

A Case of Faculty Discrimination Based on Politics

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On Feb. 13 in St. Paul, Minn., the Eighth Circuit Court of Appeals will hear arguments in *Wagner v. Jones*. The appeal is procedurally complex. But the legal question at the heart of the original case has potentially far-reaching implications for public and private legal education. To wit, whether a candidate for a faculty position at a state law school could provide sufficient evidence that, in violation of her constitutional rights, she had been denied employment because of her political beliefs.

In a trial concluded 15 months ago, Teresa Wagner accused the University of Iowa College of Law of violating her First Amendment right of free expression and 14th Amendment right of equal protection under the law when the school's dean, Carolyn Jones, refused to hire her for its legal analysis, writing and research program.

Ms. Wagner was hired initially in August 2006 and was serving on a part-time basis as the associate director of the law school's writing center when two full-time positions for legal-writing instructors opened up that fall. She became one of the two finalists for the openings.

She had impressive qualifications. Ms. Wagner had taught legal writing at George Mason University Law School in Virginia, edited three books, practiced as a trial attorney in Iowa, and written several legal briefs, including one in a U.S. Supreme Court case, *Stenberg v. Carhart* (2000), which struck down a Nebraska law criminalizing partial-birth abortions. The faculty-appointments committee at the University of Iowa College of Law enthusiastically recommended her appointment as a full-time instructor.

There was a catch, however. Teresa Wagner is a pro-life conservative. Her résumé showed prior employment with the National Right to Life Committee and the Family Research Council, both socially conservative organizations in Washington, D.C.

The University of Iowa's law-school faculty, like most law-school faculties, is overwhelmingly liberal. When Ms. Wagner was considered for the job, the law school had only one Republican on its 50-member faculty, according to party registration records obtained from the Iowa Secretary of State, and he had joined the faculty 25 years earlier.

In deciding whether to hire Ms. Wagner, neither her politics nor those of the law school's faculty should have been relevant. Yet the day after the law-school faculty voted to reject Ms. Wagner, in January 2007, Associate Dean Jon Carlson wrote to Dean Jones in an email, "Frankly, one thing that worries me is that some people may be opposed to Teresa serving any role, in part at least because they so despise her politics (and especially her activism about it)." The dean generally follows the results of an all-faculty vote, but precedent at the law school shows that the dean has the discretion to set it aside.

Other than by looking to politics, it is difficult to explain the law school's efforts to avoid hiring Ms. Wagner. One of the full-time legal-writing instructor positions for which she applied went to the other finalist, Matt Williamson, a self-described "off the charts liberal" with one semester of law-school teaching experience, no legal publications and no experience practicing law. He requested to leave his new job at mid-year, but Dean Jones persuaded him to stay. He quit after one year of full-time teaching.

The law school struggled to fill the second instructor vacancy with adjuncts, preferring over Ms. Wagner a former research assistant originally hired fresh out of law school. The research assistant had worked for Prof. Randall Bezanson, a former law clerk to Harry Blackmun at the time Justice Blackmun wrote the decision in *Roe v. Wade*. Mr. Bezanson (who passed away recently) led the opposition to Ms. Wagner.

She sued in federal court in January 2009. At the trial three years later, the law school's principal defense was that Ms. Wagner had "flunked" her interview when she refused to teach the "analysis" component of the class, which involves methods of legal reasoning. Ms. Wagner disputed the allegation. But the law school destroyed the videotape of her job interview, as court testimony confirmed, within a month of its decision not to hire her.

Faculty emails also contradicted the law school's allegations about her poor interview. For example, shortly after Ms. Wagner's job talk, Prof. Sheldon Kurtz, respected for his work on trusts and estates, emailed Mark Janis, chairman of the faculty-appointments committee: "Great. Lets [sic] hire her." Nevertheless, more than a dozen law professors who took the stand supported the law school's story.

Ms. Wagner convinced the jury that her rights had been violated. After the trial, on Nov. 20, 2012, the jury foreman told the *Des Moines Register*, "Everyone in that jury room believed she had been discriminated against." But after three days of deliberation, the jury could not agree on whether to hold Dean Jones exclusively responsible.

Presiding Judge William Pratt and his magistrate, Thomas Shields, phoned counsel to say the jury was hung and the case would be retried. However, according to court records, after thanking and discharging the jury, Mr. Shields, in an extraordinary move, called jurors back from the courtroom. Despite the trial having ended, he instructed the foreman to sign a verdict form that next to Count 1 had an "X," indicating that Dean Jones was not liable for a First Amendment violation. Later, Judge Pratt dismissed Count II, the 14th Amendment violation.

Now, with her appeal next week, Ms. Wagner is asking the Eighth Circuit to grant her a new trial.

Since the lawsuit, the law school has hired at least four faculty members who are Republicans, including former Congressman James Leach and the Republican governor's chief legal counsel, Brenna Findley, who was appointed as an adjunct professor. The hirings

perhaps gave the school cover from charges of ideological bias during the Wagner affair, but taking such steps just perpetuates the idea that it's proper to subject job candidates to a political litmus test.

Instead, state boards of regents and state legislatures have a responsibility to ensure that their law-school faculties do not discriminate on the basis of political persuasion. Procedural transparency in hiring practices would be a help, beginning with the retention for a reasonable period of all relevant documents, including video recordings of interviews. Private university trustees should implement the same safeguards at their institutions.

Hiring decisions should be based on candidates' merits, including their ability to vigorously present in the classroom and criticize conservative as well as progressive views. If the Eighth Circuit protects Teresa Wagner's constitutional rights, the court will also bolster legal education in America by promoting its depoliticization.

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