIPPMAN: Isn't there public
23 policy against discrimination?

24 MS. GREENBERG: Certainly, Your Honor.
25 They are competing public policies at issue.

1 CHIEF JUDGE LIPPMAN: Isn't that - - -
2 isn't that what we're dealing with here?

3 MS. GREENBERG: There are competing public
4 policies at issue here. But what I'm saying is that
5 - - -

6 CHIEF JUDGE LIPPMAN: But is one - - - is -
7 - - assuming that's right, is one a slam dunk over
8 the other, and that there's nothing left to be
9 resolved here - - -

10 MS. GREENBERG: It - - -

11 CHIEF JUDGE LIPPMAN: - - - when there are
12 - - - wouldn't you say it's fair to say that there
13 are - - - there's kind of indicia on both sides of
14 what you're advocating?

15 MS. GREENBERG: It depends on the context -
16 - -

17 CHIEF JUDGE LIPPMAN: Of what each of you
18 is advocating - - -

19 MS. GREENBERG: - - - Your Honor. Here the
20 plaintiff has submitted no specific evidence, no
21 nonspeculative evidence, that this particular
22 decision was motivated by discriminatory - - -

23 JUDGE SMITH: They - - - she did submit
24 evid - - - there may be credibility problems, but she
25 testified that this man called people faggots in

1 front of the world, that he - - - that he imitated
2 gay people with - - - with an offensive walk. Is
3 that - - - is that not enough to make a rational def
4 - - - assuming it's true, is that - - - could you not
5 rationally conclude from that, that that was part of
6 his motivation?

7 MS. GREENBERG: No, Your Honor. This goes
8 to the heart of our appeal, that under the case law,
9 general statements of discriminatory - - -

10 JUDGE SMITH: Is - - - this is - - -

11 MS. GREENBERG: - - - animus - - -

12 JUDGE SMITH: - - - these are stray
13 remarks, basically, is what you're saying?

14 MS. GREENBERG: It needs to either be
15 connected to the employment decision at issue, or the
16 plaintiff has to have some evidence that the
17 proffered reason was pretextual, that it was false,
18 that there was disparate treatment - - -

19 CHIEF JUDGE LIPPMAN: Well, but wasn't
20 there - - -

21 MS. GREENBERG: - - - of actual - - -

22 JUDGE RIVERA: Couldn't she - - -

23 CHIEF JUDGE LIPPMAN: - - - evidence that
24 he was hostile to her, that he had a close
25 relationship to the two young women? I mean, why - -

1 - why is this such an open and shut case in your
2 mind? There's certainly a lot of evidence, again, as
3 I think Judge Smith just said, you may have issues as
4 to credibility, but - - - but there's certainly
5 plenty out there that might lead to the conclusion it
6 was pretextual.

7 MS. GREENBERG: There - - - I don't believe
8 plaintiff introduced any - - -

9 CHIEF JUDGE LIPPMAN: And a rational person
10 - - -

11 MS. GREENBERG: - - - evidence - - -

12 CHIEF JUDGE LIPPMAN: - - - could find it
13 pretextual.

14 MS. GREENBERG: In this - - -

15 JUDGE PIGOTT: Let me ask it - - -

16 MS. GREENBERG: - - - in this - - -

17 JUDGE PIGOTT: - - - this way. First of
18 all, I don't find your answer, so I don't know what
19 you admitted to or what you denied with respect to
20 the claims in the - - - in the complaint. Let's
21 assume it's a general denial, just for purposes.

22 Your argument cannot be they don't have any
23 evidence. If you're moving for summary judgment, you
24 have to establish your entitlement to judgment as a
25 matter of law. Don't you agree?

1 MS. GREENBERG: Correct. Your Honor, our -
2 - -

3 JUDGE PIGOTT: The question's not whether
4 or not they have evidence. The fact of the matter is
5 that you want to come forward and say this is a mixed
6 motive, and that because it's a mixed motive and
7 because we're dealing with sex and we're dealing with
8 children, there, the mixed motive doesn't apply. And
9 as long as you have a motive, you win.

10 MS. GREENBERG: Your Honor, we're
11 contending that where we come forward with - - -

12 JUDGE PIGOTT: Do you disagree with what I
13 just said, then?

14 MS. GREENBERG: I'm a - - - I agree in
15 part. And I'm just elaborating on it. That where we
16 come forward with a nondiscriminatory reason that's
17 substantiated by the evidence that the plaintiff
18 needs to produce something more, either proof of
19 comparators that were treated differently, proof that
20 the proffered reason was false, proof that the
21 statements were connected, in the way that - - - the
22 case law, when summary judgment is denied, "trading
23 is a young man's - - -

24 JUDGE RIVERA: Because of the - - -

25 MS. GREENBERG: - - - game", discussing - -

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JUDGE RIVERA: - - - statements being - - -

MS. GREENBERG: - - - at the board
meetings.

JUDGE RIVERA: - - - the statements being
connected, you're asking for a smoking gun, which is
not what you necessarily have in a discrimination
case.

MS. GREENBERG: There could - - -

JUDGE RIVERA: I mean, if she - - - if she
presents evidence that - - - as Judge Smith already
mentioned - - - that the principal makes these biased
remarks, targets her, embarrasses her in particular,
why is that not enough?

MS. GREENBERG: Because they have to be
connected. The law doesn't assume that if a person
does one thing wrong - - -

JUDGE RIVERA: And then he treats her
adversely - - -

MS. GREENBERG: - - - they do some other
things - - -

JUDGE RIVERA: - - - why - - - why is that
not enough?

MS. GREENBERG: Well, the adverse treatment
was based on - - - if we had come forward - - -

1 JUDGE SMITH: You say it has to be
2 connected to the employment decision?

3 MS. GREENBERG: Once we come forward with a
4 nondiscriminatory - - -

5 JUDGE SMITH: Yeah.

6 MS. GREENBERG: - - - reason, yes.

7 JUDGE SMITH: Let me - - - let me put a
8 very extreme hypothetical. There's a black person
9 who's complaining that she wasn't promoted or was
10 disciplined in some way, and all she has - - - the
11 only fact she has is the person who made the decision
12 is a life member of the Ku Klux Klan. Can she get to
13 a jury with that?

14 MS. GREENBERG: If the plaintiff - - - if the
15 defendant in that case had the type of evidence that
16 we do that the - - -

17 JUDGE SMITH: No, no, no.

18 MS. GREENBERG: - - - would be - - -

19 JUDGE SMITH: I told you all the evidence
20 in the case - - -

21 MS. GREENBERG: Then - - -

22 JUDGE SMITH: - - - can she get to the
23 jury?

24 MS. GREENBERG: Not - - - not where a - - -

25 JUDGE SMITH: You say no - - -

1 MS. GREENBERG: - - - nondis - - -

2 JUDGE SMITH: - - - because - - - you say

3 no - - -

4 MS. GREENBERG: - - - not where a non - - -

5 JUDGE SMITH: - - - because it's not - - -

6 MS. GREENBERG: - - - discriminatory reason

7 - - -

8 JUDGE SMITH: - - - connected to the

9 employment decision.

10 MS. GREENBERG: - - - is proffered.

11 JUDGE SMITH: Um-hum.

12 CHIEF JUDGE LIPPMAN: Okay, counsel.

13 Thanks.

14 MS. MEENAN: Good afternoon. May it please
15 the court, my name is Colleen Meenan, and I represent
16 Ayodele Sandiford.

17 JUDGE SMITH: Isn't it - - - isn't it a
18 problem, Ms. Meenan, that if - - - if you can get to
19 a jury solely on evidence of general bias, without
20 anything connected to the employment decision, then
21 every - - - then every decision-maker who's ever said
22 a biased thing in his life, the plaintiff can sue no
23 matter what the decision is?

24 MS. MEENAN: Well, yes, as to the second
25 part of your question that any - - - any plaintiff

1 could conceivably get to a jury. But that's not
2 really what's at stake here, Judge.

3 JUDGE SMITH: Well - - - well, I mean, is
4 it - - - I'm a little confused. Are you saying, yes,
5 any plaintiff can get to a jury? There are no
6 summary judgment in these cases, once you've got some
7 evidence of bias by the defendant?

8 MS. MEENAN: Correct. I think that - - -

9 JUDGE SMITH: I mean, Judge - - - there's
10 one of - - - a Second Circuit case where Judge
11 Calabresi says, if that's - - - if that's a rule,
12 then anyone who's lucky enough to have failed a
13 promotion and to be in a group that the promoter is
14 biased against, can get - - - automatically got to a
15 jury. Is that really the law?

16 MS. MEENAN: No, Judge. You know, not on
17 that set of facts. But I think those are not the set
18 of facts at issue here. I mean, there is an ex - - -

19 JUDGE SMITH: Well, why - - - my question
20 is, why shouldn't it be rule that you have to connect
21 the - - - the bias with the employment decision?

22 MS. MEENAN: Well, that is the rule, Judge.
23 I do accept that you have to show causation, that you
24 have to connect - - -

25 JUDGE SMITH: But you - - - you're going to

1 say you could - - - if there's bi - - - if there's
2 strong enough evidence of bias, you can infer it.

3 MS. MEENAN: No - - -

4 JUDGE SMITH: That - - - you don't have any
5 direct evidence here of this guy saying, I'm sorry,
6 I'm not going to have any gay people on my staff, or
7 anything like that?

8 MS. MEENAN: No, but we have sufficient
9 direct evidence of his state of mind in terms of his
10 gay animus.

11 JUDGE SMITH: I understand that. You - - -
12 you have evidence, some of it pretty good, some of it
13 pretty terrible, but you have evidence that - - - of
14 - - - that he - - - of negative feelings about gay
15 people by this man. He said - - - is that it? Is
16 that enough to get you to a jury? And you have
17 evidence that he - - - that he wanted to fire her.
18 Is that it? Does that get you to a jury?

19 MS. MEENAN: Yes, be - - - yes, Judge,
20 because - - - Your Honor, because every reasonable
21 inference on a motion for summary judgment should be
22 given to the plaintiff. And based on - - -

23 JUDGE SMITH: Okay. But then why doesn't
24 that work at - - - then every gay person that Mr.
25 Coleman either dismissed or disciplined or didn't

1 promote or didn't hire can get to a jury.

2 MS. MEENAN: Based on the direct evidence
3 and the - - -

4 JUDGE SMITH: That's a yes?

5 MS. MEENAN: Yes.

6 JUDGE SMITH: So the City better - - -
7 better expect a lot of lawsuits.

8 MS. MEENAN: But they're - - - if they're -
9 - - if they are employees - - - if they are employees
10 - - -

11 JUDGE SMITH: Or wanted to be.

12 MS. MEENAN: - - - under his - - - under
13 his direct supervision.

14 JUDGE PIGOTT: Are we debating mixed
15 motives?

16 MS. MEENAN: We're debating both mixed
17 motives and I think pretext. Under the example given
18 by Your Honor in terms of the evidence, if there's -
19 - - if a defendant comes forward with what they
20 describe as a nondiscriminatory reason for taking the
21 actions that they took, and the plaintiff has also
22 established a prima facie case, under a mixed-motive
23 analysis, the defendant's evidence at the summary
24 judgment stage does not negate the prima facie case.

25 JUDGE GRAFFEO: So - - -

1 JUDGE PIGOTT: Does that apply to - - -

2 JUDGE GRAFFEO: - - - so summary judgments

3 - - -

4 JUDGE PIGOTT: - - - retal - - -

5 JUDGE GRAFFEO: - - - are going to be
6 pretty rare then, in a mixed motive situation?

7 MS. MEENAN: When there is direct evidence,
8 as there is in this record, I would suggest to the
9 Court, yes, it should be very rare on a summary
10 judgment. And I think that was the discussion, in
11 part, in Bennett, by the First Department.

12 JUDGE PIGOTT: Does that apply on a
13 retaliation? You have a claim for retaliation as
14 well, do you not?

15 MS. MEENAN: Yes. Yes, Your Honor.

16 JUDGE PIGOTT: Does that apply on
17 retaliation?

18 MS. MEENAN: Yes, it does. It does reply -
19 - - apply under the state law in retaliation when - -
20 - because under the state law, both mixed motive and
21 pretext are still both relative theories of analysis
22 for those types of claims under the state law.

23 JUDGE PIGOTT: How about under federal law?

24 MS. MEENAN: Under - - - yes. Because
25 state law follows the federal law, Title VII, in this

1 regard.

2 JUDGE PIGOTT: Are you familiar with the
3 Nassar case that was decided earlier this year by the
4 Supreme Court, that said in retaliation cases, mixed
5 motive doesn't apply?

6 MS. MEENAN: Somewhat, Judge, yes. But I
7 don't think that that case has ever been applied by
8 this court in the - - - in the state law context for
9 - - -

10 JUDGE PIGOTT: It's very new. Yeah.

11 MS. MEENAN: - - - yes. Under the New York
12 State Human Rights Law. So the state of the law at
13 this time is still the same in the state court.

14 And I - - - with respect to the collateral
15 estoppel issue, I mean, I think that the - - - the
16 argument made by my friend from the City has been
17 that they've, in essence, conceded that argument,
18 because this was nothing more than an informal
19 process. This was not a - - -

20 CHIEF JUDGE LIPPMAN: But she says despite
21 that, you still don't get to the - - -

22 MS. MEENAN: Well, I think it has to be
23 given some context in that there was two separate
24 processes that took place. There was this - - - the
25 grievance process, which never, you know, arose to a

1 level of an arbitration or a hearing, but there was
2 also an internal investigation by the Office of
3 Special Investigations where there was a finding
4 that, at best, Sandiford engaged in inappropriate
5 conversation.

6 JUDGE SMITH: On the other hand, there were
7 - - - and that - - - basically that office agreed
8 with Mr. Coleman. On the other hand, there are quite
9 a few people who saw this situation who said, this is
10 nothing. I mean, the victim herself said I didn't -
11 - - I didn't expect Mr. Coleman to take it seriously.

12 MS. MEENAN: Yes. And I also think that
13 it's worth noting that this was not a student-teacher
14 relationship. Sexual misconduct, inappropriate
15 conduct or contact between a two - - - a teacher and
16 a student is reprehensible. But what's equally
17 reprehensible is to charge this young woman with
18 sexual misconduct based on nothing more than her
19 sexual orientation.

20 JUDGE PIGOTT: Wasn't - - - what was the
21 situation, if it wasn't a teacher-student?

22 MS. MEENAN: These - - -

23 JUDGE PIGOTT: What is TOAST ?

24 MS. MEENAN: This is an after-school
25 program. It's - - - it was - - - the after-school

1 program was run by a separate company that contracts
2 with the New York City Department of - - -

3 JUDGE PIGOTT: That aside, though, I mean,
4 it's - - - somebody's in charge and some people are
5 doing something? In other words, wasn't this lady
6 doing - - - you know, supervising or doing something
7 with these kids?

8 MS. MEENAN: No, Judge, these weren't - - -
9 these weren't children. This was not a teacher - - -

10 JUDGE SMITH: This is a - - -

11 MS. MEENAN: - - - these were all
12 coworkers.

13 JUDGE SMITH: - - - sort of - - - is this
14 more like the camp counselor and the more senior
15 counselor? Is that the - - -

16 MS. MEENAN: No, not at all. Not at all.
17 This was not the situation - - -

18 JUDGE ABDUS-SALAAM: A coworker situation?

19 JUDGE GRAFFEO: I thought she was a college
20 student that was working at the after-school program.
21 Am I wrong?

22 MS. MEENAN: No, these are three coworkers.
23 They all held the same title.

24 JUDGE SMITH: You say - - - basically your
25 client and the alleged victim, you say, were peers,

1 essentially?

2 MS. MEENAN: Yes, they were all peers - - -

3 JUDGE SMITH: How old is your client? Does
4 the record - - -

5 MS. MEENAN: At the time she was twenty-
6 six.

7 JUDGE SMITH: And the - - - and the alleged
8 - - - the so-called victim was eighteen?

9 MS. MEENAN: No, there was - - - there was
10 two other young women involved. One was - - -

11 JUDGE SMITH: One's - - - yeah, but the - -
12 -

13 MS. MEENAN: - - - one was - - -

14 JUDGE SMITH: - - - the one that she - - -
15 the one she said I would be interested in you if you
16 were older was sixteen?

17 MS. MEENAN: No, actually, Judge, she was
18 seventeen. The - - - she continues to be described
19 as sixteen, but there's sufficient - - -

20 JUDGE SMITH: Okay.

21 MS. MEENAN: - - - evidence that she was
22 actually seventeen.

23 JUDGE SMITH: Okay.

24 JUDGE PIGOTT: How old was the third one?

25 JUDGE SMITH: And the other lady was

1 eighteen? The other young lady was - - -

2 MS. MEENAN: The other lady was eighteen.

3 They were all coworkers. They worked in the same

4 title as activity specialist for younger children.

5 But my client did not have a teacher-student

6 relationship. She didn't have any authority over

7 these two women. They were all coworkers, similar to

8 if they were all working in - - -

9 JUDGE ABDUS-SALAAM: Counsel, are you

10 saying that - - -

11 MS. MEENAN: - - - a McDonald's together.

12 JUDGE ABDUS-SALAAM: - - - Mr. Coleman, the

13 principal, would not have reported this incident had

14 your client not been gay?

15 MS. MEENAN: That is corr - - -

16 JUDGE ABDUS-SALAAM: That it had just been

17 one coworker talking to another coworker; he was

18 under no obligation to report that incident?

19 MS. MEENAN: Well, I think that he was

20 motivated. I think that's the whole point is that he

21 was motivated by her sexual orientation. And I think

22 he - - - otherwise, he didn't have any authority

23 whatsoever in this program. He wasn't a supervisor.

24 He wasn't connected with the program, but for the

25 fact - - -

1 JUDGE SMITH: There is a point, though,
2 that we don't - - - I mean, even though - - - I agree
3 with you, this isn't exactly the most shocking
4 conduct I've ever heard. But we don't want to
5 discourage school principals from reporting it when a
6 - - - if a twenty-six-year-old man or woman is
7 arguably hitting on an eighteen-year-old - - - you
8 can call her a woman, but she's pretty close to being
9 a girl.

10 MS. MEENAN: I don't - - - you know, Judge,
11 I don't think - - - I think that that occurs every
12 day in life between - - -

13 JUDGE SMITH: Yeah, is that good?

14 MS. MEENAN: - - - people in a work
15 situation.

16 JUDGE SMITH: Yeah, but - - - but some
17 people think it's a problem.

18 MS. MEENAN: Well, particularly, Principal
19 Coleman thought it was a problem because there was -
20 - -

21 JUDGE SMITH: Yeah, I guess what I'm saying
22 - - -

23 MS. MEENAN: - - - anti-gay bias.

24 JUDGE SMITH: - - - is, actually putting
25 principals in a very tough position. If you - - - if

1 you don't protect the kid, you're going to get sued
2 for not protecting the kid. If you go after the
3 older person, if that person happens to be in a
4 protected class, you - - - on your theory, it's very
5 easy to get to a jury in a discrimination case.

6 MS. MEENAN: There was no child involved
7 here, Judge. And I think it almost asserts - - -

8 JUDGE SMITH: Different case, if it were?

9 MS. MEENAN: Well, I think it almost
10 asserts, to some extent, a gaypanic defense, which
11 has been raised in the criminal context. But for the
12 fact that she was a lesbian, there are absolutely no
13 facts in this case to support a description - - -

14 JUDGE SMITH: You can't imagine a principal
15 being a little disturbed if a twenty-six-year-old man
16 had been asking dates - - - asking an eighteen-year-
17 old coworker for dates?

18 MS. MEENAN: Well, Judge, there is evidence
19 in the record that, in fact, a security guard, who
20 was about twenty-six, Antonio Bane (ph.), was
21 involved in a relationship with Minerva Ritchie
22 (ph.), and the principal didn't seem to be concerned
23 about that.

24 JUDGE READ: Remind me again how this came
25 to the principal's attention?

1 MS. MEENAN: These young women often spent
2 time with him in his office. Both - - -

3 JUDGE READ: So they told him about it?

4 MS. MEENAN: - - - Minerva Ritchie and
5 Cadel. And as it was described by Paul Shorter
6 (ph.), who was the actual supervisor in the after-
7 school program, that -- because Shorter interviewed
8 all of these women when he learned of this. And
9 Shorter's representation was that this was nonsense,
10 it didn't warrant an investigation, and he conveyed
11 that to Coleman.

12 Shorter also testified that these women
13 were in having a conversation, a normal run-of-the-
14 day - - -

15 JUDGE READ: But I guess my question is,
16 and I don't recall, how did it get to anybody's
17 attention to investigate it or to look at it in the
18 first place?

19 MS. MEENAN: That - - -

20 JUDGE READ: Somebody didn't complain, one
21 of the women didn't - - - must've complained?

22 MS. MEENAN: No. They - - - they didn't
23 complain. And that's clear in the record.

24 JUDGE RIVERA: What's the - - - what's the
25 triable - - - I'm sorry, what's the triable issue of

1 fact?

2 MS. MEENAN: The triable issue of fact is
3 whether or not the employer and the principal were
4 motivated by discrimination and retaliation in taking
5 adverse acts or whether or not there was a legitimate
6 business justification.

7 That's the evidence in the record. Both
8 the defendant's evidence and the plaintiff's
9 evidence, and at this stage, the summary judgment
10 stage, giving all reasonable inferences to the
11 plaintiff, the ultimate decision about what evidence
12 rules the day is up to the jury.

13 CHIEF JUDGE LIPPMAN: Okay, counselor.
14 Thanks.

15 Counselor, how do you connect this? If
16 your position is you've got to connect this, you have
17 to connect it to the decision determining, how does
18 one do that?

19 MS. GREENBERG: There are - - - there is -
20 - -

21 CHIEF JUDGE LIPPMAN: Based on what they
22 have, how do they make that connection?

23 MS. GREENBERG: Well, they could - - - if
24 they had had examples of comparators who were
25 reasonably - - - who were reasonably similarly

1 situated, they give - - -

2 CHIEF JUDGE LIPPMAN: What about the - - -
3 the guard that she's talking about?

4 MS. GREENBERG: That was not substantiated.
5 You can't com - - - you can't compare a situation
6 where someone looked into something and found nothing
7 was wrong and there - - -

8 JUDGE RIVERA: What if there are no - - -

9 MS. GREENBERG: - - - was just - - -

10 JUDGE RIVERA: - - - comparators? That's
11 just the nature of that workplace, there are no
12 comparators?

13 MS. GREENBERG: There - - -

14 JUDGE RIVERA: Are you out?

15 MS. GREENBERG: - - - there - - - the cases
16 give several different avenues. In - - - in some of
17 the case law, the comments that were made, "trading
18 is a young person's game", discussing the stereotyped
19 comments in the context of making a decision about
20 the person, evidence - - - some other evidence.
21 Here, the real problem the plaintiff has is that she
22 can't prove that the reason was pretextual.

23 CHIEF JUDGE LIPPMAN: Yeah, but - - -

24 MS. GREENBERG: Because the complaints - - -

25 -

1 CHIEF JUDGE LIPPMAN: - - - but say - - -
2 say this - - -

3 MS. GREENBERG: - - - are what they are.

4 CHIEF JUDGE LIPPMAN: - - - was a more
5 extreme version of what you have. Say that you have
6 the principal was wildly homophobic, you know, in a
7 very public way. Say that he was best friends with
8 these two other women. Say he had, you know,
9 demonstrated his hostility to this particular person.
10 And - - - but we don't know that this decision was
11 because of all of that. You know what I mean? How
12 do you - - - do you make the connection in a
13 situation that to some, would be that this was
14 obviously discrimination.

15 MS. GREENBERG: Well, it was exactly - - -

16 CHIEF JUDGE LIPPMAN: Do you follow what
17 I'm saying?

18 MS. GREENBERG: - - - in recog - - - yes -
19 - -

20 CHIEF JUDGE LIPPMAN: Is this - - - is this
21 easier said than done? The flip side of the issue
22 of, gee, everyone gets to a jury, how do you get to a
23 jury?

24 MS. GREENBERG: It was exactly in
25 recognition of this issue that the court set up these

1 different frameworks: the McDonnell Donna (sic)
2 list, the Price Waterhouse, where the plaintiff could
3 initially put forward a lower burden and then have
4 several different options: showing comparators,
5 showing that it was reasonably related, showing that
6 the proffered reason is false, showing other
7 circumstantial evidence that it was false, arose in -
8 - -

9 CHIEF JUDGE LIPPMAN: In this situation,
10 what would we have to have?

11 MS. GREENBERG: In this situation - - -

12 CHIEF JUDGE LIPPMAN: What specifically in
13 this situation?

14 MS. GREENBERG: - - - the problem that you
15 have is that the reason is substantiated by so much
16 evidence. And that's exactly why the plaintiff is
17 struggling to come up with - - -

18 JUDGE RIVERA: What about the fact that she
19 gets reinstated?

20 MS. GREENBERG: Your Honor, if that were -
21 - -

22 JUDGE RIVERA: Why doesn't that undermine
23 your argument?

24 MS. GREENBERG: - - - if - - - two points,
25 if I may, quickly?

1 JUDGE RIVERA: Please.

2 CHIEF JUDGE LIPPMAN: Quickly, go ahead.

3 MS. GREENBERG: If that were allowed to be
4 taken into account, that would disincentivize
5 employer grievances - - - employee grievance systems
6 which are promoted by this court and favored by this
7 court.

8 But second of all, the defense cites at
9 least three cases, all involving New York City
10 Department school system, where the educators on the
11 ground, who were acting without the benefit of
12 hindsight, want to terminate. And either the JHO,
13 the arbitrator, the - - - one of the judges in the
14 case, disagrees and gives some lighter sentence.

15 And if we were to allow every one of these
16 cases to go to trial, that would disincentivize those
17 same educators on the ground and make them overly
18 conservative; where even where they have evidence and
19 even where reasonable people could disagree, they
20 have to go to trial over each and every one of these
21 allegations, as long as the plaintiff can say,
22 without any substantiation, that they're a member of
23 a protected group and that the - - - one employee and
24 one decision-maker made statements unrelated to this
25 of some discriminatory animus.

1 Again, without any other evidence, other
2 than their own allegations, every single one of these
3 instances - - -

4 CHIEF JUDGE LIPPMAN: So he would have to
5 say to - - - to her, I'm firing you because you're
6 gay?

7 MS. GREENBERG: No, again, there's several
8 - - -

9 CHIEF JUDGE LIPPMAN: I mean, is that the
10 only way to get to that point?

11 MS. GREENBERG: - - - there's several
12 different avenues that the law offers.

13 JUDGE SMITH: What if he had said, I don't
14 think gay people should work in schools?

15 MS. GREENBERG: That would be - - -

16 JUDGE SMITH: Would that do it?

17 MS. GREENBERG: - - - much more akin to the
18 types of cases where summary judgment was denied.
19 "Trading is a young man's game." Discussing the
20 person's candidacy in a board meeting using sex-
21 stereotyped comments. Saying things along the lines
22 of "you must not be interested in this because you're
23 too old." Those are all examples from the cases - -
24 -

25 CHIEF JUDGE LIPPMAN: What this comes down

1 to is you don't think they made the connection, and
2 they think that they have enough of a connection
3 based on their evidence?

4 MS. GREENBERG: They think that merely
5 stating any discriminatory animus on the part - - -
6 any general statement on the part of a decision-
7 maker, immediately taints every decision, no matter
8 how much evidence otherwise supports - - -

9 CHIEF JUDGE LIPPMAN: Okay, counsel.

10 MS. GREENBERG: - - - that decision.

11 CHIEF JUDGE LIPPMAN: We understand both of
12 your arguments. Appreciate it and we'll - - -

13 MS. GREENBERG: Thank you very much.

14 CHIEF JUDGE LIPPMAN: - - - try to make a
15 decision.

16 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Sandiford v. City of New York Department of Education, No. 157 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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