No. 10-2588

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

TERESA R. WAGNER,

Appellant,

v.

CAROLYN JONES, Dean Iowa College of Law
(in her official and individual capacities),

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

PETITION FOR REHEARING EN BANC AND/OR PANEL REHEARING

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REQUIRED RULE 35 STATEMENT

Appellee Carolyn Jones, former Dean of the University of Iowa College of Law ("Dean Jones"), petitions for rehearing en banc and/or panel rehearing under Fed. R. App. P. 35 and 40. In a decision dated December 28, 2011, the panel (Schreier, D.J., with Murphy and Smith, JJ.) reversed the district court's grant of qualified immunity to Dean Jones. The panel held a jury should decide whether Dean Jones is personally liable to Appellant Teresa Wagner ("Plaintiff") under 42 U.S.C. § 1983 for the Iowa Law School's failure to hire Plaintiff as a legal writing instructor.

The panel decision conflicts with prior decisions of the United States Supreme Court and of this Court, most notably Hughes v. Stottlemeyer, 506 F.3d 675 (8th Cir. 2007) and Graning v. Sherburne County, 172 F.3d 611 (8th Cir. 1999). Consideration by the full Court is necessary to secure and maintain uniformity of this Court's decisions.

The panel decision also raises questions of exceptional importance. The Supreme Court and this Court have long expressed extraordinary reluctance to interfere with hiring decisions in the academy. Yet the panel denied qualified immunity to Dean Jones in a sweeping, *sua sponte* decision that marks a radical shift away from the judicial system's historical reluctance to second-guess the hiring decisions at Colleges and Universities.

BACKGROUND

As relevant here, Plaintiff sued Dean Jones in her personal capacity under 42 U.S.C. § 1983. *(Slip Op. at 1-2)*. Plaintiff alleged Dean Jones violated the First Amendment to the United States Constitution when the Iowa Law School failed to hire Plaintiff as a legal writing instructor. *(Id.)*. Plaintiff is a conservative Republican and alleges Dean Jones failed to hire Plaintiff because of her political beliefs. *(Id. at 2)*. The Iowa Law School faculty had recommended Dean Jones hire other candidates. *(Id. at 8)*.

Dean Jones asserted qualified immunity and moved for summary judgment. The district court granted Dean Jones' motion on qualified immunity grounds and dismissed Plaintiff's lawsuit. *(Id. at 9)*. After reviewing the record, the district court held "[t]here is no evidence whatsoever that [Dean] Jones, in accepting the faculty recommendation, was motivated by animus against [Plaintiff's] politics and her association with conservative organizations." *(Appellant's App'x at 59)*. The district court was "troubled" by Plaintiff's request that "she alone, and not the persons [Dean Jones] hired, was entitled to be selected" for a faculty position because such requested relief "would elevate political views over competence and deem this court, after a jury trial, the 'super personnel council' to make academic hiring decisions." *(Id.)*.

The panel reversed. Characterizing Plaintiff's claim as one of "political discrimination" not "political retaliation," the panel observed, "[T]his is our first opportunity to address a political discrimination claim." *(Slip Op. at 11, 12)*. The panel proceeded to examine the two-prong test for qualified immunity defenses, i.e., whether (1) Plaintiff established that Dean Jones committed a constitutional violation and (2) the law concerning the constitutional violation was clearly established. *(Id. at 9-21)*.

On the first prong of the qualified immunity analysis, the panel adopted the First Circuit's "extensive case law in the area of political discrimination claims." *(Slip Op. at 12-13)*. Specifically, the panel extended the "substantial or motivating factor test articulated by the . . . Supreme Court for First Amendment retaliation claims in Mt. Healthy City School District v. Doyle, 429 U.S. 274, 287 (1977)" to Plaintiff's § 1983 claim against Dean Jones. *(Slip Op. at 12)*. Critically, the panel rejected the familiar three-step McDonnell Douglas framework for employment discrimination claims under which (1) the plaintiff must establish a prima facie case of discrimination; (2) the burden of *production* shifts to the defendant to articulate a legitimate, non-discriminatory reason for the adverse employment action; and (3) the Plaintiff must present sufficient evidence to show the defendant's proffered reason is pretext for illegal discrimination. *(Slip Op. at 13)*. Instead, purportedly following Mt. Healthy and First Circuit, the panel shifted the

burden of *persuasion* to Dean Jones to "produce[] enough evidence to establish that the plaintiff's dismissal would have occurred in any event for nondiscriminatory reasons" once Plaintiff presented evidence tending to show political discrimination was a motivating factor in the adverse employment action. *(Id.)*.

Stressing that under its motivating factor standard "[a] plaintiff need only prove that the employer's discriminatory motive played *a part* in the adverse employment action" (emphasis in original), the panel held a reasonable jury could find Plaintiff's politics played a part in "Dean Jones's repeated decisions not to hire" Plaintiff. *(Slip Op. at 14)*. Even though there was no evidence that Dean Jones herself harbored any discriminatory animus toward Plaintiff, the panel held Dean Jones could not meet her burden to prove Plaintiff's "dismissal"[1] would have occurred in any event because (1) the faculty are nearly all registered Democrats; (2) at an unknown "faculty meeting, which Dean Jones attended, someone mentioned that [Plaintiff] holds conservative beliefs"; and (3) a faculty member sent Dean Jones an email "inquiring whether [Plaintiff's] politics had been considered by the faculty when they voted not to hire [Plaintiff]." *(Slip Op. at 14-15)*.

[1] The Iowa Law School did not "dismiss" Plaintiff. Plaintiff was not hired.

On the second prong of the qualified immunity analysis, the panel held the relevant law was clearly established. *(Slip Op. at 18-21)*. Despite its prior observation that there were no Eighth Circuit cases on point, the panel held the Supreme Court's longstanding general ban on political discrimination in hiring for government employment was sufficient. *(Slip Op. at 12, 18-21)*. The panel held the district court "erred in finding qualified immunity protects Dean Jones from liability in her individual capacity" and, therefore, a jury should decide whether the First Amendment required Dean Jones to reject the Iowa Law School faculty's recommendations and unilaterally hire Plaintiff. *(Id. at 22)*.

Before reaching its conclusion, the panel recognized it could not hold Dean Jones strictly liable for the possible illicit motives of other members of the Iowa Law School faculty. *(Slip Op. at 21-22)*. A violation of the First Amendment requires intentional conduct on the defendant's part; in the words of the panel decision, Plaintiff's "claim against Dean Jones is based on Dean Jones's own actions and omissions during the hiring process." *(Id. at 22)*. But in contrast to the district court, which had observed (1) there was no evidence of an illicit motive on Dean Jones' part and (2) the record was replete with undisputed evidence that Dean Jones lacked the power to hire a candidate whom the Iowa Law School faculty had not recommended *(Appellee's App. at 56-57, 59-60)*, the panel apparently seized on (1) Plaintiff's contention that "at least one other dean in the

past 50 years chose not to hire the person whom the faculty recommended" and (2) the fact that, at her deposition, Dean Jones said she "imagine[ed] if there were some unusual circumstances" she might have authority to "do anything but authorize the faculty recommendation" *(Slip Op. at 20-21)*.

ARGUMENT

Before analyzing the legal merit of the panel decision, it is critical to place that decision in its proper procedural context. One overarching aspect of the panel decision is striking: the panel arrived at the overwhelming majority of its legal analysis *sua sponte*. For example, in neither the District Court nor on appeal did the Plaintiff argue the Mt. Healthy and First Circuit burden-of-persuasion shifting analyses that the panel analyzed, adopted, and applied at length; indeed, those cases do not appear *anywhere* in the parties' briefs. The district court did not rule upon whether to shift the burden of persuasion to Dean Jones. Put simply, the panel shifted the burden of persuasion to Dean Jones without Plaintiff requesting that the district court or the panel do so and without affording Dean Jones any opportunity to respond to the panel's arguments.

The panel's *sua sponte* analysis is disfavored, especially in a case such as this appeal, which touches on a constitutional issue. See, e.g., Ladner v. United States, 358 U.S. 169, 172-73 (1958). In any event, it appears the absence of briefing and argument led the panel (1) to adopt legal conclusions that are

inconsistent with Supreme Court and Eighth Circuit precedent, (2) to gloss over an important, reoccurring intra-circuit split, and (3) to a conclusion that if allowed to stand will inhibit academic freedom in this Circuit.

En banc review and/or panel rehearing is warranted for four independent reasons:

I. MISAPPLICATION OF MT. HEALTHY

Mt. Healthy has no application in summary judgment proceedings deciding qualified immunity. Indeed, Mt. Healthy and the principal First Circuit case upon which the panel relied, Acevedo-Diaz v. Aponte, 1 F.3d 62, 67 (1st Cir. 1993), *were not summary judgment or qualified immunity cases.* See Mt. Healthy, 429 U.S. at 282-83 & 287 n.1; Acevedo-Diaz, 1 F.3d at 66. In Mt. Healthy, for example, the Supreme Court held that a district judge making findings in a bench trial was permitted to shift the burden of proof to the defendant only after the plaintiff proved by a preponderance of the evidence, and with direct evidence of illegal discrimination, that the defendant did not hire the plaintiff because of protected speech the plaintiff made on a radio program. See Mt. Healthy, 429 U.S. at 282-83 & 287 n.1.

Not only does this case arise in a much different procedural posture than Mt. Healthy and Acevedo-Diaz, but also in this case there is no direct evidence that Dean Jones discriminated against Plaintiff. Absent such direct evidence on Dean

Jones' part,[2] the panel's decision to shift the burden of persuasion to Dean Jones for the purpose of analyzing her qualified immunity defense at summary judgment violates the Supreme Court's maxim that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507 (1993).

Consistent with the foregoing observations, another panel of this Court in Hughes v. Stottlemeyer, 506 F.3d 675, 678-79 & n.1 (8th Cir. 2007) (Bye, Riley and Benton, JJ.) squarely held that McDonnell Douglas and *not* Mt. Healthy applies at summary judgment in a § 1983 First Amendment case. The Hughes panel quoted Stewart v. Indep. Sch. Dist. No. 196, 481 F.3d 1034, 1042-43 (8th Cir. 2007) for the proposition that, "Without direct evidence of a retaliatory motive, we analyze retaliation claims . . . under the burden-shifting framework of [*McDonnell Douglas*]."). Inexplicably, however, the panel cited Hughes for exactly the *opposite* of what Hughes held: the panel reasoned Hughes provides a

[2] "Direct evidence" is "strong" evidence that "clearly points to the presence of an illegal motive." Griffith v. City of Des Moines, 387 F.3d 733, 736 (8th Cir. 2004); see, e.g., Beshears v. Asbill, 930 F.2d 1348, 1354 (8th Cir.1991) (approving of other circuits' decisions that characterized direct evidence of race or sex discrimination as an employer's statement that "no woman would be named to a B scheduled job" or "if it was his company, he wouldn't hire any black people").

"similar test" to the panel's new test when, in fact, Hughes held McDonnell Douglas, not Mt. Healthy, applies at summary judgment.

The panel decision misconstrued Mt. Healthy and squarely conflicts with Hughes. Accordingly, en banc review and/or panel rehearing is warranted.

II. INTRA-CIRCUIT SPLIT

Digging deeper into this Court's precedents, which the panel did not do, it appears there are some panel decisions that are inconsistent with the square holding of Hughes. In Rynder v. Williams, 650 F.3d 1188, 1194 & n.1 (8th Cir. 2011), a direct evidence case, the panel appears to have shifted the burden of persuasion to the defendant with the express observation that "some ambiguity exists in our jurisprudence as to the appropriate burden-shifting framework to apply in First Amendment retaliation cases that do not involve 'direct evidence.'" That ambiguity stems in large part from Davison v. City of Minneapolis, 490 F.3d 648, 654-55 & n.5 (8th Cir. 2007), in which a split panel invoked the now-defunct "free to choose" prior panel rule to shift the burden of persuasion to a defendant in a non-direct evidence case. See Mader v. United States, 654 F.3d 794, 800 (8th Cir. 2011) (en banc) (later abrogating the much-criticized "free to choose" prior panel rule). The panel majority in Davison conceded this Court had held, as early as Graning v. Sherburne County, 172 F.3d 611, 615 n.3 (8th Cir. 1999), that "the Mount Healthy framework applies only where the plaintiff has presented direct

evidence showing that the employer used the plaintiff's protected speech as a criterion in the employment decision," but ultimately the Davison panel declined to follow Graning in light of intervening inconsistent panel decisions. Here the panel simply adopted Davison without briefing, argument, or any analysis of the intra-circuit split.[3]

This reoccurring intra-circuit split warrants en banc review. Indeed, the en banc court recently agreed to hear yet another case, Dempsey v. City of Omaha, 633 F.3d 638, 645 n.1, vacated by en banc order (8th Cir. Apr. 11, 2011), that identified the issue of this Court's "inconsistent treatment" of Mt. Healthy. Dempsey settled before en banc oral argument.

This court should once again grant en banc review, examine the intra-circuit split, and adopt the analysis of Hughes and Graning. This case is the perfect vehicle for resolving the intra-circuit split: as shown below, Plaintiff's case against Dean Jones is, if not entirely speculative, certainly based upon circumstantial evidence. If not for the panel shifting the burden of persuasion to Dean Jones to prove the negative, i.e., that political discrimination did not cause her decision to

[3] If the panel here *had* cited Graning, under the Mader rule the panel would have been required to follow the earlier Graning case, not the later Davison case. In other words, the panel could not have chosen Davison's path, because after Mader the "free to choose" rule relied upon in Davison is no longer good law.

not hire Plaintiff, there can be no question this case would not survive summary judgment.

III. IMPACT OF GROSS

Even if Mt. Healthy burden-of-persuasion shifting were appropriate, the panel overlooked the impact of Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 129 S. Ct. 2433 (2009). In Gross, an ADEA case, the Supreme Court discarded the motivating factor standard in favor of a more stringent but-for causation standard. 129 S. Ct. at 2439. Notably, *all* of the First Circuit cases upon which the panel relied are pre-Gross cases.

In light of Gross, the Seventh Circuit Court of Appeals has repeatedly held Mt. Healthy's motivating factor analysis is no longer appropriate in § 1983 First Amendment political discrimination cases. See Kodish v. Oakbrook Terrace Fire Protection Dist., 604 F.3d 490, 500-01 (7th Cir. 2010); Gunville v. Walker, 583 F.3d 979, 984 n.1 (7th Cir. 2009) ("Until the Supreme Court's recent decision in [Gross], plaintiffs could prevail in a First Amendment § 1983 action if they could demonstrate that their speech was a motivating factor in the defendant's decision. After Gross, plaintiffs in federal suits must demonstrate but-for causation unless a statute (such as the Civil Rights Act of 1991) provides otherwise."); Waters v. City of Chi., 580 F.3d 575, 584 (7th Cir. 2009). But see Greene v. Doruff, 660 F.3d 975 (Posner, J.) (disagreeing with this Seventh Circuit precedent). The Seventh

Circuit is not alone in its view. See, e.g., Hackworth v. Torres, No. 1:06–CV–773–RCC, 2011 WL 1811035, at *3 (E.D. Cal. May 12, 2011).

IV. ISSUES OF EXCEPTIONAL IMPORTANCE

This appeal now presents issues of exceptional importance. The Supreme Court and this Court have long expressed extraordinary reluctance to interfere with academic hiring decisions. See Slip Op. at 11. As this Court explained nearly a generation ago in Brousard-Norcross v. Augustana College Association in the tenure context,

> Courts . . . are understandably reluctant to review the merits of a tenure decision . . . [T]riers of fact cannot hope to master the academic field sufficiently to review the merits of such views and resolve the differences of scholarly opinion. Moreover, the level of achievement required for tenure will vary between universities and between departments within universities. Determination of the required level in a particular case is not a task for which judicial tribunals seem aptly suited. Finally, statements of peer judgments as to departmental needs, collegial relationships and individual merit may not be disregarded absent evidence that they are a facade for discrimination.

935 F.3d 974, 975-96 & n.3 (8th Cir. 1991).

If allowed to stand as written, the panel's sweeping, *sua sponte* decision will mark a radical shift away from the judicial system's historical reluctance to second-guess academic hiring decisions. It is no exaggeration to conclude that university presidents, college deans, and faculty chairs with arguably nominal authority to make hiring decisions, such as Dean Jones, will be hauled into federal

court under § 1983 to explain the vagaries of the faculty lounge to juries across this Circuit. But as Judge Wollman has aptly observed, "The enhancement of learning, rather than the forestalling of possible litigation, should be the overriding consideration guiding school administrators' decision making." Stever v. Indep. Sch. Dist. No. 625, St. Paul, 943 F.2d 845, 855 (8th Cir. 1991) (Wollman, J., concurring in part and dissenting in part).

The import of the panel's proposed shift in this Court's jurisprudence for academic hiring decisions is especially pronounced on the present record. This is *not* a case in which a plaintiff sues a hands-on decisionmaker, armed with evidence directly implicating that particular decisionmaker with impermissible motives. As the district court correctly held, on this record there is simply insufficient evidence in the record on which a jury could find Dean Jones intentionally discriminated against Plaintiff based on her political beliefs. Even if all of Plaintiff's innuendo about a liberal Iowa law faculty is accepted at this stage, there is simply no *evidence* that discrimination was the but-for cause, or even a motivating factor, in *Dean Jones's* failure to affirmatively hire Plaintiff.[4] The uncontroverted affidavits of Dean Jones and her immediate predecessor, Dean N. William Hines, make clear that the Dean was never authorized to hire a candidate that was not recommended

[4] Indeed, reliance on the faculty's political affiliation as evidence of discrimination seemingly violates the faculty's First Amendment association rights.

by the faculty, (*Appellee-Appx. at 1, § 2, and 11 § 4*); the panel's finding that there was no evidence in the record that this policy is a mandatory policy is wrong. The mere fact an *unnamed* former Dean *once in fifty years* may have *rejected* a faculty's chosen candidate is not evidence that, in customarily and perfunctorily *accepting* the faculty's choice here, Dean Jones was intentionally discriminating against Plaintiff. "Evidence, not contentions, avoids summary judgment." Haas v. Kelly Servs., Inc., 409 F.3d 1030, 1036 (8th Cir. 2005).

In any event, in the qualified immunity context public officials must be judged on the basis of their own conduct and the analysis always "must be undertaken in light of the specific context of the case, not as a broad general proposition." Tuggle v. Mangan, 348 F.3d 714, 720 (8th Cir. 2003). Close cases should be resolved in the public official's favor. Pearson v. Callahan, 555 U.S. 223, 244-45 (2009). Yet the panel decision denies qualified immunity to Dean Jones on a burden-shifting theory that (1) Plaintiff did not bother to argue; (2) lacks direct Supreme Court support; and (3) a prior panel of the Eighth Circuit squarely rejected. Surely the qualified immunity defense is stronger than the defense the panel afforded to Dean Jones here.

If Plaintiff's threadbare allegations against Dean Jones raise a genuine issue of material fact and are worthy of a jury trial, juries across this circuit will wield unprecedented power over academic hiring decisions.

CONCLUSION

Dean Jones requests this Court grant her petition for rehearing under Fed. R. App. P. 35 and/or 40.

Respectfully submitted,
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PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon each of the persons identified as receiving a copy by delivery in the following manner on January 10, 2012:

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- ☐ Overnight Courier
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- ☐ Other
- ☒ ECF System Participant (Electronic Service)

Signature: /s/Betty Christensen