No. _____

In The Supreme Court of the United States

CAROLYN JONES, Dean of the University of Iowa College of Law (in her official and individual capacities), and GAIL B. AGRAWAL, Dean of the University of Iowa College of Law (in her official and individual capacities),

Petitioners,

v.

TERESA R. WAGNER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Carolyn Jones decided not to hire Teresa Wagner as a legal writing instructor at the University of Iowa College of Law, where Jones served as Dean. Wagner alleged that Jones' decision was based on Wagner's political beliefs, and she sued Jones for violation of her rights under the First Amendment. She later amended her complaint to include an Equal Protection claim and named the current Dean, Gail Agrawal, in her official capacity for prospective relief. The case was tried to a jury at the federal courthouse in Davenport, Iowa, before the Honorable Judge Robert W. Pratt. During deliberations, jurors sent several notes to the magistrate judge who was presiding over deliberations. The notes indicated that the jury had reached a verdict on the First Amendment claim, but could not agree on the Equal Protection claim. The magistrate judge mistakenly declared a mistrial on both counts and dismissed the jury without asking the jurors about each count separately. Recognizing his error, he immediately recalled the jury and accepted its unanimous verdict for Jones. On post-trial motions, the trial court ruled that it may recall a jury to correct error where the jury had remained an undispersed unit within the court's control. The Eighth Circuit, however, reversed this decision. It held that once the magistrate judge excused the jury the first time, he was no longer empowered to discover and accept the verdict the jury had reached. In doing so, the Eighth Circuit rejected

QUESTION PRESENTED – Continued

the analysis applied by every other circuit to have considered the issue. Despite the jury's verdict in Jones' favor, the case is set for retrial.

The question presented is:

> Whether a district court judge may recall a jury on discovery of its own error in the receipt or recording of a jury's verdict and, if the jury has remained an undispersed unit within the court's control since discharge, may accept its verdict.

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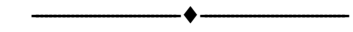
The district court's ruling on post-trial motions, denying Wagner's motion for a new trial, is recorded at 928 F. Supp. 2d 1084, and is reproduced at App. 17-78.

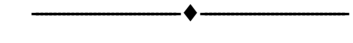
The district court's order granting summary judgment for the Defendants on the basis of qualified immunity is reproduced at App. 163.

The opinion of the court of appeals reversing the district court's granting of summary judgment and remanding the case for trial is recorded at 664 F.3d 259 and is reproduced at App. 163.



JURISDICTION

The court of appeals rendered its decision on July 15, 2014, and denied a timely petition for rehearing and rehearing en banc on August 25, 2014. App. 164. This Court has jurisdiction under 28 U.S.C. § 1254(1).



CONSTITUTIONAL PROVISION INVOLVED

The Seventh Amendment to the United States Constitution states:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. Const. amend. VII.

STATEMENT OF THE CASE

This case arises out of an employment dispute at the University of Iowa College of Law. The College designed a new legal writing program and sought to hire writing instructors. In 2006, Wagner applied for one of these positions. Dean Carolyn Jones decided to hire candidates other than Wagner. In 2009, Wagner sued Dean Jones in her personal capacity under 42 U.S.C. § 1983, alleging that Dean Jones had made her decision because of Wagner's political views, in violation of the First Amendment. The district court had jurisdiction under 28 U.S.C. § 1331. The district court granted Jones summary judgment on the basis of qualified immunity, and the Eighth Circuit reversed and remanded for trial. Wagner then amended her complaint, adding an Equal Protection claim against Jones, and First Amendment and Equal

Protection claims against Gail Agrawal, the current Dean of the College of Law, in her official capacity under 42 U.S.C. § 1983 for prospective relief.

A. Summary Judgment and Remand

The Defendants moved for summary judgment on the First Amendment claim, asserting that Dean Jones was entitled to qualified immunity. App. 134. The district court granted summary judgment for Defendants. The Eighth Circuit reversed and remanded the case for trial. *Id.*

B. The Trial

The parties tried the case to a jury of twelve citizens of eastern Iowa over five days beginning on October 15, 2012, at the federal courthouse in Davenport, Iowa. On the afternoon of October 22, the jury retired to deliberate with United States Magistrate Judge Thomas Shields presiding. The trial judge, the Honorable Judge Robert W. Pratt, had returned to his chambers in Des Moines. The jury deliberated the entire day on October 23.

On October 24, 2012, the jury continued deliberations. At approximately 9:00 in the morning, the jury sent two notes asking, "Can we have a copy of the 14th Amendment, equal protection?" and "What happens if we cannot come to an agreement?" App. 89. (The actual juror notes are part of the court's file, but are under seal.) These questions together, as the jury

sent them, make clear that the jury was having trouble reaching agreement on the Equal Protection claim, not the First Amendment claim. After consulting with the attorneys, Magistrate Judge Shields advised the jury to continue its deliberations in an attempt to arrive at a unanimous verdict. App. 91. Two hours after submitting the two notes together, the jury sent the magistrate judge another note. This note, signed by all twelve jurors, stated, "We are unable to come to a unanimous verdict for either the Plaintiff, Teresa Wagner, nor the Defendant, Carolyn Jones." App. 93. Subsequently, the district court held a telephone conference with the magistrate judge and the attorneys, discussing how to proceed. During this discussion, the district court recognized that "we don't know if [the note] pertains to one of the submitted counts or both of the submitted counts." App. 93.

A little after 1:00 p.m., the magistrate judge convened the jury in open court and read them an *Allen* charge, *Allen v. United States*, 164 U.S. 492 (1896), directing the jury to continue to try to reach a verdict. App. 99-101. The magistrate judge also noted that he had received a question from a juror asking for permission to use a cellphone during the lunch break, because that juror had a sick child. App. 100. The magistrate judge granted this request and filed the juror's note.

A short time after 4:00 p.m., the jury sent the court another note indicating that the jury could not reach a unanimous verdict. App. 101-102. After receiving this note, the magistrate judge again convened

the jury in open court without counsel present. The magistrate judge questioned the jury about the note, and each juror confirmed that the note reflected his or her individual view as to the state of deliberations. App. 102-103. The magistrate judge then declared a mistrial without asking the jurors about each count. The magistrate judge told the jury "you are excused," and the members retired from the courtroom at 4:35 p.m. according to the Clerk of Court's minutes. App. 113.

As soon as the jury was excused, the magistrate judge realized that he had neglected to ask the jury about each count separately. He asked the jury to return to the courtroom. According to the trial judge familiar with the layout of the Davenport courthouse and the second-floor restored courtroom in which the trial had been held, the jury was still within the secure area next to the courtroom and had not yet dispersed. The jurors had been inaccessible to the public, the press, and all other outside influences. App. 43. The jury was fully reassembled in the courtroom, and the magistrate judge addressed the jurors on the record at 4:37 p.m. App. 43, 113. At most, two minutes had passed since the jurors had left their places in the jury box.

The magistrate judge's failure to ask about each count separately turned out to have dramatic consequences, because the jury actually had reached a verdict for Dean Jones on the First Amendment claim. As the jury's earlier questions indicated, it was only on the Equal Protection claim – since abandoned

by Wagner – that the jury had been unable to reach consensus. The magistrate judge discovered the error as he engaged in the following discussion with the jury forewoman.

> Judge Shields: What I failed to ask you for on the record was there were two counts in the Complaint filed by Ms. Wagner against the Defendants and the indication of the jury was that you were unable to reach an agreement. Was that as to both Counts 1 and 2?
>
> Ms. Carol Lynn Tracy: The one that we were unable to reach was on form two.
>
> Judge Shields: I'm sorry?
>
> Ms. Carol Lynn Tracy: Form two.
>
> Judge Shields: The – as to form one?
>
> Ms. Carol Lynn Tracy: We were able to reach a verdict for the Defendant, Carolyn Jones. Do you need me to read what it was?
>
> Judge Shields: I will need to – is that form signed?
>
> Ms. Carol Lynn Tracy: No.
>
> Judge Shields: We will – I will ask you to sign that and we will file that; but, ladies and gentlemen, then not to belabor this, it is a crazy week for all of us, I want to ask each of you, Mr. Weston, is that your verdict as to form one?
>
> Mr. Michael Patrick Weston: Yes.

Judge Shields: Okay. Ms. Scott, was that your verdict?

Ms. Marilyn Rhea Scott: Yes.

Judge Shields: All right. Mr. Braun, was that your verdict?

Mr. Kurtis Paul Braun: Yes.

Judge Shields: Ms. Chapman, was that your verdict?

Ms. Brenda Kay Chapman: Yes.

Judge Shields: Ms. Willits, was that your verdict?

Ms. Susan Marie Willits: Yes.

Judge Shields: Ms. McCluskey, was that your verdict?

Ms. Michelle Renee McCluskey: Yes.

Judge Shields: Mr. Mayes, was that your verdict?

Mr. Don Webster Mayes: Yes.

Judge Shields: Ms. Campbell, was that your verdict?

Ms. Teiah Elize Campbell: Yes.

Judge Shields: Mr. Laing, was that your verdict?

Mr. Brian John Laing: Yes.

The Court: Ms. Pilkington, was that your verdict?

> Ms. Stella Marie Pilkington: Yes.
>
> The Court: Ms. Tracy, was that your verdict?
>
> Ms. Carol Lynn Tracy: Yes.
>
> Judge Shields: Ms. Hoogheem, was that your verdict?
>
> Ms. Pamela Sue Hoogheem: Yes.
>
> Judge Shields: And, ladies and gentlemen, as we discussed before, as to form two, there was no ability to reach a unanimous decision on form two?
>
> Ms. Carol Lynn Tracy: There was not.
>
> Judge Shields: Then I am amending my Order only to the extent that the mistrial that I have ordered is as to form two or Count 2 and not Count 1, so again, I think your work has not been for naught because that verdict stands, but the mistrial as to Count 2 or form two leaves that part of the case still open in my opinion. Okay. Good.

App. 105-108.

This record of the conversation between the magistrate judge and the forewoman clearly indicates that the jury had reached the verdict on Count 1 and recorded it in writing before being excused at 4:35 p.m. App. 108, 113. The court simply had not asked for it.

The court then entered judgment for Dean Jones on the First Amendment count and declared a mistrial as to the Equal Protection count. App. 108.

The jury was finally excused at 4:40 p.m. App. 109, 113.

C. Post-Trial Proceedings

Both parties filed post-trial motions. Defendants requested judgment as a matter of law on the Equal Protection claim, which the district court granted, and Wagner abandoned her appeal of that ruling. Wagner challenged the court's acceptance of the jury verdict on the First Amendment claim by moving to alter the judgment under Rule 59(e), moving for relief from the judgment under Rule 60(b)(4), and moving for a new trial under Rule 59(a). The district court upheld the jury's verdict. App. 40, 48.

The district court held that the validity of any action taken after a jury is discharged must be determined "on a case-by-case basis." App. 40-41. In a case like this, where the jury remains a unit within the control of the court, it may be reconvened and a verdict accepted. *Id.* The court then considered the particular facts of this case: the "exceedingly short" amount of time that the jury was outside of the jury box; the layout of the Davenport courthouse, which includes the restricted access area outside the second-floor courtroom where the jurors stood briefly from 4:35 to 4:37 p.m.; and a record devoid of any *ex parte* communication by the magistrate judge or other communications with the jurors during their brief time in the restricted access space. On the basis of these facts, the district court concluded that the jury

had remained an undispersed unit within the control of the court from 4:35 to 4:37 p.m. Therefore, the district court reasoned, the magistrate judge could recall the jury to correct his error and to accept its verdict, the product of several days of difficult deliberation.

The district court relied on a Sixth Circuit case that held that a jury may be reconvened after it is excused to correct error, if that action would be justified by the particular facts presented. *Ross v. Petro*, 515 F.3d 653 (6th Cir. 2008). The First, Second, Third, Fourth, and Seventh Circuits also decide whether a jury may be reconvened on a case-by-case basis, relying on trial judges present in the living courtroom to determine whether a jury has been subjected to outside influences. *Putnam Res. v. Pateman*, 958 F.2d 448, 457 (1st Cir. 1992) (plaintiff waived objection to error in verdict because jury could still be recalled after being excused); *United States v. Rojas*, 617 F.3d 669, 677 (2d Cir. 2010) (court could reassemble jury to correct mistake in accepting verdict); *United States v. Figueroa*, 683 F.3d 69 (3d Cir. 2012) (same); *Summers v. United States*, 11 F.2d 583 (4th Cir. 1926) (same); *United States v. Marinari*, 32 F.3d 1209, 1214 (7th Cir. 1994) (same). According to all these cases, where a jury remains within the control of the court, it may be recalled to correct error. Each case must be decided on its own facts, as the trial court did in the instant case.

Wagner filed a timely appeal with the U.S. Court of Appeals for the Eighth Circuit. App. 6. Describing the question as an issue of first impression, the

Eighth Circuit acknowledged that federal precedent supported the view that a jury "may remain undischarged and retain its functions, though discharge may have been spoken by the court, if, after such announcement, it remains an undispersed unit, within control of the court, with no opportunity to mingle with or discuss the case with others." App. 8, 10. Nevertheless, the Eighth Circuit departed from the precedent of its sister circuits and imposed a new rigid rule that deprives trial judges of any ability to correct errors in the receipt or recording of verdicts. "Today, we hold, in a case such as the present one, where a court declares a mistrial and discharges the jury which then disperses from the confines of the courtroom, the jury can no longer render, reconsider, amend, or clarify a verdict on the mistried counts." App. 10.

In reaching this conclusion, the Court speculated on whether the jurors could have had "pocket-sized wireless devices" or contact with unidentified "wandering" people. The fact that a juror asked permission from the magistrate judge to use her phone to check on an ill child shows that the jurors did not have access to their mobile devices during deliberation. Instead of relying on the record regarding the specific circumstances of this case, the court of appeals presumed that mingling occurred once the magistrate judge uttered the word "excused."

The Court also improperly relied on a letter that Wagner alleged had been sent to her counsel after the trial to support its view that the jurors must have

been "confused" and "vacillating" about their verdict, liable to change their minds at any time. App. 6 n. 6, 12. The Court's speculation is belied by the actual statements of the jury forewoman and other jurors in the record, which reflects no such confusion. The record actually reflects that the jury had questions about the Equal Protection claim, but no doubt about the First Amendment claim.

The Eighth Circuit should have relied on federal precedent to affirm the district court. Alternatively, it could have remanded the case for additional factual findings on the short time frame in question. Instead, the Court snatched away the uncompromised verdict in Dean Jones' favor and ordered her to defend herself in court all over again.

The court of appeals denied a timely petition for rehearing and rehearing en banc on August 25, 2014. App. 164. This petition follows.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted for four reasons. *First*, the Eighth Circuit's decision creates a conflict among the circuit courts concerning a trial judge's discretion to recall a jury to preserve its valid verdict from the trial court's own procedural error, if that jury had remained within the control of the court since discharge. *Second*, the Eighth Circuit's decision infringes on Dean Carolyn Jones' Seventh Amendment rights, discarding a verdict in her favor that the Amendment

requires the courts to preserve and protect, and creating a new rule that deprives trial judges of discretion in every future instance. *Third*, the Eighth Circuit's decision relies improperly on statements in a purported juror letter sent after the trial concluded and on an erroneous assumption about juror use of mobile devices. *Fourth*, the fundamental injustice of the Eighth Circuit's decision has substantial impact. The Court's intervention is required to restore the trial judge's discretion to evaluate the jury's integrity and to preserve its verdict whenever the facts permit.

I. The Eighth Circuit's Decision Creates a Split in Authority Among the Courts of Appeals.

The Eighth Circuit's decision conflicts with decisions from the First, Second, Third, Fourth, Sixth and Seventh Circuit Courts, which hold that where the jury remains within the control and confines of a secure federal courthouse, it may be reconvened. *Putnam Res. v. Pateman*, 958 F.2d 448, 457 (1st Cir. 1992); *United States v. Rojas*, 617 F.3d 669, 677 (2d Cir. 2010); *United States v. Figueroa*, 683 F.3d 69 (3d Cir. 2012); *Summers v. United States*, 11 F.2d 583 (4th Cir. 1926); *Ross v. Petro*, 515 F.3d 653 (6th Cir. 2008); *United States v. Marinari*, 32 F.3d 1209, 1214 (7th Cir. 1994). All other circuits that have considered this issue have rejected a "bright-line" rule in favor of a circumstantial inquiry. This conflict among the circuit courts means that a trial judge may inquire into the facts of each case and preserve a jury

verdict where an undispersed jury has remained within the court's control – except in the Eighth Circuit, where the trial judge has no such discretion and may not preserve a verdict, regardless of its validity.

Where the jury remains within the court's control as an undispersed unit, "with no opportunity to mingle with or discuss the case with others," federal appellate courts have affirmed the recall of a jury to return a verdict that was erroneously withheld or incorrectly reported. *Rojas*, 617 F.3d at 677; *Marinari*, 32 F.3d at 1214. The trial court must "evaluate the specific scenario presented" in order to determine whether recalling the jury would result in prejudice to the defendant or undermine the confidence of the court or public in the verdict. *Rojas*, 617 F.3d at 667.

The Eighth Circuit court of appeals disregarded all federal precedent, instead borrowing a test applied by a few state courts. App. 9-10. The court of appeals ignored the precedent in Iowa, however, where the law is clear that a court may reconvene a jury to correct an error, and where the courts recognize "the equitable right of a party to a judgment obviously in his favor." *Oxford Junction Savings Bank v. Cook*, 111 N.W. 805, 808 (Iowa 1907); *Rutledge v. Johnson*, 281 N.W.2d 111, 117 (Iowa 1979) (confirming long-recognized power of trial courts to recall a separated or discharged jury for the purpose of correcting a ministerial error, where no prejudice in the particular circumstances can be shown). Further, the state cases

the court of appeals cited were inapplicable here, since they hold that juries may not deliberate further after discharge. App. 9, citing *Nails v. S&R, Inc.*, 639 A.2d 660, 667 (Md. 1994) (further deliberation after discharge impermissible). The jury in the instant case did not deliberate further after it was discharged, and cases discussing appropriate procedure where deliberations did occur are inapplicable.

The court of appeals departed from federal precedent without any basis in the record. The record here reveals no jury deliberations between discharge and recall, nor any other errors compromising the verdict. The only error here is that of the trial court in failing to discover the jury's verdict before discharging it. No facts distinguish the trial court's error in this matter from the type of errors that were corrected and affirmed in the above-cited federal cases.

II. The Eighth Circuit's Decision Contravenes the Seventh Amendment Right to Jury Trial.

"Trial by jury is the glory of the English law." William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765-1769*, Chicago: University of Chicago Press, 1979. Blackstone described the jury trial as "the most transcendent privilege" that any citizen can enjoy and the best criterion for the "investigation of truth" ever established. *Id.*; *see also*, Darrell A.H. Miller, *Text,*

History, and Tradition: What the Seventh Amendment Can Teach Us About the Second, 122 Yale L.J. 852, 873 (2013). What Blackstone extolled in the English common law became codified in the United States Constitution through the inclusion of the Seventh Amendment in our Bill of Rights. James Madison, then a member of the new House of Representatives, drafted what has become the Bill of Rights, and argued convincingly for the inclusion of the right to civil jury trials: "In suits at common law, between man and man, **the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate**." *Proceedings on the Amendments to the Constitution in the House of Representatives*, 1 Annals of Cong. 435, June 8, 1789. The Seventh Amendment right to a jury trial in civil cases today restrains the decisions trial and appellate courts may make, by preserving the civil jury system as it existed in the English common law in 1791, when the Amendment was adopted. *United States v. Wonson*, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750) (establishing the historical test later adopted by this Court and holding that there will be no new trial of issues already determined by jury); *Teamsters Local No. 391 v. Terry*, 494 U.S. 558 (1990); *Balt. & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935); *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996) (historical analysis of right to a jury trial). Preserving the factual determinations made by the jury is one of the primary purposes of the Amendment. *See Gasoline Prods. Co. Inc. v. Champlin Ref. Co.*, 283 U.S. 494, 498 (1931) (where jury reached

verdict on one issue, no new trial of that issue even though separable issue must be tried again).

The Seventh Amendment right to a jury trial applies to § 1983 claims for legal relief. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999). This Court reasoned that § 1983 claims for legal relief sound in tort, so that although the statutory cause of action was unknown at common law, the nature of the claim is analogous to common-law causes that were tried before juries and therefore subject to the Seventh Amendment. *Id*. at 729 (Scalia, J., concurring). Accordingly, Dean Jones enjoyed the protection of the Seventh Amendment when she was sued for political discrimination under § 1983.

Consistent with her Seventh Amendment right, Dean Jones was provided a trial on Wagner's claims, and the jury deliberated and reached a verdict – the essence of the jury trial – in her favor. *See Tennant v. Peoria & P.U. Ry. Co*., 321 U.S. 29, 35 (1944) (jury is ultimate fact finder). Throughout the five-day trial, Judge Pratt observed the jury and the courtroom. He relied on his knowledge, observations, and the record to determine that in fact, the jury had not been compromised and had delivered a valid verdict. App. 40-46. The jury had not left the control of the court during its two-minute break from 4:35 to 4:37 p.m., nor was there any other reason that would undermine the parties' or public's confidence in the jury's verdict. App. 43. The trial judge included his observations and conclusions in his Order on post-trial motions.

App. 42-43. In the appropriate exercise of his discretion, the trial judge upheld the jury's valid verdict in Dean Jones's favor. Yet, the Eighth Circuit discarded the verdict without giving any deference to the trial judge's analysis, thereby violating Dean Jones's Seventh Amendment rights.

The Eighth Circuit's decision in this case disturbs the careful balance of authority between the trial and appellate courts developed over time in the federal system. Much of this development has occurred in the course of interpreting the Seventh Amendment's Reexamination Clause. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996). Appellate review of jury verdicts is a much later recognized and less securely constitutional development. Such review was once deemed inconsonant with the Seventh Amendment's Reexamination Clause. *Gasperini*, 518 U.S. at 434. The Eighth Circuit's decision in this case rejects the district court's observations and conclusions about the jury's integrity, which were made by the judge closest to the events. The appellate court substitutes its own analysis of the cold record instead. Moreover, the Eighth Circuit's new rule mandates that the trial judge will never recover the discretion to accept a jury's verdict, thereby substituting the appellate court's judgment in every case. The Court should grant certiorari in this case to ensure that the balance of authority between trial and appellate courts is congruous with the Reexamination Clause.

III. The Eighth Circuit's Decision Relies on Information Outside the Record.

The court of appeals relied on incompetent evidence instead of relying on the trial court judge's analysis and observations. Twice in its decision, the court of appeals referred to a letter that Wagner's counsel allegedly received from a juror weeks after the trial concluded. App. 6, n. 6, 12. The letter was unsigned, and its envelope (included in the exhibit) is stamped but bears no U.S. Postal Service mark. App. 165-168. Nevertheless, the court of appeals relied on this letter in deciding that the jurors were confused, vacillating, and unable to understand their instructions. App. 6. This reliance was in error, because Federal Rule of Evidence 606(b) precludes evidence from any juror regarding communications among jurors in deliberations, even if prompted by the jurors themselves. *Tanner v. United States*, 483 U.S. 107 (1987) (transcribed interview with jurors after the trial held inadmissible); Fed. R. Evid. 606(b). The court of appeals disregarded the jury forewoman's clear statements indicating no confusion, made in the courtroom and on the record. Instead, the Eighth Circuit relied on an unsigned letter produced by Wagner's counsel that is precluded from consideration by the Federal Rules of Evidence and precedent in this Court.

The court of appeals also supported its new rule with speculation about jurors' mobile device use. App. 10. Jurors were prohibited from using their cellphones during the trial, so the court of appeals' speculation was without basis. App. 100. One juror requested

special permission to use a phone during a break to check on a sick child at home. *Id.* This juror took her instructions very seriously, and refrained from using her phone without permission even in a crisis involving her child. The court of appeals' concern that the jurors would search for media reports on their phones immediately after leaving the courtroom is unfounded, and does not support a new "bright-line" rule against reassembling the jury.

IV. The Eighth Circuit Decision's Fundamental Injustice Has Substantial Impact.

The Eighth Circuit's flawed and unreasonable decision is fundamentally unfair to the Defendants and the University of Iowa. They must now face retrial solely because the magistrate judge mistakenly discharged an uncompromised jury. The Eighth Circuit's new "bright-line" rule, however, has implications beyond those affecting these Defendants. The rule requires the trial court to disregard a verdict *every time* a jury is dismissed and recalled, including those times when the verdict rendered is otherwise valid. For example, under the Eighth Circuit's rule, if a trial judge merely utters, "discharged," the moment before a jury forewoman – still seated in the jury box – corrects him to present a properly completed verdict form, the trial court may not accept the verdict.

The Eighth Circuit's rule removes discretion from trial judges who have observed the juries and the courtrooms. The rule is a presumption *against*

preserving the jury's verdict. This presumption systematically prevents trial judges from exercising discretion and examining the particular facts of each case in order to evaluate whether the jury's verdict should be preserved. The case-by-case factual approach adopted by all other federal courts of appeals, leaving discretion to the trial court and limiting appellate review, is what the Seventh Amendment demands. The Eighth Circuit's ruling rejects it, not only in this case, but in all future cases. The Court should consider the split among circuits created by the Eighth Circuit's decision because of its impact on the Constitutional rights of Dean Jones and future litigants within the Eighth Circuit.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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United States Court of Appeals
for the Eighth Circuit

No. 13-1650

Teresa R. Wagner

Plaintiff-Appellant

v.

Carolyn Jones, Dean Iowa College of Law
(in her official and individual capacities);
Gail B Agrawal, Dean Iowa College of Law
(in her official and individual capacities)

Defendants-Appellees

Appeal from the United States District Court
for the Southern District of Iowa – Davenport

Submitted: February 13, 2014
Filed: July 15, 2014

Before SMITH, BEAM, and BENTON, Circuit Judges.

BEAM, Circuit Judge.

Teresa Wagner appeals from the district court's denial of her motion for new trial, arguing that significant errors in the verdict formulation process entitle her to a new trial. Under the standard we apply today, we conclude that the district court abused its discretion in denying Wagner's motion. Accordingly, we reverse and remand for a new trial.

I. BACKGROUND

This case returns to us for the second time following reversal and remand of the district court's initial summary judgment ruling. *See Wagner v. Jones*, 664 F.3d 259, 275 (8th Cir. 2011) (remanding for "further proceedings" consistent with the court's opinion). The facts pertinent to the instant appeal are set forth below.

On January 20, 2009, Wagner commenced action against Carolyn Jones, then Dean of the Iowa College of Law (the "College of Law") in her individual capacity. She alleged claims associated with her candidacy as a legal writing instructor at the College.[1] Wagner

[1] The record establishes that although the College of Law uses a multifaceted process for receiving advice and consent from relevantly involved faculty and staff, especially in the selection of new members of the teaching faculty, the Dean has final authority and responsibility for the exercise of the College's employment actions. In this case, Dean Jones acted in her individual capacity as a supervisor. Under such circumstances, a supervisor may incur liability under 42 U.S.C. § 1983 for a violation of a federally protected right when the supervisor is personally involved in the violation or when the supervisor's

(Continued on following page)

subsequently amended her complaint, seeking injunctive relief in the form of employment from the current College of Law Dean, Gail B. Agrawal, in her official capacity. On October 15, 2012, pursuant to 42 U.S.C. § 1983, Wagner's trial commenced in Davenport, Iowa, on two constitutional claims-political discrimination and equal protection.

On October 22, 2012, the jury began deliberations. Deliberations continued on October 23, with a magistrate judge presiding over the deliberations by consent of the parties.[2] At 9:00 a.m., on October 24, the jury sent the magistrate judge a note, inquiring, "What happens if we cannot come to an agreement?" After the magistrate judge conferred with the parties and, by telephone, with the district judge, the magistrate judge directed the jury to continue with deliberations in an attempt to arrive at a unanimous verdict.

Roughly two hours after submitting their first question, the jury sent the magistrate judge another note, signed by all twelve jurors, stating, "We are unable to come to a unanimous verdict for either the Plaintiff, Teresa Wagner, nor Defendant, Carolyn Jones." Subsequently, the district court held a telephone conference with the magistrate judge and the

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corrective inaction constitutes deliberate indifference toward the violation. *Ottman v. City of Independence, Mo.*, 341 F.3d 751, 761 (8th Cir. 2003).

[2] The district court judge conducting the trial had returned to his chambers in Des Moines, Iowa.

parties, discussing how to proceed. During this discussion, the district court recognized that "we don't know if [the note] pertains to one of the submitted counts or both of the submitted counts," but the court clearly operated at that time under the assumption that both counts were at issue in the jury notes.[3] At this point, the district court asked the parties whether they thought it appropriate to give the jury a so-called *Allen*[4] charge. Wagner desired such a charge, but the appellees objected to giving the instruction.

Pursuant to the district court's instructions, a little after 1:00 p.m., the magistrate judge convened the jury in open court and read them the *Allen* charge. At 3:24 p.m., through email, Wagner's counsel requested that the district court discharge the jury and order a new trial. A short time after 4:00 p.m., the jury sent the court another note, indicating that the jury could not reach a unanimous verdict and predicting, "I DO NOT SEE US EVER AGREEING." After receiving this note, the magistrate judge again convened the jury in open court without counsel present. The magistrate judge questioned the jury about the note, and each juror confirmed that the note reflected his or her

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[3] Indeed, the court's jury instructions clearly directed the jury to evaluate the issues and return a separate verdict on each count submitted for deliberations, without further instructions from the court.

[4] *Allen v. United States*, 164 U.S. 492 (1896). "An *Allen*-charge is a supplemental jury instruction that advises deadlocked jurors to reconsider their positions." *United States v. Walrath*, 324 F.3d 966, 970 (8th Cir. 2003) (quotation omitted).

individual view as to the state of deliberations. The magistrate judge, then, declared a mistrial, asked the jury to later complete and return a post-trial assessment, and thanked the jury for their service. The magistrate judge finally excused the jury and the members retired from the courtroom at 4:35 p.m. according to the clerk of court's minutes.

Then, after having discharged the jury, the magistrate judge reassembled the previously dispersed members in the courtroom.[5] According to the clerk of court's minutes, this occurred at 4:37 p.m. The magistrate judge, out of the presence of the parties and their lawyers, then engaged in the following colloquy with the jury:

> What I failed to ask you for on the record was there were two counts in the Complaint filed by Ms. Wagner against the Defendants and the indication of the jury was that you were unable to reach an agreement. Was that as to both Counts 1 and 2?

The foreperson replied that the jury had reached a verdict on Count I, but not Count II. Specifically, the foreperson indicated that the jury had found for

[5] From the time the magistrate judge discharged the jury and the members dispersed from the courtroom, until the time the magistrate judge reassembled them in the courtroom, we have no record of the jury members' location, supervision, contacts, communications or conduct, either as individuals or as a group.

defendant Jones on Count I.[6] The magistrate judge polled each juror, and the jurors confirmed the verdict on Count I. After this, the magistrate judge amended the previous mistrial ruling, now limiting it to Count II, and ordered the foreperson to sign the verdict form and again excused the jury. On October 25, 2012, the clerk entered judgment on the verdict on Count I in favor of Jones and noted that the court declared a mistrial on Count II.

On November 1, 2012, the appellees moved for judgment as a matter of law on Count II – the equal protection claim. On November 20, 2012, Wagner moved for a new trial on the basis that the magistrate judge lacked authority to reconvene the jury and accept a verdict after he had already declared a mistrial. The district court granted the appellees' motion for judgment as a matter of law on Count II and denied Wagner's motion for new trial, among other rulings. Wagner now appeals.[7]

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[6] There is, however, information in the record tending to show that the jury's "I DO NOT SEE US EVER AGREEING" note to the magistrate judge prior to discharge and reassembly better described the then continuing status of jury deliberations on both counts. *See, e.g., Wagner v. Jones*, No. 3:09-CV-10 (Response to Motion for Judgment as a Matter of Law, Ex. A, Nov. 19, 2012).

[7] In her reply brief, Wagner has abandoned her challenge to the district court's grant of judgment as a matter of law on Count II.

II. DISCUSSION

Wagner raises many issues in this appeal. However, we substantially limit our review to a single matter: whether the district court erred in denying her motion for new trial under Federal Rule of Civil Procedure 59(a) due to errors in the verdict process.[8] "We review the denial of a motion for a new trial for a clear abuse of discretion, with the key question being whether a new trial is necessary to prevent a miscarriage of justice." *Hallmark Cards, Inc. v. Murley*, 703 F.3d 456, 462 (8th Cir. 2013) (internal quotation omitted). Although our standard of review is deferential, "we may reverse a district court's denial of a Rule 59 motion where its judgment rests on an erroneous legal standard." *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 656 (8th Cir. 1995). Indeed, the abuse of discretion

[8] Technically speaking, Wagner moved for a new trial under Rule 59(a). Later, in a single document, Wagner moved to alter the judgment under Rule 59(e) and alternatively moved for relief from judgment under Rule 60(b)(4). Wagner's Rule 59(e) motion was untimely, and she lodged the same basis for relief in her Rule 59(a) and 60(b)(4) motions. The district court evaluated whether Wagner's complaints were "cognizable under *any* rule." Rule 60(b)(4) provides a court authority to relieve a party from a final judgment that is void. "A judgment is void if the rendering court lacked jurisdiction or acted in a manner inconsistent with due process." *Baldwin v. Credit Based Asset Servicing and Securitization*, 516 F.3d 734, 737 (8th Cir. 2008). We therefore limit our review to Wagner's timely Rule 59(a) motion for new trial, which allows a district court to grant a new trial "after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a)(1)(A).

standard "does not mean a mistake of law is beyond appellate correction." *Koon v. United States*, 518 U.S. 81, 100 (1996).

Wagner asserts that she is entitled to a new trial because the magistrate judge, after declaring a mistrial, had no legal authority to reconvene the jury and accept an unsigned verdict in favor of Jones on Count I. In ruling on Wagner's motion, the district court found legal authority for the magistrate judge's conduct in the "numerous federal courts that have held a jury remains 'undischarged' and subject to recall by the court under such circumstances."

Generally, with some factual distinctions, precedent falls within two camps on whether a jury may be recalled after discharge, especially a discharge such as we have in this case. One line of authority – followed by the district court here – requires a case-specific analysis of "whether the jurors became susceptible to outside influences" and beyond the control of the court once discharged. *United States v. Figueroa*, 683 F.3d 69, 73 (3d Cir. 2012). Many of the cases that adhere to this rule draw support from *Summers v. United States*, where the Fourth Circuit observed that a jury "may remain undischarged and retain its functions, though discharge may have been spoken by the court, if, after such announcement, it remains an undispersed unit, within control of the court, with no opportunity to mingle with or discuss the case with others." 11 F.2d 583, 586 (4th Cir. 1926). Although the court in *Summers* determined that a

nominally discharged jury that stayed in the courtroom remained undischarged for the purposes of correcting an error, *see id.* ("[t]hey remained in their seats"), a few courts have extended *Summers* to apply to situations where the court announces discharge and the jury retires to the deliberating room, *see, e.g., Figueroa*, 683 F.3d at 72; *United States v. Rojas*, 617 F.3d 669, 673 (2d Cir. 2010); *United States v. Marinari*, 32 F.3d 1209, 1215 (7th Cir. 1994). In those situations, even though discharged and outside the presence of the court, the jury remains subject to recall, the Third Circuit has reasoned, as long as "[t]he jurors did not disperse and interact with any outside individuals, ideas, or coverage of the proceedings." *Figueroa*, 683 F.3d at 73. Thus, according to this view, if a jury remains within the court-imposed "protective shield," it is subject to recall after discharge. *People v. McNeeley*, 575 N.E.2d 926, 929 (Ill. Ct. App. 1991).

The equally established competing view is that "[w]hen the court announces [the jury's] discharge, and they leave the presence of the court, their functions as jurors have ended, and neither with nor without the consent of the court can they amend or alter their verdict." *Melton v. Commonwealth*, 111 S.E. 291, 294 (Va. 1922); *see Nails v. S & R, Inc.*, 639 A.2d 660, 667 (Md. 1994) ("[I]n a civil case, after a jury has rendered an initial verdict, the trial judge ordinarily may ask the jury to amend, clarify or supplement the verdict in order to resolve an ambiguity, inconsistency, incompleteness, or similar problem with the initial verdict, up until the jury has been discharged

and has left the courtroom."). Under this rule, if the jury disperses from the courtroom, we presume "mingling occurs once the individual jurors have been discharged from their oath and duties as jurors and have left the presence, control, and supervision of the court." *Spears v. Mills*, 69 S.W.3d 407, 412 (Ark. 2002); *see Mohan v. Exxon Corp*., 704 A.2d 1348, 1352 (N.J. Sup. Ct. App. Div. 1998) ("We do not consider it of any moment that individual jurors may not have discussed the case with anyone or been subject to improper or any influences."). As Justice Cardozo long ago explained: "where [the jury] has been discharged altogether and relieved, by the instructions of the judge, of any duty to return . . . it has ceased to be a jury, and, if its members happen to come together again, they are there as individuals, and no longer as an organized group, an arm or agency of the law." *Porret v. City of New York*, 169 N.E. 280, 280 (N.Y. 1929).

Our circuit has not had the opportunity to address the issue of recalling a jury after a court has declared a mistrial and discharged the jury. Today, we hold, in a case such as the present one, where a court declares a mistrial and discharges the jury which then disperses from the confines of the courtroom, the jury can no longer render, reconsider, amend, or clarify a verdict on the mistried counts. In this age of instant individualized electronic communication and widespread personal control and management of pocket-sized wireless devices, we think this bright

line rule is more faithful to precedent[9] and offers better guidance than an amorphous rule that turns on whether jurors in fact became available for or were susceptible to outside influences or remained within total control of the court. Indeed, the *Summers* rule and its variations become unworkable when, as here, the record is silent as to juror security and conduct after discharge and leaves much to chance depending upon the nature of the architectural design of a courthouse and the availability of non-court personnel

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[9] In this regard, we question whether some courts have improvidently extended Summers, because the precedent that *Summers* relied upon for its holding – like Summers itself – involved situations where a court nominally discharged the jury but corrected errors before the jury dispersed from the courtroom and the direct view of the trial judge. *See Levells v. State*, 32 Ark. 585, 1877 WL 1678, at *3 (Ark. 1877) ("[T]he jurors arose from their seats in the jury box, and began to pass out from the box . . . all in full view of the judge."); *Brister v. State*, 26 Ala. 107, 1855 WL 294, at *6 (Ala. 1855) ("[T]he jury started out of the court-room, but had not got out of the bar."). Notably, this precedent remains in force, *see, e.g., Spears*, 69 S.W.3d at 411-12; *Ex parte T.D.M*, 117 So.3d 933, 938 (Ala. 2011), and is seemingly inconsistent with some cases purporting to apply *Summers* to situations where jurors dispersed beyond the courtroom. As *Summers* explained, we are concerned with whether a juror had the "opportunity" to encounter an outside influence, not whether the juror actually had such encounter. 11 F.2d at 586. In any meaningful sense, once a juror leaves direct judicial supervision in the courtroom, he or she virtually always has the "opportunity" to encounter outside influences. But there remains a marked difference between an admonished jury that disperses from the courtroom with a case still under consideration and one that disperses under the impression that the case is over and their duties complete. *Mohan*, 704 A.2d at 1352.

wandering the spaces outside the courtroom and its jury facilities. And, we are forced to speculate as to the undefined limits of the so-called "protective shield." Furthermore, once a court has declared a mistrial and discharged the jury from the courtroom, an attempt to reconvene the jurors, question them, and re-poll them on the mistried counts raises serious potential for confusion, unintended compulsion and, indeed, coercion.[10] We hesitate to give a vacillating juror an opportunity to reconsider, after he or she has already been polled and discharged, especially where there is the possibility that the jury, or some of its members, may have been confused in the understanding of the instructions. *See ante* at n.6; *see also United States v. Schroeder*, 433 F.2d 846, 851 (8th Cir. 1970) ("After a jury has given its verdict, has been polled in

[10] On this point, given that the magistrate judge had declared a mistrial in addition to discharging the jury from the confines of the courtroom, we are not entirely convinced that those courts following the case-by-case, "outside influence" rule would condone recalling a jury to question and re-poll it on the already mistried counts. *See Figueroa*, 683 F.3d at 72-73 (allowing discharged jury to be recalled and consider new charge after court declared mistrial on different charge); *Rojas*, 617 F.3d at 678 (allowing discharged jury to be recalled from deliberating room "to correct a technical error in the courtroom deputy's reading of the verdict form"); *see also Camden v. Circuit Court of Second Judicial Circuit, Crawford Cnty., Ill.*, 892 F.2d 610, 616 n.7 (7th Cir. 1989) ("Once the jury is discharged and has dispersed, a trial court is unable to reconsider its intention to declare a mistrial."). Criminal cases, of course, present constitutional concerns not present here. *See Camden*, 892 F.2d at 616 n.7. But even in civil cases, both the litigants and the public must have the utmost confidence that verdicts remain untainted.

open court and has been discharged, an individual juror's change of mind or claim that he was mistaken or unwilling in his assent to the verdict comes too late.").

Applying the standard we adopt today, we conclude that the magistrate judge erred in recalling the jury to question and re-poll them as to the mistried, or not, counts. After declaring a mistrial, the magistrate judge thanked the jury for their service and explained to the jury that the "case will move on and we will either set another trial or it will be resolved in another way." Also, upon discharge, the magistrate judge provided the jurors with "letters" to complete and send back to the court as a post-trial assessment. The record does not indicate what inquiries or information the "letters" contained, but we do know that the magistrate judge informed the jury that "[i]f there's something about this case that we need to know about, this is your opportunity to tell us." At this point, the jury no longer operated under the admonition that it could not talk to others about the case outside of the deliberation room. And, once discharged and dispersed from the courtroom, we are left, as earlier noted, to speculate as to the jurors' conduct.[11] Once reassembled in the courtroom, the magistrate judge reminded the jury that two counts were at

[11] Although the district court offered the magistrate judge's personal account of the time interval between discharge and reconvening the jury, as the district court recognized, this is not part of the record.

issue and re-polled them as to Count I, but nothing indicates that the jury understood that the case was being placed back in their hands, and that they were being re-polled essentially to rescind the mistrial. Although it may have been an inadvertent mistake in failing to clarify the jury verdict before the mistrial was declared, the mistake was beyond correction after the jury left the courtroom. Therefore, in light of our holding, we conclude the district court applied an erroneous legal standard and, thus, abused its discretion in denying Wagner's motion for a new trial.

Finally, since we remand this case for retrial, we question whether the trial court's jury instructions adequately embraced our earlier guidance in adopting the First Circuit's test concerning First Amendment political discrimination claims. *See Wagner*, 664 F.3d at 270. There, we recognized that a discrimination plaintiff such as Wagner has "the threshold burden to produce sufficient direct or circumstantial evidence from which a rational jury could find that political affiliation was a substantial or motivating factor behind the adverse employment action." *Id.* (quotation omitted). If Wagner produces such evidence at trial, as we felt she did for summary judgment purposes, the burden of persuasion then shifts to "Jones to show that she would have made the same hiring decisions regardless of Wagner's political affiliations and beliefs." *Id.* at 271. In other words, Wagner "will prevail unless the fact finder concludes that the defendant has produced enough evidence to establish that [the adverse action against Wagner] would have

occurred in any event for nondiscriminatory reasons." *Id.* at 270. However, unlike other employment discrimination cases "where a plaintiff is required to come forward with affirmative evidence that the defendant's nondiscriminatory reason is pretextual," in this political discrimination case Wagner is not required to produce any evidence of pretext to prevail. *Id.* at 272 (quotation omitted). Indeed, while she "*may* discredit the proffered nondiscriminatory reason, either circumstantially or directly, by adducing evidence that discrimination was more likely than not a motivating factor," *id.* (emphasis added), "her prima facie case may suffice for a factfinder to infer that the defendant's reason is pretextual," *Padilla-Garcia v. Guillermo Rodriguez*, 212 F.3d 69, 78 (1st Cir. 2000). In this regard, we do not think the district court's Final Instructions Nos. 6 and 7 adequately address these principles and the attendant shifting burden of persuasion. Accordingly, upon remand, we direct the district court to revisit these instructions.

III. CONCLUSION[12]

We reverse the district court's order denying Wagner a new trial on Count I, vacate the judgment on Count I, and remand for a new trial.

[12] The appellees argue that we lack appellate jurisdiction over this appeal to the extent it covers Wagner's claims against Dean Agrawal for prospective relief, because Wagner's notice of appeal did not list Agrawal as a named defendant or identify the district court's ruling with respect to Agrawal. Despite Agrawal's attempts to create one, we see no jurisdictional defect in Wagner's notice of appeal as to prospective relief. *See* Fed. R. App. P. 3(c)(1) (requiring notice of appeal to (1) "specify the party or parties taking the appeal"; (2) "designate the judgment, order, or part thereof being appealed"; and (3) "name the court to which the appeal is taken"); *Hallquist v. United Home Loans, Inc.*, 715 F.3d 1040, 1044 (8th Cir. 2013) ("This court has jurisdiction over the underlying order if the appellant's intent to challenge it is clear, and the adverse party will suffer no prejudice if review is permitted.").

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

TERESA R. WAGNER, Plaintiff, v. CAROLYN JONES, Dean of Iowa College of Law (in her individual capacity); GAIL B. AGRAWAL, Dean of the Iowa College of Law (in her official capacity), Defendants.	§ § § § § § § § § § § § §	3:09-cv-10 ORDER (Filed Mar. 8, 2013)

Before the Court are the following motions: 1) Teresa Wagner's ("Plaintiff") Objection[1] to Entry of Judgment on Count I ("Pl.'s Objection") (Clerk's No. 126), filed October 25, 2012; 2) Carolyn Jones' and Gail Agrawal's ("Defendants") Motion for Judgment as a Matter of Law Pursuant to Fed. R. Civ. P. 50(b) ("Defs.' Mot. for JAML") (Clerk's No. 130), filed November 1, 2012; 3) Defendants' Motion to Strike Plaintiff's Reply to Resistance to Objection to Entry of Judgment on Count I or, in Alternative, Request that the Court Consider the Response Brief Filed by Defendants ("Defs.' Mot. to Strike") (Clerk's No. 131),

[1] Although not filed as a "motion," the Court will treat Plaintiff's "Objection" as a motion for relief.

filed November 9, 2012; 4) Plaintiff's Motion for New Trial ("Pl.'s Mot. for New Trial") (Clerk's No. 133), filed November 20, 2012; 5) Plaintiff's Motion to Alter Judgment or Alternatively Motion for Relief from Judgment, filed November 26, 2012 ("Pl.'s Mot. to Alter") (Clerk's No. 135); and 6) Defendants' Motion for Leave to File Additional Authority in Support of Defendants' Renewed Motion for Judgment ("Defs.' Mot. for Leave") (Clerk's No. 138), filed December 10, 2012. Defendants filed a resistance to Plaintiff's Objection on October 29, 2012. Clerk's No. 129. Plaintiff replied on October 31, 2012.[2] Clerk's No. 130. Plaintiff filed a resistance to Defendants' Motion for JAML on November 19, 2012. Clerk's No. 132. Defendants replied on November 28, 2012. Clerk's No. 136. Plaintiff filed a resistance to Defendants' Motion to Strike on November 26, 2012. Clerk's No. 134. Defendants filed a resistance to Plaintiff's Motion for New Trial on December 6, 2012. Clerk's No. 137. Defendants filed a resistance to Plaintiff's Motion to Alter on December 12, 2012. Clerk's No. 139. Plaintiff filed a resistance to Defendants' Motion for Leave on December 21, 2012. Clerk's No. 140. Defendants replied on December 31, 2012. Clerk's No. 141. The matters are fully submitted.

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[2] Plaintiff's Reply is the subject of Defendants' Motion to Strike.

I. FACTUAL BACKGROUND

On October 15, 2012, trial in this case commenced in Davenport, Iowa. *See* Clerk's No. 102. After several days of testimony, the jury began deliberations on two counts from Plaintiff's Complaint at the end of the trial day on October 22, 2012. Clerk's No. 110. Specifically, the jury was tasked with deciding Plaintiff's claims of: 1) political discrimination; and 2) equal protection, both arising under 42 U.S.C. § 1983.[3]

The jury deliberated the entire day on October 23, 2012, with United States Magistrate Judge Thomas Shields presiding over the deliberations with the consent of the parties. On October 24, 2012, the jury continued deliberations. At around 9:00 in the morning, the jury sent a note asking, "What happens if we cannot come to an agreement?" *See* Clerk's No. 121. After consulting with the attorneys and with the undersigned, Judge Shields advised the jury to continue its deliberations in an attempt to arrive at a unanimous verdict.[4]

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[3] Generally, Plaintiff claimed that she was denied a position as an LAWR instructor with the University of Iowa because of her conservative viewpoints and activism.

[4] *See* Oct. 24, 2012 Trial Tr. at 3 (Magistrate Judge Shields: "Judge Pratt and I also agree that the appropriate instruction to the jury is simply you are directed to continue your deliberations in an attempt to arrive at a unanimous verdict. I will not advise the jury that if they cannot reach an agreement, there will be a mistrial and/or a new trial. I think that would be inappropriate

(Continued on following page)

At approximately 11:00 a.m. on October 24, 2012, Judge Shields received another note from the jury, signed by all twelve jurors, which stated: "We are unable to come to a unanimous verdict for either the Plaintiff, Teresa Wagner, nor Defendant, Carolyn Jones." *See* Clerk's No. 122. In a colloquy between the undersigned, Judge Shields, and counsel, the following occurred, in pertinent part:

> The Court: [S]o my first question is we don't know if this pertains to one of the submitted counts or both of the submitted counts, I am assuming, maybe this is an assumption I should not make, it pertains to both counts that the jury has, the discrimination claim and the equal protection claim, so if that is something I should put my trust in, that is that both counts they are unable to reach a unanimous verdict, I want to know the Plaintiff's sense, I think I know the answer to this based upon Mr. Fieweger's earlier e-mail, I suspect, Mr. Fieweger, is it fair to say you still want the Court to give an instruction, better known as the Allen charge, which is in the patter [sic] instructions is 3.07?
>
> Mr. Fieweger: I do.
>
> The Court: Mr Carroll, what is the Defendant's position?

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at this stage. That may come later, but that would be a decision for Judge Pratt to make so that will be the written instruction that I give to the jury and that will be filed along with th[is] question[ ].").

Mr. Carroll: I disagree with giving that instruction, certainly at this point in time. . . . I honestly think they should be told, I mean number one, go back and deliberate; but if they're saying – if that's their note, that's fine; but if, you know, if Plaintiff is saying you must given the Allen, then I have a proposal instead of that. . . . I also think that – and I understand what the Allen instruction is, it is so unbelievably coercive to jurors that the Court is saying people, go back, when they've tried so hard and I know the Allen instructions has been approved, but I disagree that there should be any Allen instruction.

The Court: Mr. Carroll, the circuit approved it in a case called *Williams v. Fermenta Animal Health Co.,* 924 [984] F.2d 261, a 1993 case in which they said there's no error where the District Court gave the Allen charge to a civil jury in an employment discrimination case.

Mr. Carroll: I must admit I wasn't aware of that decision, Your Honor, but I still am objecting.

The Court: I don't disagree, Mr. Carroll. You make a very good point and what my law clerk just told me we have done historically, that is I am talking about myself, is that I've always said go back and deliberate again, keep deliberating before I have given the Allen charge. Here is the problem I think with that now. The Magistrate Judge has already instructed them continue your deliberations, and Judge Shields, am I correct, that that is the status of your communications with the jury?

Judge Shields: That is correct, Judge Pratt. That is the last written Order that I gave them.

The Court: And that –

Mr. Fieweger: And that was back at like 9:30, wasn't it Judge?

Judge Shields: That's correct.

Mr. Fieweger: Okay. They've been deliberating now for another two hours with no progress and a note that is signed by all 12 saying they can't agree on anything.

The Court: I am reading the committee comments to 3.07 and, you know, my sense is to tell them one more time, continue your deliberations, and if we get another note, then give the Allen charge; but, you know, I want to hear from both of you. Maybe that's too, quote, conservative, and on the other hand, maybe it is too, quote, explosive to give them the Allen charge now. Mr. Fieweger, you are still firm that you want it?

Mr. Fieweger: Right. [cites and discusses additional case law].

The Court: Okay.

Mr. Fieweger: Mr. Carroll.

Mr. Carroll: I don't have those cases in front of me nor have I done that research. I continue to object to the Allen charge. . . .

. . .

The Court: Okay. Here is what the Court is going to do. I am going to tell Judge Shields to tell

> them to continue to deliberate then after lunch I am going to give them the Allen charge . . . because I am going to have them eat lunch, Tom is going to tell them now – Judge Shields is going to say continue to deliberate, and then after lunch I am going to have Tom read – have Judge Shields read them the Allen Charge.

Oct. 24, 2012 Trial Tr. at 5-10.[5]

At approximately 1:11 p.m. on October 24, 2012, Judge Shields convened the jury in open court and read the jury the Allen charge. *See id.* at 11-13. At around 3:24 p.m., Plaintiff's counsel, Mr. Fieweger, requested by email that a mistrial be declared. *See* Clerk's No. 126-2 at 4 ("It has become obvious to me as plaintiff's counsel that this jury cannot reach a unanimous verdict and [I] would request that they be discharged from their duties and that a new trial be held"). At approximately 4:00 p.m., the undersigned and counsel held a brief conference call wherein Defendants' counsel, George Carroll, stated that he needed to discuss the matter with his clients.[6] *See id.* at 3. A short time later, the Court received another note from the jury, which stated: "We are still unable to come to an [sic] unanimous verdict. I DO NOT SEE

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[5] All references to the Trial Transcript throughout this Order are to an unedited RealTime version provided to the Court by the court reporter.

[6] A court reporter was not present for this particular conference call. Neither the Court nor Mr. Fieweger heard back from Mr. Carroll on Mr. Fieweger's request for a mistrial, however, presumably due to the subsequent events described below.

US EVER AGREEING. One juror has conflict and needs to leave at 4:30 today. And another Juror, with the sick child, may not be able to attend on Thursday. Please advise where we go from here."[7] Clerk's No. 124.

At approximately 4:30 p.m. on October 24, 2012, Judge Shields again convened the jury in open court. *See* Clerk's No. 114 (Clerk's Court Minutes from October 24, 2012). After reciting the contents of the jury's note, the following colloquy ensued:

> Judge Shields: Ladies and gentlemen, is this the consensus of all of you as to the contents of this note? [Judge Shields individually asks each juror if this is their consensus and each juror responds "Yes"]. I am going to declare a mistrial and I want to say a few things. I don't want to keep you, I know this has been a long period for you. Judge Pratt wants you to know he really appreciates everything that you have done in working as hard as you have. He wanted me to assure you that this is not a failure. These things happen. There are no guarantees in a lawsuit what will happen, what will not happen. Sometimes there are just the inabilities for people to agree as to verdicts and we recognize that. That is why there is a mistrial. There is nothing at all that

[7] According to Mr. Fieweger, Judge Shields telephoned him at approximately 4:26 p.m. to advise him of the jury's note and to inform him that a mistrial would be declared. Clerk's No. 126-2 at 2. Mr. Fieweger concurred that a mistrial was appropriate. *Id.*

any of you should feel that lessens your service here. We appreciate this. We know this is a – a serious imposition on your personal and business lives, no question. I will tell you, after I was a Judge, I served on a jury in state court so it is not as if I do not understand firsthand exactly what jurors go through. I do. Not to the extent that you have gone through your discussion in this case and that brings up my other point. There are letters on the seat of your chairs. We would request and Judge Pratt specifically has asked that you do complete those and send them back to us. That is important to us. Believe me. You are why we are here and we – if we need to do a better job, then we want to know that. If there's something about this case that we need to know about, this is your opportunity to tell us. Now, under the rules of this Court no lawyers and no employees for lawyers or agents for lawyers may contact you without prior written approval from the Court. If you are contacted, you have every right to say I do not want to talk about this. If it is a persistent issue or if someone is pushing on that, you should feel free to call and ask for me, I am the Chief Magistrate Judge. I promise you, I will resolve that issue. You have the right not to talk to anyone about this case and that is your choice; but the lawyers specifically know that they cannot contact you and should not in that regard. I will have this note filed, it will be part of the record. All I can tell you is that the case will move on and we will either set another trial or it will be resolved in another way. I don't know, no one knows at this point in time; but again, I want to emphasize, I don't want to overemphasize this,

> but we need trials, this is one way society sends the message as to what is right, what is wrong as things go on and that's why we certainly don't want you to feel that there has been any lack of attention on your part or any failure on your part. It is just what it is and the case will move on and I do appreciate your service more than I can tell you. I do hope that you take away from this week and a half, almost two weeks an appreciation of how good our system really is and this is part of what the system is all about. Believe me. I am happy to answer any questions that I can if any of you want to ask me questions. If you don't, I appreciate that too, and you can leave. Thank you all. Safe trips back to your home and as I said, if there's anything that we can do or anything you need from us, do not hesitate to call. You are excused. (A recess was taken.)

Oct. 24, 2012 Hr'g Tr. at 13-17. According to the Clerk's Court Minutes, Judge Shields addressed the jury in open court, without counsel, read the jury's note, declared a mistrial, and "thank[ed] the jury at 4:35 p.m. Clerk's No. 114.

The Minutes go on to state that, "[a]t 4:37 p.m., without counsel, in open Court, [the] Court again addressed the jury." *Id.* The transcript reflects the following colloquy:

> Judge Shields: Be seated, please. Again, I apologize. We are back on the record in Case No. 3:09-cv-10. Ms. Tracy, you were the foreperson?
>
> Foreperson: I was.

Judge Shields: What I failed to ask you for on the record was there were two counts in the Complaint filed by Ms. Wagner against the Defendants and the indication of the jury was that you were unable to reach an agreement. Was that as to both Counts 1 and 2?

Foreperson: The one that we were unable to reach was on Form Two.

Judge Shields: I'm sorry?

Foreperson: Form Two.

Judge Shields: The – as to Form One?

Foreperson: We were able to reach a verdict for the Defendant, Carolyn Jones. Do you need me to read what it was?

Judge Shields: I will need to – is that form signed?

Foreperson: No.

Judge Shields: We will – I will ask you to sign that and we will file that; but, ladies and gentlemen, then not to belabor this, it is a crazy week for all of us, I want to ask each of you, [Juror 1], was that your verdict as to Form One?

Juror 1: Yes.

Judge Shields: Okay. [Juror 2], was that your verdict?

Juror 2: Yes.

Judge Shields: All right. [Juror 3], was that your verdict?

Juror 3: Yes.

Judge Shields: [Juror 4], was that your verdict?

Juror 4: Yes.

Judge Shields: [Juror 5], was that your verdict?

Juror 5: Yes.

Judge Shields: [Juror 6], was that your verdict?

Juror 6: Yes.

Judge Shields: [Juror 7], was that your verdict?

Juror 7: Yes.

Judge Shields: [Juror 8], was that your verdict?

Juror 8: Yes.

Judge Shields: [Juror 9], was that your verdict?

Juror 9: Yes.

Judge Shields: [Juror 10], was that your verdict?

Juror 10: Yes.

Judge Shields: [Foreperson], was that your verdict?

Foreperson: Yes.

Judge Shields: [Juror 11], was that your verdict?

Juror 11: Yes.

Judge Shields: And, ladies and gentlemen, as we discussed before, as to Form Two, there was

no ability to reach a unanimous decision on Form Two?

Foreperson: There was not.

Judge Shields: Then I am amending my Order only to the extent that the mistrial that I have ordered is as to Form Two or Count 2 and not Count 1 so again, I think your work was not for naught because that verdict stands, but the mistrial as to Count 2 or Form Two leaves that part of the case still open in my opinion. Okay. Good. Now, I think I am done; but any – I am trying to think about this and the problem, of course, it is not my case and I didn't try it so I am trying to do the best I can from what I know. Any other questions right now? Good. Thank you all. I am not moving from here. Leave. I need all of you to sign Count 1.

Foreperson: All of us? It just states here –

Judge Shields: Is it just for the foreman? Then that's fine. Some Verdict Forms require all jurors to sign, but if that one only has yours, then that's fine, Ms. Tracy, then it is done. Thank you.

Oct. 24, 2012 Hr'g Tr. at 17-20.

According to Mr. Fieweger, Judge Shields telephoned him at approximately 4:55 p.m. on October 24, 2012, and stated that he had accepted the jury's verdict on Count I. Clerk's No. 126-2 at 2. The Clerk's Court Minutes reflect that "Jury finds for defendant on count 1 but cannot reach a verdict on count 2. Court declares a mistrial on count 2. Court thanks jury and jury excused 4:42 pm." Clerk's No. 114. At

approximately 9:26 a.m. on October 25, 2012, the Clerk of Court entered a Judgment in the case stating that judgment was entered in favor of Defendants on Count I and that a mistrial was declared on Count II.[8] Clerk's No. 125.

II. LAW AND ANALYSIS

A. *Plaintiff's Objection and Defendants' Motion to Strike*

1. *Plaintiff's Objection.*

In Plaintiff's Objection, Plaintiff contends that she was denied her right under Federal Rule of Civil Procedure 48(c) to "poll the jury." Pl.'s Br. in Supp. of Objection (Clerk's No. 126-1) at 2 ("Because plaintiff was under the impression that a mistrial was going to be declared on both counts and was never informed prior to the time in which the jury was discharged that the court was accepting a verdict, plaintiff has been denied her fundamental rights to challenge this verdict by polling the jury."). Defendants resist the motion, contending that the attorneys for both parties waived being present while the jury verdicts were announced, and pointing out that the jury was, in

[8] At approximately 11:24 a.m. on October 25, 2012, the undersigned, Judge Shields, and counsel for both parties participated in a short telephone conference at the request of Mr. Carroll. *See* Oct. 25, 2012 Hr'g Tr. Mr. Carroll expressed that he objected to a mistrial having been declared. *Id.* at 1. He also renewed his motion made at trial for a directed verdict on Count II. *Id.*

fact, properly polled, both as to its ability to reach a verdict at all regarding Count II and as to the unanimity of the verdict regarding Count I. Defs.' Br. in Resistance to Pl.'s Objection (Clerk's No. 127-1) at 2-4.

The Court agrees with Defendants that Plaintiff's Rule 48(c) objection must be overruled. Rule 48(c) provides that "[a]fter a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually." In this case, Judge Shields polled the jury regarding its inability to reach a verdict generally, and then, upon discovering that the jury had, in fact, reached a verdict on Count I, polled the jury again to determine the jury's unanimity as to that Count. The Court can find no violation of Rule 48(c) under these circumstances.[9]

2. *Defendants' motion to strike.*

Two days after Defendants filed their resistance to Plaintiff's Objection, Plaintiff filed a "Reply to Resistance/Memorandum of Law in Support of Objection to Entry of Judgment on Count I." Clerk's No. 129. In

[9] Plaintiff's argument about Rule 48(c) touches upon a broader argument that the polling on Count I was improper because the jury had already been discharged. The question of whether Judge Shields could properly have done *anything* after initially declaring a mistrial, including polling the jury a second time, is addressed in detail in the Court's discussion, *infra* § II.B, of Plaintiff's Motion to Alter.

a sixteen-page brief, Plaintiff goes substantially beyond the arguments made in her "Objection to Entry of Judgment on Count I," arguing that the jury verdict was compromised and inconsistent and that Judge Shields had no authority to accept the jury verdict on Count I after permitting the jury to leave the courtroom. *Id.* at 5-15.

Defendants move to strike Plaintiff's "Reply," pointing out that it raises new arguments and exceeds the page limitation for reply briefs in violation of Local Rule 7(g).[10] *See*, LR7(g) ("Ordinarily, reply briefs are unnecessary. . . . However, the moving party may, within 7 days after a resistance to a motion is served, file a reply brief, not more than 5 pages in length, to assert newly-decided authority or to respond to new and unanticipated arguments made in the resistance."). Plaintiff resists Defendants' Motion to Strike, arguing that extraordinary circumstances excuse Plaintiff's noncompliance with Local Rule 7(g) and that Defendants' Motion to Strike "blindly elevates form over substance." Pl.'s Resistance to Mot. to Strike (Clerk's No. 134) at 1.

Despite Plaintiff's arguments about "extraordinary circumstances," Plaintiff easily could have requested leave of Court to file a nonconforming reply

[10] In the event the Court denies Defendants' Motion to Strike, Defendants request that the Court alternatively consider a response brief by Defendants filed as an attachment to the Motion to Strike. *See* Clerk's No. 131-1.

brief or to supplement her Objection. Since she did not do so, the Court agrees with Defendants that Plaintiff's Reply should be stricken for its failure to comply with Local Rule 7(g).[11]

B. *Motion to Alter Judgment*

Plaintiff moves the Court to alter the Judgment in favor of Defendants on Count I, pursuant to Federal Rule of Civil Procedure 59(e). Pl.'s Mot. to Alter at 1. Rule 59(e), however, provides that a "motion to alter or amend a judgment must be filed no later than 28 days after the entry of judgment." Judgment in this case was entered on October 25, 2012. *See* Clerk's No. 125. Plaintiff did not file the Motion to Alter Judgment until November 26, 2012 – 32 days after the entry of judgment.[12] Accordingly, Plaintiff's Motion to Alter Judgment pursuant to Rule 59(e) is

[11] No prejudice inures to Plaintiff from striking the Reply brief because Plaintiff has recited nearly all new arguments of the Reply brief verbatim in her Motion to Alter. *Compare* Pl.'s Reply to Resistance/Mem. of Law in Supp. of Pl.'s Objection (Clerk's No. 129) at 6-11 *with* Pl.'s Br. in Supp. of Mot. to Alter (Clerk's No. 135-1) at 5-10.

[12] The three-day extension of time to file under Federal Rule of Civil Procedure 6(d) is inapplicable because Plaintiff's Motion to Alter was not precipitated by a requirement that Plaintiff "may or must act within a specified time after service." Moreover, the Court would have been prohibited from granting Plaintiff an extension of time to file the Motion to Alter under Rule 59(e), even had Plaintiff made such a request. *See* Fed. R. Civ. P. 6(b)(2) ("A court must not extend the time to act under Rules . . . 59(b), (d), and (e). . . .").

denied as untimely. *See Sanders v. Clemco Indus.,* 862 F.2d 161, 169 (8th Cir. 1988) (finding that "the district court loses jurisdiction over [an untimely Rule 59(e)] motion and any ruling upon it becomes a nullity").

Alternatively, Plaintiff requests relief from Judgment, pursuant to Federal Rule of Civil Procedure 60(b)(4).[13] *Id.* Rule 60(b)(4) permits the Court to "relieve a party or its legal representative from a final judgment, order, or proceeding . . . [if] the judgment is void." Here, Plaintiff contends that Judge Shields' acceptance of the jury verdict on Count II is void because Judge Shields had no authority to reconvene the jury after declaring a mistrial and discharging the jury, and because Judge Shields lacked authority to question the jury about whether they had reached a verdict on Count I after discharging them. Mot. to Alter at 1-2.

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[13] Defendants argue that Plaintiff's Motion to Alter is not cognizable under Rule 60(b)(4) because the present case does not present one of the rare types of infirmities held to support such a motion. *See* Defs.' Br. in Supp. of Resistance to Pl.'s Mot. to Alter (Clerk's No. 139-1) at 1-3 (citing *United Student Aid Funds, Inc. v. Espinosa,* 559 U.S. 260 (2010)). While the Court agrees with Defendants, Plaintiff also raises Judge Shields' acceptance of the jury verdict on Count I as a basis for her Motion for New Trial. Accordingly, to the extent that Plaintiff's complaints in this section are cognizable under *any* rule, the Court will address the merits of Plaintiff's arguments to ensure a complete resolution of Plaintiff's objections to the entry of judgment in favor Defendants on Count I.

The record supports the following facts regarding the events of October 24, 2012. After giving the *Allen* charge to the jury, the Court received a note stating, "We are still unable to come to an [sic] unanimous verdict. I DO NOT SEE US EVER AGREEING." Judge Shields brought the jury into the courtroom, polled each juror individually regarding whether each agreed with the contents of the note (i.e., regarding an inability to reach a unanimous verdict), informed the jurors that he was "declaring a mistrial," and told them "you can leave. Thank you all. Safe trips back to your home . . . [y]ou are excused." Oct. 24 Trial Tr. at 13-17. Within two minutes, Judge Shields had the jurors brought back into the courtroom, and inquired as to whether their note pertained to both counts of Plaintiff's Complaint. *Id.* at 17; Clerk's No. 114. The foreperson of the jury responded that the jury had, in fact, reached a unanimous verdict on Count I of the complaint in favor of Defendants and that "[t]he one that we were unable to reach was on [Count] Two." Oct. 24, 2012 Trial Tr. at 17. Judge Shields polled each juror regarding the verdict on Count I, and upon receiving confirmation that all jurors were in agreement, requested that the foreperson sign the as yet-unsigned verdict form[14] to memorialize the jury's unanimous finding. *Id.* at 17-19. He thereafter amended his prior order by accepting the verdict

[14] The verdict form contains two "Forms" to be filled in – one for each of the two Counts. *See* Clerk's No. 116. The verdict form as a whole, however, contains only a single signature line. *Id.*

on Count I and declaring a mistrial on Count II. Judge Shields then discharged the jury. *Id.* at 19-20.

Plaintiff urges that once Judge Shields declared a mistrial and excused the jury, "he had no discretion to reconvene the jury to accept some alleged (and unsigned) verdict in favor of defendant on Count I." Pl.'s Br. in Supp. of Mot. to Alter at 4. In support, Plaintiff cites *Gugliotta v. Morano,* 829 N.E.2d 757, 762-64 (Ohio Ct. App. 2005) and *Ross v. Petro,* 515 F.3d 653 (6th Cir. 2008).

In *Gugliotta,* the jury had engaged in several days of deliberation without a verdict. 829 N.E.2d at 762. The court sent a note to the jury to inquire whether they anticipated being able to reach verdicts with further deliberations on the same day and the following day. *Id.* The jury responded in the negative. *Id.* The jury was brought into the courtroom and the judge polled each juror regarding their inability to reach verdicts. *Id.* After all jurors agreed, the judge advised the jurors they were free to discuss the case and requested they return to the jury room until he came back to dismiss them. *Id.* at 762-63. The judge then went to the jury room and was advised by the foreperson that the jury may have misunderstood the judge's polling question. *Id.* at 763. According to the foreperson, the jurors did not believe they could reach a verdict within the two days referenced in the judge's note, but did believe they could reach a verdict in a longer period of time. *Id.* The jury was returned to the courtroom, re-polled as to whether they could reach verdicts at any time if permitted to continue

deliberations, and upon responding that they could, were told by the judge to continue their deliberations. *Id.*

The plaintiff objected to permitting the jury to continue deliberations, arguing that it was an error to permit the jury to continue deliberations after it had been discharged and that the jury was tainted by the trial judge's off-the-record contact with them. *Id.* The judge then called each juror individually into the courtroom and asked what the juror recalled about the judge's contact with them and whether "anything the judge said in the jury room outside the presence of counsel or the court reporter had prejudiced that particular jurors' ability to deliberate or form an opinion of the case." *Id.* One juror reported that the judge had asked what the jurors "thought of the case" and that the judge "said the jury was dismissed and then the jurors began asking questions and the judge answered the jurors' questions." *Id.* at 763-64. A second juror began crying on the witness stand and indicated that the emotional state of the jury changed after the judge told them they were dismissed. *Id.* at 764. The trial judge ultimately determined, however, that her ex parte communications with the jury had not prejudiced the jury and the jury was permitted to continue its deliberations. *Id.* The jury ultimately reached a verdict in favor of the defendant and the plaintiff appealed. *Id.* Relying on "'well established [law] in Ohio that once a jury has returned its verdict and has been discharged, it cannot be reconvened to alter or amend its verdict,'" the Ohio Court of

Appeals determined that the trial judge abused her discretion in permitting the jury to continue deliberations because the "jury in the instant matter was discharged in open court and without reaching a verdict." *Id.* at 762, 764 (citations omitted).

In *Ross v. Petro,* deliberating jurors told the judge in a note that they believed one of their fellow jurors was "agreeing with the group [merely] to expedite the process." *Id.* at 657. The judge decided, based solely on the note, that the juror had engaged in misconduct that "impeded full and fair deliberation of the evidence by other jurors." *Id.* at 658. Accordingly, she declared a mistrial on all pending criminal counts and discharged the jury on the record. *Id.* Shortly thereafter, the judge met with the jury in the jury room. *Id.* She explained what she had done and invited the jurors to speak with her individually in her chambers. *Id.* Five jurors spoke individually with the judge and, during one of these meetings, the judge learned that the jury had unanimously completed and signed verdict forms on several of the counts. *Id.* The judge instructed the bailiff to retrieve the verdict forms and released the jurors. *Id.* After the jurors had left the building, the judge informed counsel of the existence of signed verdict forms. *Id.* When a retrial was set, the defendant moved to bar the proceedings on double jeopardy grounds. *Id.* A different judge found there had been no "manifest necessity for declaring a mistrial" and barred the retrial. *Id.* at 659. *Id.*

Relying on *Gugliotta*'s "teach[ing] that a trial court's authority to reconsider an order discharging

the jury is narrowly circumscribed and must be justified by the particular facts presented," the Sixth Circuit upheld the second judge's decision under Ohio law. *Id.* at 665. The Court noted that, although the complete details of the first judge's ex parte communications with the jurors remained undisclosed, it was clear that the first judge had told at least one juror that there was additional evidence that had not been disclosed, and that the judge had tried to "accommodate the emotion in the room" after jurors became upset at the announcement of a mistrial. *Id.* at 665-66. "[T]hese facts, of which [the judge] was necessarily aware, substantiate the 'potential for prejudice' much more strongly than the circumstances which, in *Gugliotta,* were held to foreclose reconvening the jury after it had been discharged." *Id.*

Plaintiff urges the Court to follow *Gugliotta* and *Ross,* contending that it is "obvious from the transcript of proceedings that this jury was discharged in open court without reaching a verdict and Judge Shields abused his discretion when he reconvened this jury after explicitly declaring a mistrial and discharging the jury." Pl.'s Br. in Supp. of Mot. to Alter (Clerk's No. 135-1) at 8. Plaintiff further contends that, prior to recalling the jury to the courtroom, there "was no indication whatsoever from this jury that they had reached a verdict as to Count I." *Id.* at 9. While Plaintiff concedes that there is no evidence in the record that Judge Shields engaged in ex parte communications with the jury, she nonetheless contends that the sequence of events supports "a

conclusion of intervening ex parte communications between Judge Shields and the jurors, creating at least a substantial 'potential for prejudice,' which should have foreclosed the reconvening of the jury."[15] *Id.* at 10.

The Court finds Plaintiff's arguments unconvincing and concludes that there was no error in Judge Shields' acceptance of the jury's verdict on Count I. *Gugliotta* and *Ross* both arise under Ohio case law, which is not binding on this Court. Even if the Court were to follow *Gugliotta* and *Ross,* however, it would not mandate the result Plaintiff desires. Indeed, both cases clearly recognize that the question of the validity of any action taken after a jury is discharged "must be answered on a case-by-case basis." *Gugliotta,* 829 N.E.2d at 762; *see also Ross,* 515 F.3d at 664 ("[T]he authority of a trial court under Ohio

[15] Plaintiff goes even farther in the next section of her brief, asserting that "there can be no dispute that whatever occurred must have involved Judge Shields receiving testimony from the jurors after the mistrial had been declared and after the jury had been discharged." Pl.'s Br. in Supp. of Mot. to Alter at 11. Likewise, Plaintiff contends that Judge Shields' statements to the *Iowa City Press Citizen* make it "apparent that not only had the jury been excused, but they had left the courtroom, and it was only after judge Shields spoke with jurors outside the presence of anyone that he reconvened this jury." *Id.* at 9. Notably, all the *Press Citizen* article states is that, "By the time Shields realized the jury had not reported its verdict for the individual claims, reporters and the jurors already had left the courtroom, [Shields] said. The jury was brought back in and reported that it decided in favor of the defendant in one claim and could not reach a decision on the other." *See* Clerk's No. 135-2.

law to reconsider its decision after having discharged the jury in open court is limited – even before the journal entry has been made. It is a determination that must be made 'on a case-by-case basis based upon the facts of each particular situation.'" (citing *Gugliotta,* 829 N.W.2d at 762)).

Here, despite Plaintiff's assertion that there is "no indication whatsoever" from the jury that they had a verdict on Count I, the jury's note, in fact, actually contained no indication whatsoever as to whether they were deadlocked on either or both of Counts I and II. The Court recognized this fact in a reported conversation on October 24, 2012 with counsel present. *See* Oct. 24 Trial Tr. ("[S]o my first question is we don't know if this pertains to one of the submitted counts or both of the submitted counts, I am assuming, maybe this is an assumption I should not make, it pertains to both counts that the jury has, the discrimination claim and the equal protection claim. . . . "). Given that Judge Shields' first poll of the jury simply asked whether the note accurately reflected the jurors' consensus, Plaintiff's assertion that "Judge Shields' polling of the jury established that they unanimously agreed that they had not reached a verdict on either Count I or II" is without merit. *See* Pl.'s Br. in Supp. of Mot. to Alter at 11.

The present case is also factually distinguishable from both *Gugliotta* and *Ross* in that, here, the record is devoid of any evidence that Judge Shields' engaged in any ex parte communications with the jury whatsoever. Although Plaintiff speculates that Judge

Shields must have engaged in some impropriety, the exceedingly short period of time the jury was absent from the courtroom undermines such an assertion. Moreover, upon being asked if their inability to reach a verdict pertained to both counts, the jurors clearly informed the Court *on the record* that they had already, in fact, unanimously reached a verdict on Count I and were only deadlocked on Count II. The jury had neither the time nor the opportunity to engage in any additional or further deliberations after leaving the courtroom the first time. Under these circumstances, the Court finds no indication on the record that any impropriety existed that created any potential for prejudice either for or against the Plaintiff.[16]

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[16] Although the Court does not consider the information in this footnote in any way in conducting its legal analysis and deciding the issues before it, it notes that, in representations to the undersigned, Judge Shields firmly denies any improper ex parte communications. He states that he polled the jurors about the note and excused them from the courtroom. As he was gathering his papers from the bench, he recalled that there were two separate counts and realized that he had not polled the jury regarding the separate counts. Within moments of the jury's exit from the courtroom, Judge Shields personally walked to the jury room and, upon finding all twelve jurors still present, asked the jury to return to the courtroom so that he could ask them a few additional questions. According to Judge Shields, his *only* communication with the jury was requesting that they return to the courtroom and this communication was made to the jury with all twelve jurors present, with the jury room door open, and with a Court Security Officer present. Once the jurors had reassembled, Judge Shields made the record reflected *supra*.

(Continued on following page)

Finally, the Court finds it particularly significant that the jury room is in a secure area of the courthouse. When the jurors exited the courtroom for the approximately two minutes after Judge Shields polled them on the contents of their note, they remained at all times in this secure area of the courthouse. This is important because, although Judge Shields informed the jurors that they were "excused," they remained at all times in the control of the Court and were inaccessible to any outside influences. This Court agrees with the numerous federal courts that have held a jury remains "undischarged" and subject to recall by the court under such circumstances.[17] *See United*

The Court Deputy present in the courtroom on October 24, 2012 also confirmed to the undersigned that, immediately after the jury exited the courtroom, Judge Shields, while still on the bench, stated something akin to "I didn't ask them about the individual counts." He thereafter walked to the jury room, and returned almost immediately to the bench with the jury following closely behind.

[17] The Court finds no merit in Plaintiff's objection to the fact that the verdict form had not yet been signed by the jury's foreperson. The jury orally informed the Court that it reached a unanimous verdict on Count I. Each individual juror was polled as to whether they, in fact, found in favor of Defendants on Count I. The jury had reached a substantive decision and was polled on that decision before Judge Shields even discovered that the verdict form had not yet been signed. Thus, there was nothing improper about Judge Shields' request that the foreperson sign the verdict form to commemorate the oral record that had already been made. As the Court' Final Jury Instructions makes clear, "the verdict form is simply the written notice of the decision you reach in this case." Final Jury Instruction 12 (Clerk's No. 107 at 17).

States v. Figueroa, 683 F.3d 69, 72-73 (3d Cir. 2012)[18]; *United States v. Rojas,* 617 F.3d 669, 677 (2d Cir.

[18] In *Figueroa,* Carlos Figueroa faced a trial on three counts, with a bifurcated portion of the trial to follow on a fourth count. 683 F.3d at 72. The jury reached verdicts on two counts in the first phase of the trial, but was unable to reach a verdict on the third count. *Id.* The trial judge accepted the jury's verdicts on counts one and two, "thanked the jury members for their service and released them." *Id.* "Immediately upon their exit, the chief of the firearm section of the U.S. Attorney's Office . . . presented himself to the court and asked that the jury be held so [the bifurcated fourth count] could be further discussed." *Id.* The trial judge "immediately sent a court employee to hold the jury," and after a bit of research, "concluded that she would bring the jury back into the courtroom to consider Count Four." *Id.* Thereafter, the jury returned to the courtroom, the trial judge "rescinded her prior dismissal," the parties presented evidence on count four, and the jury ultimately reached a guilty verdict on that count. *Id.*

Figueroa appealed his conviction on count four, arguing that his due process and double jeopardy rights had been infringed because "[n]ever before . . . has a judge asked for the opinions of both parties regarding dismissing a jury reached a decision on the record regarding the issue, proceeded to dismiss the jury, and then reconvened the same jury and presented it with new evidence regarding an additional criminal charge." *Id.* at 73. Recognizing that the "discharge or release of jurors can be problematic, because, upon release, they become susceptible to outside influences," the Third Circuit nonetheless found no error in the process employed by the trial judge:

> In cases such as Figueroa's, the pivotal inquiry is whether the jurors became susceptible to outside influences. "When a jury remains as an undispersed unit within the control of the court and with no opportunity to mingle with or discuss the case with others, it is undischarged and may be recalled." [*United States v.*] *Marinari,* 32 F.3d [1209,] 1213 [(7th Cir. 1994)] (citing *Summers v. United States,* 11 F.2d 583

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2010) ("The mere incantation of the word 'discharged' marks only a time when the jurors have been discharged nominally.")[19]; *United States v. Marinari,* 32 F.3d 1209, 1214 (7th Cir. 1994) ("Until the jury is actually discharged by separating or dispersing (not

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(4th Cir. 1926)); *see also United States v. Rojas,* 617 F.3d 669, 678 (2d Cir. 2010) ("It is significant that, although the jury had technically been declared 'discharged' by the court, it had not dispersed."). As the Fourth Circuit long ago stated, "the mere announcement of [the jury's] discharge does not, before they have dispersed and mingled with the bystanders, preclude recalling them." *Summers,* 11 F.2d at 586 (citing Austin Abbott, *A Brief for the Trial of Criminal Cases* 730 (2d ed. 1902)).

In this case, the jury returned its verdict as to Counts One and Two, and notified the District Court that it could not reach a verdict as to Count Three. The District Court below retained control of the jury at all times after it informed the jurors they were released. The jurors did not disperse and interact with any outside individuals, ideas, or coverage of the proceedings. Thus the fact that the jury was momentarily released did not subject them to outside influence. Accordingly, the District Court did not err by reconvening the jury for Count Four.

Id.

[19] In *Rojas,* the courtroom deputy incorrectly read the jury's verdict when publishing it in open court. 617 F.3d at 673. After the jury had been polled, declared "discharged," and exited the courtroom, the error was discovered. *Id.* The jurors were reassembled over the objection of the defendant, the verdict was reread, and the jury was repolled and discharged a second time. *Id.* The appellate court found no error in the trial court's procedures, noting that since the jury had not dispersed, it "retained its function" as a jury subject to recall. *Id.* at 678.

merely being declared discharged), the verdict remains subject to review."); *Summers v. United States,* 11 F.2d 583, 586 (4th Cir. 1926) ("[The jury] may remain undischarged and retain its functions, though discharge may have been spoken by the court, if, after such announcement, it remains an undispersed unit, within control of the court, with no opportunity to mingle with or discuss the case with others, and particularly where, as here the very case upon which it has been impaneled is still under discussion by the court, without the intervention of any other business."); *State v. Stewart,* No. 2001-P-0035, 2002 WL 31886657, at *3 (Ohio Ct. App. Dec. 27, 2002) (finding no error where judge misunderstood jury's decision, declared a mistrial, discovered error, brought jury back into courtroom, and accepted verdict on some counts); *Brown v. Gunter,* 562 F.2d 122, 125 & n.1 (D. Mass. 1977) (finding it permissible for an undispersed jury to be recalled the courtroom to correct an inaccurately read verdict and explicitly rejecting a state court rule similar to that in *Gugliotta* as "merely adopt[ing] a rule of trial procedure without reference to constitutional law").

C. *Plaintiff's Motion for New Trial*

Plaintiff next requests that the Court grant a new trial, pursuant to Federal Rule of Civil Procedure 59(a). In particular, Plaintiff contends that she is entitled to a new trial because: 1) Judge Shields lacked authority to accept the jury's verdict on Count I; 2) the Court prohibited Plaintiff from questioning

jurors about their opinions on same sex marriage and abortion during voir dire; 3) the Court permitted certain cross-examination of Professor Mark Osiel; 4) the Court declined a jury request to view Randall Bezanson's deposition testimony; 5) the Court improperly sustained certain hearsay objections during Plaintiff's case-in-chief; 6) the Court declined to give certain of Plaintiff's proposed jury instructions; 7) the Court gave a business judgment instruction to the jury; and 8) the Court declined to provide an additional instruction on the meaning of "acting under color of state law" to the jury. Mot. for New Trial at 1-3.

Federal Rule of Civil Procedure 59(a)(1) provides: "The court may, on motion, grant a new trial on all or some of the issues – and to any party . . . (A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court." The power to grant a new trial "is confided almost entirely to the exercise of discretion on the part of the trial court." *Allied Chem. Corp. v. Daiflon,* 449 U.S. 33 (1980). While a trial court unquestionably has the discretionary power to grant a new trial, the role and function of the jury is not to be trivialized. "The district court can only disturb a jury verdict to prevent a miscarriage of justice." *Beckman v. Mayo Found.,* 804 F.2d 435, 439 (8th Cir. 1986) (citing *McGee v. S. Pemiscot Sch. Dist. R-V,* 712 F.2d 339, 344 (8th Cir. 1983)). Erroneous evidentiary rulings warrant a new trial only where they affect "the substantial rights of the parties." Fed. R. Civ. P. 61; *Anderson*

v. Genuine Parts Co., 128 F.3d 1267, 1270 (8th Cir. 1997). Erroneous jury instructions warrant a new trial only where the objecting party can show that it was materially prejudiced by the erroneous instruction. *See Fink v. Foley-Belsaw Co.,* 983 F.2d 111, 114 (8th Cir. 1993).

1. *Judge Shields' acceptance of jury verdict.*

The Court has already considered and rejected Plaintiff's arguments regarding Judge Shields' authority to accept the jury's verdict on Count I. For the same reasons discussed *supra* § II.B, the Court declines Plaintiff's request for a new trial on this basis. The Court, therefore, turns to Plaintiff's additional arguments in support of a new trial.

2. *Prohibitions on voir dire.*

Plaintiff asserts that the Court abused its discretion by refusing to permit Plaintiff's counsel to "inquire of the jurors regarding their positions on abortion and same sex marriage." Pl.'s Br. in Supp. of Mot. for New Trial (Clerk's No. 133-1) at 4-5 ("[P]laintiff's counsel's recollection is that this Court expressly forbade plaintiff's counsel from inquiring as to those two areas . . . [i]t was imperative that plaintiff's counsel be allowed to inquire regarding the abortion and same sex marriage issues to ensure plaintiff's right to have an impartial jury in this case."). Defendants respond that Plaintiff failed to preserve error on this issue, and that even if she had,

the Court acted well within its wide discretion over the scope of voir dire. Defs.' Br. in Resistance to Pl.'s Mot. for New Trial (Clerk's No. 137-1) at 3-4.

The following colloquy contains the only record prior to or during voir dire where the Court even arguably limits the scope of Plaintiff's voir dire in any way:

> The Court: I want to talk about the voir dire because both of you have expressed an interest in it. Here is where I am coming from on it so you know my position. I am worried about the intrusiveness of asking them about their political, social views. Many of them as you know from experience comment that they are reluctant to serve and I always tell them at the outset that they have privacy rights, that we don't want to interfere with so I guess I just want a general discussion. I think the assumption, Mr. Fieweger, in your brief, and I am referring to the voir dire discussion in your pretrial brief, is it is necessarily true because one holds strong, quote, liberal views or conservative views the idea that one cannot be a judge of what the facts are I don't think necessarily correlates. Having said that, I think you are both correct to some extent, that we, you know, should delve into it. Here is what I am going to do, my voir dire, we are going to take a recess, and then you can voir dire, Mr. Fieweger first, then Mr. Carroll; but *we are not going to have a checklist of your position on abortion, gay marriage, affordable care act, gun control, just not going to do that. Okay?*
>
> Mr. Fieweger: Okay.

The Court: I have been led to believe that their party registration in a county auditor's office is, in fact, public record. People told me that, I don't know if that is true or not.

Mr. Fieweger: It is.

Mr. Carroll: It is true.

The Court: I guess in that sense we are not, quote, invading their privacy so, you know, have at it in terms of their party registration. Some of them, you know, you may be hurting yourselves, but that's a judgment call you all [] have to make, not me. . . .[20]

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[20] The following colloquy continued several minutes later:

The Court: I think most of your [voir dire] questions frankly will be hit on by me. I am going to make a corollary here because I think it is a good one . . . I am requesting to tell them that frequently I have to apply law that I don't think ought to be the law. Here is my point. I think a strong liberal could rule for the Plaintiff here. I think an equally strong conservative could rule for the Defendant. I don't think one's political views necessarily dictate the outcome of the case. Having said that, there is, as both of you have acknowledged, a political, quote, unquote, aspect to this case that I think we have to deal with. . . . Do either of you see any problems with any of the proposed voir dire of the other side?

Mr. Fieweger: I don't.

Mr. Carroll: No.

. . .

The Court: Any questions that either the plaintiff or Defendant feel are better coming from me and less likely to erode your credibility with the jury because if there are, I will ask them.

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Oct. 15-17 Trial Tr. at 1-2 (emphasis added).

While the Court does not doubt the sincerity of Mr. Fieweger's assertion, it simply cannot agree that the emphasized language can be construed as "expressly forbidding" counsel from questioning jurors about their views on abortion or same sex marriage. While the Court did prohibit counsel from questioning each and every juror about their specific political views on hot-button topics in a "checklist" fashion, counsel was not constrained in the manner alleged. Indeed, a review of the actual voir dire demonstrates that the venire was extensively questioned about their ability to be impartial in light of the Plaintiff's "strong political views" and Republican party "activism." *See, e.g.,* Oct. 15-17 Trial Tr. at 64 (The Court:

> Mr. Carroll: I actually think to the extent we are delving into any political beliefs, I think it is better it comes from how the registrations are public, they are not easy to access publicly, but you could go down to – that's how we get into this, we have a huge [newspaper] article about Iowa so I prefer you did that.
>
> Mr. Fieweger: I agree.
>
> Mr. Carroll: Then we have that.
>
> Mr. Fieweger: I wouldn't want to be foreclosed in finding out, for example, if they are a Democrat and they say something to the effect well, I am also a precinct person, he'd be somebody I may want to ask something more of than just the regular run of the mill person who goes and votes every election because that could indicate they have more of an activism with their politics.
>
> The Court: Okay.

Id. at 5-8.

"Ms. Wagner based upon what the lawyers tell me has strong political views and she asserts . . . that as a result of those views, she was denied employment so it may be that what your political views are has something . . . to do with your ability to serve. Because Ms. Wagner is a strong advocate of her position and what we would call an activist – does that – and she is a member of the Republican party, is there something about that, because of your own background or your own political views . . . that would make it impossible or difficult . . . to serve as a fair and impartial juror?"); *id.* at 69, 71, 72, 75, 76, 77, 82, 83, 84, 85 (Mr. Fieweger questioning the venire about their political affiliations, the extent of their activism, and their political donations); *id.* at 83 (Mr. Fieweger: "You will hear my client is a registered Republican and is active in her causes. Anything about that cause you to say I don't want to listen to that?").

Moreover, the Court must agree with Defendants that Plaintiff did not preserve error on this issue. *See Hicks v. Mickelson,* 835 F.2d 721, 724 (8th Cir. 1987) (finding that only a plain error analysis would be applied where it did "not appear from the record that counsel . . . objected to the limitation of voir dire. . . . In order for us to review challenges of the district court's rulings, the district court must be advised by counsel on the record of his objection of the relief requested"). At no time after the Court imposed the above restriction did Plaintiff's counsel object, request broader questioning, or express that Plaintiff was hampered in any way in attempting to select a

fair and impartial jury through the voir dire process.[21] Accordingly, on the record before it, the Court cannot say that any limitation imposed on Plaintiff's voir dire was "so prejudicial as to cause a miscarriage of justice," such that a new trial would be warranted. *Id.*

3. *Mark Osiel.*

Plaintiff next contends the Court should grant a new trial because it improperly permitted Defendants to cross-examine Mark Osiel about an allegation of misconduct. Pl.'s Br. in Supp. of Mot. for New Trial at 5-8. During trial, the following colloquy occurred:

> Mr. Carroll: Professor Osiel, were you recently accused of misconduct in your office at the University of Iowa College of Law?
>
> Mr. Fieweger: Objection.
>
> The Court: Sustained.
>
> Mr. Carroll: Your Honor, I believe it goes to the bias and motive of this witness.

[21] Plaintiff's counsel essentially conceded his failure to object at the conclusion of trial. *See* Oct. 17-22, 2012 Trial Tr. at 104-05 (Mr. Fieweger: "I do want to make one thing for the record. I didn't object to this at the time of voir dire, but the Court precluded me from asking questions about their political positions, in particular about pro life versus pro choice." The Court: "I didn't preclude you, counsel." Mr. Fieweger: "You said we were not going to ask questions of the jury panel." The Court: "I didn't say that at all." Mr. Fieweger: "I believe you did." The Court: "The record will say whatever it says.").

The Court: 404, 403, what? What rule, counsel?

Mr. Carroll: Bias and motive of the witness.

The Court: Is it 404(b)?/

Mr. Carroll: It is not reputational evidence, it is specific misconduct that, in fact goes to that.

The Court: Okay. You can lay foundation.

Mr. Carroll: Were you accused of misconduct by the University of Iowa in the recent past?

Mr. Osiel: Associate Dean Eric Andersen came to my office and informed me that someone passing by my office had thought they had heard something resembling the sounds of sexual activity there to which I responded that because of my hip arthritis, I have to do exercises that are very painful and that cause me to emit some sound.

Mr. Carroll: And, in fact, were you interviewed by the University of Iowa Office of Equal Opportunity and Diversity?

Mr. Fieweger: Objection. Irrelevant and immaterial.

Mr. Osiel: No, I was not.

The Court: Overruled.

Mr. Carroll: You were not?

Mr. Osiel: No, I was not.

Mr. Carroll: Were you interviewed by anybody about that allegations?

Mr. Osiel: There was only the conversation with Dean Andersen and there was an email note following up on that from – from the current Dean telling me that as a matter of law it would constitute sexual harassment if somebody felt harassed by hearing sounds of sexual activity as they pass by someone's office.

Mr. Carroll: Did you tell professor Andersen that what you did in your office at the University of Iowa was your business?

Mr. Osiel: I did tell him that. I also told him that I was engaged in exercises in particular with my hip arthritis.

Mr. Carroll: You understand your office at the University of Iowa is in a public building?

Mr. Osiel: I do.

Oct. 15-17, 2012 Trial Tr. at 298-300.

Later, Defendants' counsel engaged in the following colloquy with Eric Andersen:

Mr. Carroll: Professor Andersen, in your role as Associate Dean would it be appropriate for individuals to bring to your attention alleged violations of University rules or policies?

Mr. Andersen: Yes, it would.

Mr. Carroll: And as associate dean would it be your role to look into such allegations if it involved a faculty member?

Mr. Andersen: In consultation with my Dean it would be.

Mr. Carroll: And did there come a point in time that an allegation of alleged violation, only alleged violation, came to your attention regarding Professor Osiel and violation of University of Iowa policies and procedures?

Mr. Andersen: I am not sure violation is the word I would use, but there was a concern raised about – by a staff member about Professor Osiel . . . and I was asked to deal with that.

Mr. Carroll: No further questions.

. . .

Mr. Fieweger: I move to strike that with no foundation.

The Court: Your Motion is . . . overruled.

. . .

Mr. Fieweger: It was unfounded, correct?

Mr. Andersen: No, that's not correct.

Mr. Fieweger: There was no discipline?

Mr. Andersen: No discipline, but that doesn't mean the report was unfounded.

Mr. Fieweger: And you haven't give us a time, date, or place where this occurred, have you?

Mr. Andersen: I have not.

Mr. Fieweger: No further questions.

Id. at 420-22.

At the lunch recess on the same day, the Court made further record with counsel on Osiel's testimony. Oct. 15-17, 2012 Trial Tr. at 746-750. Mr. Fieweger made various objections in support of a request to strike all testimony related to Osiel's alleged misconduct, and Mr. Carroll responded. *Id.* The Court declined to strike the testimony, finding that "[e]xtrinsic evidence of misconduct may be used to show that a witness was motivated by bias, interest, or influence and the misconduct may show hostility or animus to a party. The fact is that there was an investigation . . . I think it is being offered to show that it is perhaps animus against Defendant because of the investigation, not because of the alleged act." *Id.* at 749. The Court proposed a limiting instruction to be provided to the jury, and Mr. Fieweger reserved his decision on whether such an instruction should be given. *Id.* at 749-50. Ultimately, Mr. Fieweger declined to have the Court's proposed limiting instruction read to the jury.

Both at trial and in their resistance brief, Defendants asserted that the "purpose of this cross examination and related testimony was to expose Osiel's bias: since he had [been] investigated by the law school, he might have an interest in testifying against and thus injuring the law school." *Id.* at 299; Defs.' Br. in Resistance to Pl.'s Mot. for New Trial at 4-5. Extensive record was made on this matter during the course of trial. Ultimately, the court remains convinced, as it was at trial, that it was proper to permit Defendants to ask Osiel whether he had been

investigated by the University. There can simply be no doubt that an individual subjected to an investigation into his conduct, whether justifiably or not, might harbor some ill-will toward those conducting the investigation. *See United States v. Abel,* 469 U.S. 45, 52 (1984) ("Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony.").

Plaintiff characterizes Defendants' cross-examination of Osiel as an "improper" and "unwarranted" "attack" and "smear campaign," and contends that there were "two enormous problems with it." Pl.'s Br. in Supp. of Mot. for New Trial at 5-7. First, Plaintiff asserts that Defendants' entire argument about bias was "nonsensical," because the University's investigation of Osiel occurred only a few months prior to trial. *Id.* at 6. According to Plaintiff, Osiel had written a letter in support of Wagner two years before trial, and had written letters to the State Legislature regarding discriminatory practices at the University of Iowa at least nine years before. *Id.* "Obviously, this predates any allegation or investigation into Mr. Osiel's conduct in the last few months." *Id.*; *see also id.* at 7 ("Defendant was allowed to imply to this jury that Mr. Osiel was testifying adversely to defendant in this case not because it was perfectly consistent with what he had been arguing and writing for years, but because of some nebulous retribution for some unfounded claim that he was having sex in his office.").

The second "enormous problem" Plaintiff points to is "that this Court completely failed to perform its required duties as gatekeeper under Rule 404(b) *prior* to allowing this evidence that was of clearly such a prejudicial nature. *Id.*

The Court finds Plaintiff's characterization of the cross-examination as an improper and unwarranted attack against Osiel to be without merit. Indeed, the record belies Plaintiff's contention, demonstrating that Defendants' counsel merely asked Osiel whether he had been investigated. It was Osiel who "volunteered" information about the purpose of the investigation and that the fact that it related to alleged sexual misconduct. Similarly, the Court believes that Plaintiff's "nonsensical" argument misses the mark. A pertinent question the jury had to consider was whether Osiel's testimony was influenced by any bias he might have harbored against the University. Regardless of any prior actions by Osiel in support of Plaintiff or against the University, the University's investigation of Osiel *could have* influenced his testimony at trial. Whether it did or did not was a matter for the jury to determine.

The Court likewise rejects Plaintiff's 404(b) arguments. Federal Rule of Evidence 404(b) states that "[evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Defendants' question about whether Osiel was investigated by the University, however, was not offered or admitted to prove

that he was acting in conformity with prior behavior. It was offered and admitted as probative of Osiel's potential bias against Defendants. *See* Fed. R. Evid. 608, Advisory Comm. Notes ("Opinion or reputation that the witness is untruthful specifically qualifies as an attack under [Rule 608], and evidence of misconduct, including conviction of crime, and of corruption also fall within this category. *Evidence of bias or interest does not.*" (emphasis added)); *Johnson v. Brewer,* 521 F.2d 556, 562-63 & n.13 (8th Cir. 1975) ("But so far as being 'collateral,' or provable by extrinsic testimony, is concerned, it is the universal holding of the authorities that as to bias the cross-examiner is not bound by the answer."). In short, under the circumstances in this case, the Court does not believe that Defendants' cross-examination of Osiel violated the Federal Rules of Evidence. Even if a technical violation occurred, however, the Court does not believe it was sufficiently severe or prejudicial to be considered a "miscarriage of justice" or that it affected the "substantial rights of the parties." *See Beckman,* 804 F.2d at 439; *Anderson,* 128 F.3d at 1270. Accordingly, the Court declines to grant Plaintiff's request for a new trial on this basis.

4. *Randall Bezanson's deposition.*

On October 23, 2012, during deliberations, the jury sent the following note to the Court: "Would it be possible to receive a copy of [Randall] Bezanson's deposition?" Clerk's No. 117. Plaintiff's counsel requested that the Court permit the testimony to be read to the

jury, but Defendants' counsel requested that the Court deny the request to avoid overemphasizing any particular witness' testimony. *See* Oct. 23, 2012 Trial Tr. at 1-3. The Court declined to permit the jury to review the deposition, and Judge Shields provided the jury with a written response, which read: "Consistent with the instructions given you by United States District Judge Robert W. Pratt you will not be provided with a copy of the transcript of any portion of the trial, and you will not be provided with a copy of Professor Bezanson's deposition." Clerk's No. 117-1.

Plaintiff asserts that the Court abused its discretion by denying the jury's request to view this deposition testimony during its deliberations on the morning of October 23, 2012. Pl.'s Br. in Supp. of Mot. for New Trial at 8. In particular, Plaintiff contends:

> Bezanson was the primary opponent to plaintiff and thus the chief witness on the political discrimination claim. His deposition testimony had been read to the jury a full week prior to the jury's request to view that deposition. Counsel for both parties had characterized Mr. Bezanson's deposition testimony during their closing statements. Accordingly, this Court erred in refusing the jury's request under these circumstances and this error was highly prejudicial to plaintiff in the event any alleged verdict is argued to exist as to Count I.

Id.

Bezanson's deposition testimony was read into evidence during trial, along with that of several other witnesses. It was not received as an exhibit. The Court specifically instructed the jurors in Preliminary Instruction Number 11 that, although there was an official court reporter making a record of the trial, "we will not have typewritten transcripts of this record available for your use in reaching your verdict." Clerk's No. 103 at 15. Other than implying that the jury might have viewed Plaintiff's claim on Count I more favorably if it had been permitted to see or review the transcript, Plaintiff provides no compelling argument as to how she was prejudiced by the ruling or why it warrants a new trial. The Court was well within its discretion to decline the jury's request in this regard. *See Johnson v. Richardson,* 701 F.2d 753, 757 (8th Cir. 1983) ("The decision whether to accede to a jury's request to review testimony or exhibits in the jury room during deliberations is generally left to the sound discretion of the trial court.").

5. *Hearsay objections.*

Plaintiff next argues that she is entitled to a new trial because the Court "erred in sustaining defense counsel's objections on the basis of hearsay during plaintiff's direct examination as to admissions made by Jon Carlson and Eric Andersen." Pl.'s Br. in Supp. of Mot. for New Trial at 9. Specifically, Plaintiff contends the Court did not permit Plaintiff to testify that Carlson told her not to mention that she had been offered a job at Ave Maria Law School or that

Andersen told Plaintiff that he "did not know" whether her politics would be held against her. *Id.*

While the Court initially did preclude Plaintiff from presenting such testimony as admissions of party-opponents, *see* Oct. 15-17, 2012 Trial Tr. at 210-18, it later reversed course and permitted Plaintiff to retake the witness stand and testify about the statements of Carlson and Andersen. *See id.* at 579-589. While Plaintiff acknowledges that she was permitted to testify about these matters, she nonetheless maintains that, because the Court "improperly interrupted" her direct examination, it "could have resulted in the jury subsequently rejecting her testimony when later offered into evidence." Pl.'s Br. in Supp. of Mot. for New Trial at 9. As Defendants aptly point out, however, Plaintiff's belated testimony on this issue actually could have "had even more emphasis since she presented it after the jury had heard [Andersen and Carlson] themselves." Defs.' Br. in Supp. of Resistance to Pl.'s Mot. for New Trial at 7. Regardless, even if the Court erred, it was harmless and does not support granting a new trial.

6. *Jury instructions.*

Plaintiff finally contends that the Court erred in its Final Instructions to the jury by: 1) failing to give Plaintiff's proposed jury instructions; 2) by giving the giving [sic] a business judgment instruction; and 3) by refusing to provide the jury additional instruction on the meaning of "acting under color of state law."

Pl.'s Br. in Supp. of Mot. for New Trial at 9-12. The Court has reviewed Plaintiff's arguments and finds them to be without merit for reasons stated at trial and for reasons aptly stated by Defendants in their resistance brief.[22] *See* Defs.' Br. in Resistance to Pl.'s Mot. for New Trial at 7-11. Moreover, the Court finds that Plaintiff has failed to explain how she was materially prejudiced by any instruction the Court gave or declined to give. *See Fink,* 983 F.2d at 114. Finally, to the extent that an instruction given or not given by the Court was error, the Court finds it was harmless and insufficient to warrant a new trial.

D. *Defendants' Motion for JAML and Motion for Leave*

At the close of Plaintiff's evidence and again at the close of all the evidence in the case, Defendants moved for judgment as a matter of law on Plaintiff's equal protection claim in Count II, pursuant to Federal Rule of Civil Procedure 50(a). *See* Oct. 15-17, 2012 Trial Tr. at 628-34; Oct 17-22 Trial Tr. at 96-99. The Court reserved ruling on the motion and permitted the equal protection claim to go to the jury. Oct 17-22 Trial Tr. at 98. The jury was unable to reach a

[22] The Court further notes that in *Walker v. AT&T Technologies,* the Eighth Circuit found it reversible error to deny a properly made request for an instruction explaining that employers have the right to make subjective personnel decisions for any nondiscriminatory reason. *See* 995 F.2d 846, 849 (8th Cir. 1993).

verdict on Count II and Judge Shields declared a mistrial. Oct. 24, 2012 Trial Tr. at 19. Defendants now renew their motion pursuant to Federal Rule of Civil Procedure 50(b). Defs.' Mot. for JAML at 1-2.

Defendants raise three arguments in support of their Motion for JAML: 1) Plaintiff's equal protection claim is barred by issue preclusion, since the jury has decided that Defendants did not purposefully discriminate against her; 2) Plaintiff's equal protection claim duplicates the First Amendment claim in Count I and is, therefore barred; and 3) Defendants are entitled to qualified immunity from Plaintiff's equal protection claim as a matter of law. Defs.' Br. in Supp. of Mot. for JAML (Clerks' No. 130-1) at 1. Plaintiff resists all three of Defendants' arguments, asserting that issue preclusion does not bar her claim, that the equal protection claim does not duplicate the First Amendment claim in Count I, and that Defendants are not entitled to qualified immunity. *See generally* Pl.'s Br. in Supp. of Resistance to Defs.' Mot. for JAML (Clerk's No. 132-1). Plaintiff further contends that she adequately showed that she was treated differently than similarly-situated LAWR candidates Dawn Barker-Anderson, Lorie Reins-Schweer, and Matt Williamson, and that there was no rational basis for this differential treatment. *Id.* at 9-15.

1. *Motion for leave.*

In Plaintiff's resistance, she explicitly contends, for the first time so far as the Court is aware, that

her equal protection claim is a "class of one" claim. *See id.* at 15-17 (explaining that Defendants are not entitled to qualified immunity because it is "recognized law that a class-of-one claimant may prevail" (quotations and citations omitted)). After the time to reply had passed, Defendants filed their Motion for Leave to present the Court with additional authority on this "class of one" argument. *See* Mot. for Leave. In particular, Defendants sought to present the Court with additional argument regarding *Engquist v. Oregon Department of Agriculture,* 553 U.S. 591 (2008), a Supreme Court decision on "class of one" equal protection claims. *See id.* Plaintiff resisted Defendants' request, urging that *Engquist* does not apply to this case. Pl.'s Resistance to Defs.' Mot. for JAML. Plaintiff requests that the Court deny Defendants' Motion for Leave, or alternatively, deny Defendants' Motion for JAML based on the *Engquist* decision. *Id.* In her brief in support of resistance, Plaintiff makes extensive argument about the applicability of *Engquist* to her equal protection claim. *See* Pl.'s Br. in Resistance to Defs.' Motion for Leave (Clerk's No. 140-1).

Since it appears that Plaintiff's "class of one" argument is new and since Plaintiff has fully responded to Defendants' assertions that a "class of one" equal protection claim is not cognizable under *Engquist,* the Court finds it appropriate to grant Defendants' Motion for Leave. Accordingly, the Court will consider all of the arguments presented in Defendants' additional authority, Plaintiff's resistance to Defendants' additional authority, and Defendants'

reply to Plaintiff's resistance (Clerk's No. 141) in determining whether to grant Defendants' Motion for JAML with respect to Plaintiff's equal protection claim.

2. *Defendants' Motion for JAML.*

a. *Issue preclusion.*

Defendants first argue that the question of whether they "purposefully discriminated" against Plaintiff based on her political beliefs was answered by the jury's verdict in favor of Defendants on Count I, such that Plaintiff's Count II equal protection claim is now barred by issue preclusion. Defs.' Br. in Supp. of Mot. for JAML at 2-4. In particular, Defendants point out that Final Jury Instruction Number 6 (elements for a political discrimination claim) required the jurors to determine whether "Plaintiff's political beliefs and affiliations were a motivating factor in the Defendant[s'] decision" not to hire Plaintiff, and that Final Jury Instruction Number 8 (elements for an equal protection claim) required jurors to determine whether "Defendants purposefully discriminate against Plaintiff because of her political beliefs and affiliations." *Id.* at 3. According to Defendants, the two identified elements present the same issue (i.e., whether Defendants discriminated against Plaintiff) and the jury's findings in favor of Defendants on Final Instruction Number 6 bars Plaintiff from attempting to ask a new jury to make the

"same" determination under Final Instruction Number 8. *Id.* The Court disagrees.

The doctrine of issue preclusion "bars 'successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the context of a different claim." *Taylor v. Sturgell,* 128 S. Ct. 2161, 2171 (2008) (quoting *New Hampshire v. Maine,* 532 U.S. 742, 748-49 (2001)). Here, to return a verdict for Defendants on the political discrimination claim, the jury necessarily found that Plaintiff's political beliefs and affiliations were not a motivating factor in Defendants' decision not to hire her. The question on the equal protection claim is somewhat different, however. On that claim the jury could have found in favor of Plaintiff if it determined that Defendants treated Plaintiff differently than similarly situated candidates in the hiring process and that this differential treatment was due to purposeful discrimination against Plaintiff on the basis of her political beliefs and affiliations. Stated another way, the jury *could have* concluded that Plaintiff's beliefs were not a motivating decision in Defendants' ultimate decision not to hire Plaintiff, but still find that Defendants treated Plaintiff differently than other individuals in the general hiring process because of those same beliefs. Although the two issues are extremely similar, they are not identical for purposes of issue preclusion.

b. *Duplicative claims.*

Defendants next contend that Plaintiff's equal protection claim cannot survive because it duplicates the First Amendment political discrimination claim in Count I. For the same reasons discussed in § 2.D.2.a, *supra,* the Court declines to grant Defendants' Motion for JAML on this basis.

c. *Qualified immunity.*

Defendants urge that they are entitled to qualified immunity because there was no violation of Plaintiff's equal protection rights and because a reasonable person in Defendants' position would not have known she violated Plaintiff's rights to equal protection at the time the alleged violation occurred in 2007. Defs.' Br. in Supp. of Mot. for JAML at 15. In resistance, Plaintiff urges that she may proceed with her equal protection claim under a "class of one" theory by showing that she has been "intentionally treated differently from other similarly situated and that there is not rational basis for the difference in treatment." Pl.'s Br. in Resistance to Defs.' Mot. for JAML (Clerk's No. 132-1) at 15 (quotations and citations omitted). The Court must agree with Defendants.

Plaintiff is correct that class of one claims were first recognized prior to 2007.[23] *See Village of*

[23] Throughout the litigation in this case, Plaintiff's equal protection theory has been unclear, at best. In her resistance to

(Continued on following page)

Willowbrook v. Olech, 528 U.S. 562 (2000) (per curiam). In *Village of Willowbrook v. Olech,* the Olechs sought to have the Village of Willowbrook (the "Village") connect their property to the municipal water supply, but were told that they would be required to grant the Village a 33 foot easement, even though other property owners were only required to grant a 15 foot easement. *Id.* at 563. The Olechs sued, claiming that the Village violated the Equal Protection clause of the Fourteenth Amendment by imposing upon them an "irrational and wholly arbitrary" demand for an easement that was 18 feet longer than that required of their neighbors. *Id.* Though the district court dismissed the case, the Seventh Circuit Court of Appeals reversed, "holding that a plaintiff can allege an equal protection violation by asserting that state action was motivated solely by a 'spiteful effort to get him for reasons wholly unrelated to any legitimate state objective.'" *Id.* at 564 (quoting *Olech v. Village of Willowbrook,* 160 F.3d 386, 387 (7th Cir. 1998) (other internal quotation marks and citations omitted)). On certiorari, the Supreme Court affirmed the Seventh Circuit:

Defendants' Motion for Leave, however, Plaintiff explicitly states that she is pursuing a "class of one" equal protection claim. *See* Pl.'s Br. in Resistance to Defs.' Mot. for Leave at 2 ("The dilemma for Teresa Wagner is that her political affiliation in and by itself is not a protected class. Accordingly, her only avenue of recovery under the Equal Protection clause would be under a class of one claim.").

Our cases have recognized successful equal protection claims brought by a "class of one," where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. *See Sioux City Bridge Co. v. Dakota County,* 260 U.S. 441 (1923); *Allegheny Pittsburgh Coal Co. v. Commission of Webster Cnty.,* 488 U.S. 336 (1989). In so doing, we have explained that "'[t]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.'" *Sioux City Bridge Co., supra,* at 445 (quoting *Sunday Lake Iron Co. v. Township of Wakefield,* 247 U.S. 350, 352 (1918)).

That reasoning is applicable to this case. Olech's complaint can fairly be construed as alleging that the Village intentionally demanded a 33-foot easement as a condition of connecting her property to the municipal water supply where the Village required only a 15-foot easement from other similarly situated property owners. *See Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). The complaint also alleged that the Village's demand was "irrational and wholly arbitrary" and that the Village ultimately connected her property after receiving a clearly adequate 15-foot easement. These allegations, quite apart from the Village's subjective motivation, are sufficient

> to state a claim for relief under traditional equal protection analysis. We therefore affirm the judgment of the Court of Appeals, but do not reach the alternative theory of "subjective ill will" relied on by that court.

Id. at 564-65 (some internal citations omitted).

The Supreme Court revisited and limited the scope of the "class of one" theory, however, eight years later in *Engquist,* 553 U.S. at 591. There, Anup Engquist worked as a food standard specialist for a laboratory within the Oregon Department of Agriculture ("ODA"). *Id.* at 594. Engquist had repeated problems with a coworker named Joseph Hyatt, claiming that Hyatt made false statements about her and made her life difficult. *Id.* When a new assistant director of the ODA, John Szczepanski, took over Engquist's lab, he told others that he could not "control" Engquist and that he would be "g[etting] rid of" her." *Id.* at 595. Ultimately, Szczepanski eliminated Engquist's position and Engquist sued, bringing a "class of one" equal protection claim wherein she alleged "she was fired not because she was a member of an identified class . . . but simply for 'arbitrary, vindictive, and malicious reasons.'" *Id.* The district court permitted Engquist's claim to proceed, but the Ninth Circuit reversed, finding that the extension of the "class of one" theory "to the public employment context would lead to undue judicial interference in state employment practices and 'completely invalidate the practice of public at-will employment.'" *Id.*

(quoting *Engquist v. Oregon Dep't of Ag.,* 478 F.3d 985, 992 (9th Cir. 2007)).

Recognizing that there "is a crucial difference, with respect to constitutional analysis, between the government exercising 'the power to regulate or license, as a lawmaker,' and the government acting 'as proprietor, to manage its internal operations,'" the Supreme Court affirmed the Ninth Circuit. *Id.* at 598 (quoting *Cafeteria & Restaurant Workers v. McElroy,* 367 U.S. 886, 896 (1961)). The Court noted that in *Olech* and the cases on which it relied, the "significant" consideration was the "existence of a clear standard against which departures, even for a single plaintiff, could readily be assessed," and that there was no indication in *Olech* that the governmental entity was "exercising discretionary authority based on subjective individualized determinations." *Id.* at 602 ("This differential treatment raised a concern of arbitrary classification, and we therefore required that the State provide a rational basis for it."). The Court went on:

> There are some forms of state action, however, which by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments. In such cases the rule that people should be "treated alike, under like circumstances and conditions" is not violated when one person is treated differently from others, because treating like individuals differently is an accepted consequence of the discretion granted. In such situations, allowing a

challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise.

Suppose, for example, that a traffic officer is stationed on a busy highway where people often drive above the speed limit, and there is no basis upon which to distinguish them. If the officer gives only one of those people a ticket, it may be good English to say that the officer has created a class of people that did not get speeding tickets, and a "class of one" that did. But assuming that it is in the nature of the particular government activity that not all speeders can be stopped and ticketed, complaining that one has been singled out for no reason does not invoke the fear of improper government classification. Such a complaint, rather, challenges the legitimacy of the underlying action itself – the decision to ticket speeders under such circumstances. Of course, an allegation that speeding tickets are given out on the basis of race or sex would state an equal protection claim, because such discriminatory classifications implicate basic equal protection concerns. But allowing an equal protection claim on the ground that a ticket was given to one person and not others, even if for no discernible or articulable reason, would be incompatible with the discretion inherent in the challenged action. It is no proper challenge to what in its nature is a subjective, individualized decision that it was subjective and individualized.

Id. at 604. Noting that this principle "applies most clearly in the employment context," where decisions are "often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify," the Court concluded that class of one equal protection claims are "simply a poor fit in the public employment context" and that recognition of the theory in the public employment context would "impermissibly 'constitutionalize the employee grievance.'" *Id.* at 605, 609 (citations omitted).

While Plaintiff acknowledges *Engquist*'s general holding, she attempts to discredit its effect on her equal protection claim by pointing to Justice Stevens' dissent, *see* Pl.'s Br. in Resistance to Defs.' Mot. for Leave (Clerk's No. 140-1) at 1-2, which articulated numerous reasons for disagreement with the majority's decision and concluded that "there is no compelling reason to carve arbitrary public employment decisions out of the well-established category of equal protection violations when the familiar rational review standard can sufficiently limit these claims to only wholly unjustified employment actions." *Engquist,* 553 U.S. at 615-16 (Stevens, J., dissenting). Plaintiff contends that, in countering Justice Stevens' dissent, the majority "denied its decision excepted state employees from the Fourteenth Amendments' protection against unequal and irrational treatment" when the majority stated, "'[o]f course, that is not to say that the Equal Protection Clause, like other constitutional provisions, does not apply to public employers.'" Pl.'s Br. in Resistance to Defs.' Mot. for

Leave at 2 (citing *Engquist,* 553 U.S. at 605). After making the referenced statement, however, the majority goes on to say: "Indeed, our cases make clear that the Equal Protection Clause is implicated when the government makes *class-based decisions* in the employment context, treating distinct *groups of individuals* categorically differently." *Id.* (citing *Engquist,* 553 U.S. at 605 (emphasis added)). It is this need for class-based differences that is fatal to Plaintiff's claim. While Plaintiff contends that she was treated differently than a class of liberal counterparts, there was simply no evidence presented at trial that would support a belief that the University of Iowa routinely or categorically treated conservatives differently than liberals because of their political opinions. Plaintiff's "class of one" claim presents precisely the type of discretionary public employment decision that fails under *Engquist.*[24]

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[24] The Court briefly notes that Plaintiff's equal protection claim is deficient on its merits, as well. Plaintiff asserts that she was treated differently than the similarly situated Lorie Reins-Schweer, Dawn Barker-Anderson, and Matt Williamson, in that these other candidates were given several chances and provided mentoring, but Plaintiff was not. *See* Pl.'s Br. in Supp. of Resistance to Defs.' Mot. for Leave at 3 ("In the context of this case, it was unequal and irrational treatment at the hands of the State for the University of Iowa, endorsed by Dean Jones, to treat all of the liberal candidates differently (most glaringly to mentor them) while failing to mentor or even hire plaintiff for any of these positions."). At trial, however, Plaintiff explicitly stated that she was using only Dawn Barker-Anderson as a similarly situated comparator, not Reins-Schweer or Williamson. *See* Oct. 15-17, 2012 Trial Tr. at 633 (The Court: "Under Equal

(Continued on following page)

III. CONCLUSION

For the reasons stated herein, Plaintiff's Objection (Clerk's No. 126) is DENIED; Defendants' Motion for JAML (Clerks' No. 130) is GRANTED; Defendants' Motion to Strike (Clerk's No. 131) is GRANTED; Plaintiff's Motion for New Trial (Clerk's No. 133) is DENIED; Plaintiff's Motion to Alter Judgment (Clerk's No. 135) is DENIED; and Defendants' Motion for Leave (Clerk's No. 138) is GRANTED. The Judgment entered in favor of Defendants on Count I is hereby affirmed. The Clerk

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Protection Clause, what is the – what is the evidence of similarly-situated persons that you are comparing Plaintiff?" Mr. Fieweger: "I am comparing her to Dawn Barker-Anderson.").

To the extent Plaintiff claims Barker-Anderson was "mentored," Plaintiff freely admits that Barker-Anderson was mentored by Todd Pettys and Caroline Sheerin, *see* Pl.'s Br. in Supp. of Resistance to Defs.' Mot. for JAML at 11, not by Dean Carolyn Jones. Indeed, the Court is unaware of any testimony at trial that would support a conclusion that Dean Jones, the only named Defendant, was aware of any mentoring that did or did not occur, let alone that she endorsed it. Indeed, the trial testimony supports a conclusion that it was the faculty that determined whose names would be passed along to Dean Jones for approval or rejection for hiring. Even assuming that the faculty, in fact, declined to pass along Plaintiff's name to Dean Jones for discriminatory reasons or gave persons other than Plaintiff "second chances" for discriminatory reasons, there was insufficient evidence at trial to support a conclusion that Dean Jones was aware that discriminatory animus motivated the faculty's decision or that Dean Jones herself was motivated by a discriminatory animus in any of her own conduct.

of Court shall additionally enter judgment in favor of Defendants on Count II.

IT IS SO ORDERED.

Dated this 8th day of March, 2013.

/s/ Robert W. Pratt
ROBERT W. PRATT, Judge
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

TERESA R. WAGNER, Plaintiff, -vs- CAROLYN JONES, Former Dean, Iowa College of Law, (in her official and individual capacities), and GAIL B. AGRAWAL, Dean of the Iowa College of Law, in her official capacity, Defendants.	)	CIVIL NO. 3:09-cv-10 TRANSCRIPT OF PROCEEDINGS FINAL TRIAL DAYS (October 22, 23, 24, and 25, 2012)

TRANSCRIPT OF PROCEEDINGS, held before the Honorable Robert W. Pratt, at the Federal Courthouse, Davenport, Iowa, commencing at 8:32 a.m., October 22, 2012, reported by Linda Faurote-Egbers, Certified Shorthand Reporter for the State of Iowa.

APPEARANCES

Plaintiff by: STEPHEN T. FIEWEGER
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* * *

[1058] MR. FIEWEGER: I do, Your Honor.

THE COURT: They are received. Ladies and gentlemen, if you would go with the Court Security Officer, we will bring you the Preliminary Instructions, the Final Instructions, the Verdict Form, and the exhibits.

(Outside the presence of the jury.)

THE COURT: Please be seated. Mr. Fieweger, does the Plaintiff want to be here when the jury returns their verdict?

MR. FIEWEGER: It depends on if they are taking a break tonight or not. If they do it tonight, I am willing to stick around.

THE COURT: I don't know what they are going to do. We will let them decide and then I will let you and counsel know.

MR. FIEWEGER: Okay.

THE COURT: Mr. Carroll, do you and Defendant wish to be here when the verdict comes in or should I take a sealed verdict?

MR. CARROLL: Take a sealed verdict, please.

THE COURT: Lastly, if the deliberations continue into tomorrow, do I have your permission to let Magistrate Judge Shields preside over the jury and the verdict, receipt of the verdict?

MR. FIEWEGER: You do.

[1059] MR. CARROLL: Yes.

THE COURT: We will be in recess.

(A recess was taken 4:20 p.m., October 22, 2012, and resumed at 1:30 p.m., October 23, 2012.)

(Outside the presence of the jury. The Court and counsel present by telephone.)

THE COURT: Mr. Fieweger, I want to give you the opportunity, whatever you thought was appropriate and I can get input to you as to the proper thing for the Court to do. Let's talk about sequentially the request for the Bezanson testimony. Mr. Fieweger, why don't I hear from you. If you want to make a record beyond what you told me in your e-mail, you may do so.

MR. FIEWEGER: I will. I received the call around I believe 9:30 from Judge Shields' assistant, I don't remember her name at this point, but she had informed me that the question had been asked to – that the jury wanted to review the deposition transcript of Mr. Bezanson and that Judge Shields had already instructed the jury that per your direction that would not occur, that they should rely basically on their memory, and I didn't even have the opportunity

to make any input on that question and so I did memorialize that in the e-mail I sent to you at 12:52 p.m. today and I would ask that that be made part of the record.

THE COURT: It will be.

MR. FIEWEGER: Secondly, I then received a call [1060] directly from Judge Shields which I memorialized in my 12:03 p.m. e-mail to you regarding the two questions the jury did ask shortly before the noon hour and ask that that e-mail also be made part of the record.

THE COURT: It will be.

MR. FIEWEGER: And for the record, Judge Shields instructed me that I should e-mail my positions to you when we were talking in the first – actually in the second phone conversation where I was aware of the two additional jury questions.

THE COURT: All right. So what do you want – you want the jury to get the Bezanson testimony in its entirety?

MR. FIEWEGER: I think the appropriate thing to do is to have a clerk or someone, a bailiff, read it to them from the parts that they want to hear. I don't think it is appropriate just to give them the transcript because there's parts that aren't designated in that transcript.

THE COURT: Mr. Fieweger, here was my thinking when Judge Shields called me. I think that

giving them – and I want to hear from Mr. Carroll after your request – but my sense was that the law is you can't overemphasize one person's testimony over another so that was my thinking in telling Judge Shields that they weren't going to be provided the testimony.

Mr. Carroll, what is your position on Mr. Fieweger's position? As I understand it he wants someone to read the [1061] requested testimony from Randall Bezanson. What is the Defendants' position?

MR. CARROLL: Well, it is entirely inappropriate. I mean, they're supposed to use their memory and recollection and the notes they took. I mean, it will overemphasize testimony and to be honest with you, I have never seen it. They just have to rely on what they saw in the courtroom.

THE COURT: Okay.

MR. CARROLL: Otherwise they could ask for every transcript, you know, virtually online.

THE COURT: Right. My ruling is the same with the Bezanson testimony.

Mr. Fieweger, let's go to your next request which is for Teresa Wagner, how many times she applied for LAWR, and then the second question is regarding the year in which she reapplied; and, by the way, we will make that part of the record, the exact questions are, "How many times did Teresa Wagner apply for full-time LAWR position?" The second question being, "What year did the Plaintiff's lawyer submit resume

for Teresa Wagner's LAWR position;" and again, if you want to expand on your – I think this is contained in your first e-mail, Mr. Fieweger, for the record, you may do so.

MR. FIEWEGER: I didn't have the note of the jury in front of me and I don't have any qualms with the fact that the note does say resume as opposed to request for a position; but [1062] did tell Judge Shields in my conversation with him that there were three applications or three attempts to get a LAWR position, namely beginning in October of 2006, February of 2008, and October of 2008, and that when the Dean was aware of her, quote, application or resume, was when I sent a letter to her on February 18, 2008, requesting that she be considered for the position and when I then responded to the Dean's in-house counsel, Marcus Mills, both on April 3, 2008, and April 22, 2008, these documents were not put into evidence, Your Honor, but you can look at those as Exhibits 80, 83, and 87, and in those requests, while the Dean construed this as threatened legal action, we did ask as part of the relief that she be considered for the positions that were open in May of 2008. If you recall, the record showed they had two full-time positions opened, and only filled one with Lorie Reins-Schweer,

THE COURT: Mr. Fieweger, you have gotten me way off track here. Certainly you are not saying that what you are claiming here should be given to the jury?

MR. FIEWEGER: No, not at all. I am just saying that they wanted to know when I, on behalf Ms. Wagner, asked that she be considered.

THE COURT: I want to know what you want me to get – what the jury is requesting, how you want me to respond. That's what you need to tell me.

MR. FIEWEGER: Okay. For the first question I want [1063] you to respond that she applied three times, number one in October 2006, number two in February 2008, and number three in October 2008, for the full-time LAWR instructor position; and in answering question number two, they wanted to know what year did that and it happened in February of 2008.

THE COURT: Okay. Mr. Carroll?

MR. CARROLL: Well, again, we don't resubmit. There's exhibits in the record, the jurors can look at it.

THE COURT: Okay. I am not going to give them any of this, Mr. Fieweger. I think the discretion of the Court here is that they have heard the testimony, they are going to have to rely on their memory. If you and Mr. Carroll agree on facts that we can submit to the jury, I mean, I guess I would let it go that way; but if you can't agree on what the record is, the jurors are going to have to rely on their own memory. I think that's the law, unless you've got some other cases that I am not aware of. I think this does rest in the, quote, sound discretion of the Trial Court.

MR. FIEWEGER: Well, I also think that in light of the fact that the Court has given those two Special Interrogatories and there is a question as to the Dean's authority on question number two, I think it is appropriate to instruct them in this manner.

THE COURT: Okay. Well, we've made our record so if we have any other questions, I will have Judge Shields get in [1064] touch with you.

MR. FIEWEGER: Thank you very much.

THE COURT: By now.

(A recess was taken from 1:38 p.m., October 23, 2012, until 3:15 p.m., October 23, 2012.)

(Outside the presence of the jury. The Court and counsel present by telephone.)

THE COURT: I just got an e-mail message from – in any event, I just got Mr. Fieweger's additional request so I will let you and, Mr. Carroll, you wanted to make a record so you feel free to go ahead,

MR. CARROLL: Okay. I am not clear what the additional request is to be honest with you.

THE COURT: Mr. Fieweger, I can read what you just sent me or you can tell Mr. Carroll what you have requested.

MR. FIEWEGER: Why don't you just read it to him.

THE COURT: Here is the full e-mail, Mr. Carroll, from Mr. Fieweger. "Dear Judge Pratt: Due to Mr. Carroll's objection to the use of the phrase "official capacity," Plaintiff proposes the following additional instruction, quote, state employment is generally sufficient to render a Defendant a state actor. A Defendant acts under color of state law when she abuses the position given to her by the state, thus generally a public employee acts under color of state law while exercising her responsibilities pursuant to state law," end of what he [1065] requested. He ends his e-mail by saying, "Please give this additional instruction that accurately states the law from the United States Supreme Court."

MR. CARROLL: Okay. My position right now is there's no further instructions to the jury. We answer their questions and we say go back to the instructions. I have no – I know of no authority to say here is a new instruction.

THE COURT: Well, the only authority I know, Mr. Carroll, is called the sound discretion of the Trial Court.

MR. CARROLL: Absolutely, Your Honor. Absolutely, and I agree with that completely; but, you know, I don't – I don't see it here.

THE COURT: I think they want some help. Mr. Fieweger, here is my question to you: is it what I have referred to, and I have Instruction 8 in front of me, isn't –

MR. FIEWEGER: I do too.

THE COURT: Isn't that the same thing that you have requested? I mean, you have a little more flourish to yours, but I think the instruction is substantively the same.

MR. FIEWEGER: I disagree because I believe that the language set forth in the instruction is too narrow compared to the Atkins holding and it doesn't address what is a state actor in this instruction.

THE COURT: Well, the jury hasn't said that they don't understand it so I am going to leave it as is so you have your [1066] record. Thank you very much.

(A recess was taken from 3:16 p.m., October 23, 2012, until 9:20 a.m., October 24, 2012. Counsel present by telephone.)

JUDGE SHIELDS: Good morning, everyone. This is Judge Shields.

MR. CARROLL: George Carroll.

JUDGE SHIELDS: Hi, George. Steve Fieweger not on yet?

COURTROOM CLERK: No, not yet.

JUDGE SHIELDS: We will wait or call him.

MR. FIEWEGER: I am here too.

JUDGE SHIELDS: Good, Steve. We were just chatting. We are on the record in the case of Teresa R. Wagner versus Carolyn Jones. This is Case No. 3:09-cv-10. Judge Pratt, the Trial Judge, is presently in a doctor's appointment. He is unavailable. Counsel have been advised of that – of his unavailability at this time.

We have received this morning within the last hour two questions from the jury. The first question states as follows: "Can we have a copy of the 14th Amendment, equal protection," question mark. That was signed I believe by Kurt Braun and Carol Tracy who – Ms. Tracy I am advised is the foreperson of the jury.

The second question reads as follows: "What happens [1067] if we cannot come to an agreement," question mark? That is signed by Carol Tracy and Michelle R. McCluskey.

I have read both of these questions separately to counsel in separate telephone conversations. I have discussed both of these questions with counsel. I have discussed these questions in detail with Judge Pratt, Judge Pratt's career law clerk, Nova Janssen, is also present during this hearing and I have shared these questions with her also.

Counsel, do you wish to make a record on these questions at this time?

MR. FIEWEGER: Sure, Judge. On the first question I don't believe that they should be given the

14th Amendment. I think there's more in that than what they should be considering in terms of the Amendment. The issue is limited to the equal protection portion of that Amendment and for them to be reading the whole thing is in my opinion not proper.

As to the second question, I think they need to be told to continue to deliberate until they cannot reach a unanimous verdict and then inform them that in the event that that happens, there will be a retrial.

JUDGE SHIELDS: All right. Mr. Carroll?

MR. CARROLL: Yes, and I agree with Steve. They should not be provided a copy of the 14th Amendment. With respect to the question what happens if we cannot come to agreement or a verdict, I think they should be told, if we don't [1068] already have that instruction, please continue to deliberate. I do not think they should be told the consequence which is there will be a retrial.

JUDGE SHIELDS: All right. Go ahead.

MR. CARROLL: I was going to say because that, you know, I don't think they need that information.

JUDGE SHIELDS: Okay. I have, as I indicated, I have discussed both of these questions with Judge Pratt. I agree with counsel as to the response which was my intended response as to the first question regarding receipt of the copy of the 14th Amendment.

Judge Pratt and I also agree that the appropriate instruction to the jury is simply you are directed to continue your deliberations in an attempt to arrive at a unanimous verdict. I will not advise the jury that if they cannot reach an agreement, there will be a mistrial and/or a new trial. I think that would be inappropriate at this stage. That may come later, but that would be a decision for Judge Pratt to make so that will be the written instruction that I give to the jury and that will be filed along with these two questions.

Any other record that needs to be made, Mr. Fieweger?

MR. FIEWEGER: Judge, if there are any local rules as to length of deliberation with basically a hung jury?

JUDGE SHIELDS: No, there is not.

MR. FIEWEGER: Okay.

[1069] JUDGE SHIELDS: I will tell you this, Judge Pratt and I discussed the propriety of what we euphemistically call the Allen charge and I think counsel may be familiar with that. Neither Judge Pratt nor I believe an Allen charge is appropriate in a civil case; but candidly I have not had any opportunity to do any research on that, in the last hour and that may be an issue that will be discussed among counsel and the Court later today and it may not be. I am just giving you that head's up so that if

you want to look at that and see what you feel might be appropriate, that's your prerogative.

MR. FIEWEGER: Okay,

MR. CARROLL: This is George. I know what the Allen charge is.

THE COURT: Right.

MR. CARROLL: I would disagree it should be given as the head's up. 1 know what it is, I know exactly the wording of that charge.

THE COURT: Absolutely, and that's why Judge Pratt and I discussed this and we both agreed we were unsure at best if it is appropriate in a civil case and I am telling you I am not – I am not in favor and I don't think Judge Pratt is either of plowing new ground on that issue in this case; but that is for a later determination and it will not be mine.

MR. FIEWEGER: There's been enough plowing in this case.

[1070] JUDGE SHIELDS: You may be right, Mr. Fieweger. Thank you, counsel. We will keep you advised.

MR. FIEWEGER: All right.

MR. CARROLL: Thank you.

(A recess was taken from 9:30 a.m. until 11:20 a.m.)

THE COURT: Mr. Fieweger? I think we are waiting for Mr. Carroll. I apologize for being at the doctor. Mr. Fieweger, when you get –

MR. FIEWEGER: You don't have to apologize for that. That's life.

THE COURT: Is Mr. Carroll on yet? No. Okay.

MR. CARROLL: This is George Carroll.

THE COURT: Mr. Carroll, this is Bob Pratt. Ms. Egbers is reporting this. Mr. Fieweger, Magistrate Judge Shields, and myself are on the call. I don't know if you know this, Mr. Carroll, but since I told you both I would have a phone call at 11:15, the Magistrate Judge has FAXed me another note from the jury.

MR. CARROLL: I did not know that.

MR. FIEWEGER: I didn't either.

THE COURT: Mr. Carroll, it says, "We are unable to come to a unanimous verdict for either the Plaintiff, Teresa Wagner, nor Defendant, Carolyn Jones," and it is signed by all 12 jurors so my first question is we don't know if this pertains to one of the submitted counts or both of the submitted counts, [1071] I am assuming, maybe this is an assumption I should not make, it pertains to both counts that the jury has, the discrimination claim and the equal protection claim; so if that is something I should put my trust in, that is that both counts they are unable

to reach a unanimous verdict, I want to know the Plaintiff's sense, I think I know the answer to this based upon Mr. Fieweger's earlier e-mail, I suspect, Mr. Fieweger, is it fair to say you still want the Court to give an instruction, better known as the Allen charge, which in the pattern instructions is 3.07?

MR. FIEWEGER: I do.

THE COURT: Mr. Carroll, what is the Defendants' position?

MR. CARROLL: I disagree with giving that instruction, certainly at this point in time. I will say that it does show up in the Eighth Circuit model civil, it has only been used in criminal cases. There are no civil cases in the Eighth Circuit to approve such an instruction and if, in fact, the Court is so inclined, then I will quickly e-mail to you what I propose, but not waiving any objection. I honestly think they should be told, I mean, number one, go back and deliberate; but if they're saying – if that's their note, that's fine; but if, you know, if Plaintiff is saying you must give the Allen, then I have a proposal instead of that. I also think – I am sorry.

THE COURT: No, you go ahead. I apologize.

[1072] MR. CARROLL: I also think that, and I understand what the Allen instruction is, it is so unbelievably coercive to jurors that the Court is saying people, go back, when they've tried so hard and I know the Allen instruction has been approved,

but I disagree that there should be any Allen instruction.

THE COURT: Mr. Carroll, the Circuit approved it in a case called Williams versus Fermenta Animal Health Company, 924 F.2d 261, a 1993 case in which they said there's no error where the District Court gave the Allen charge to a civil jury in an employment discrimination case.

MR. CARROLL: I must admit I wasn't aware of that decision, Your Honor; but I still am objecting.

THE COURT: I don't disagree, Mr. Carroll. You make a very good point and what my law clerk just told me we have done historically, that is I am talking about myself, is that I've always said something like go back and deliberate again, keep deliberating before I have given the Allen charge.

Here is the problem I think with that now. The Magistrate Judge has already instructed them continue your deliberations and, Judge Shields, am I correct, that that is the status of your communications with the jury?

JUDGE SHIELDS: That is correct, Judge Pratt. That is the last written Order that I gave them.

THE COURT: And that –

[1073] MR. FIEWEGER: And that was back at like 9:30, wasn't it, Judge?

JUDGE SHIELDS: That's correct.

MR. FIEWEGER: Okay. They've been deliberating now for another two hours with no progress and a note that is signed by all 12 saying they can't agree on anything.

THE COURT: I am reading the Committee comments to 3.07 and, you know, I guess my sense is to tell them one more time, continue your deliberations, and if we get another note, then give the Allen charge; but, you know, I want to hear from both of you. Maybe that's too, quote, conservative, and on the other hand maybe it is too, quote, explosive to give them the Allen charge now. Mr. Fieweger, you are still firm that you want it?

MR. FIEWEGER: Right. And, Judge, that also cites you to the – some other case authority, the Bozeman versus Hunter case, 540 F.3d 886, 888, 889.

THE COURT: Okay.

MR. FIEWEGER: Again, they gave an Allen charge in that that was approved. Actually the prisoner Plaintiff in that case objected to it and the Trial Court or the Appellate Court found that in that case it was appropriate to give it under the circumstances.

THE COURT: Okay.

MR. FIEWEGER: Further, in the Committee comments, it [1074] does say right at the end of the Committee comments on 3.07 that, "Although

Allen charges have been primarily considered in criminal cases, Courts in civil cases also have the authority to give Allen charges," and then it cites Railway Express Agency versus McKay, 181 F.2d 257 at 262, 63, and that's an Eighth Circuit 1950 case. It cites Hill versus Wabash Railway Company, 1 F.2d 626, 631, which was an Eighth Circuit 2004 case so it is not like there isn't precedent in this Circuit for giving this type of instruction in a civil case.

MR. FIEWEGER: Mr. Carroll?

MR. CARROLL: I don't have those cases in front of me nor have I done that research. I continue to object to the Allen charge. I believe it is inappropriate and actually unconstitutional under the Seventh Amendment for a jury to be told in essence here is what you have to do. I will say the Allen charge has been approved, but that doesn't mean I can't continue to challenge it which I will do, and I will e-mail you – if that's your inclination, I will e-mail you our proposed amended Allen charge.

THE COURT: Have either of you talked to each other or your clients about – I have never had this, I looked at Rule 48(b), Verdict. "Unless the parties stipulate otherwise, the verdict must be unanimous." Have you talked about a less than unanimous verdict on both of the submitted claims or not?

MR. FIEWEGER: Not at this stage.

[1075] MR. CARROLL: I am not agreeing. It has to be 12.

THE COURT: Okay. Here is what the Court is going to do. I am going to tell Judge Shields to tell them to continue to deliberate then after lunch I am going to give them the Allen charge.

MR. CARROLL: In the model instructions?

THE COURT: Yes.

MR. CARROLL: I will e-mail quickly –

THE COURT: That will be fine. What Judge Gibson said in this case, John Gibson said, they quote in the Committee comments, it says, "The language of this instruction covers the essential points of the traditional Allen charge." Judge Gibson noted in Potter versus the United States that, quote, "Caution dictates that Trial Courts should avoid substantial departures from the formulation of the charge that have already received judicial approval," so if there's language in this instruction that you think is inappropriate for this case, you tell me because I am going to have them eat lunch, Tom is going to tell them now – Judge Shields is going to say continue to deliberate, and then after lunch I am going to have Tom read – have Judge Shields read them the Allen charge.

MR. CARROLL: Great. I will e-mail just for the record what we propose on that.

THE COURT: All right.

MR. CARROLL: Just as an aside, Your Honor, it has [1076] been a long two weeks, you just called somebody by their first name.

THE COURT: I'm sorry?

MR. CARROLL: Tom. We weren't supposed to do it for two weeks.

THE COURT: I slip into these habits forgetting we all have these titles that are supposed to make us more important than we really are.

MR. CARROLL: Life is tough.

THE COURT: You have both done a very good job for your clients and I know two weeks to me is a long time so, you know, I really have appreciated the way you have handled yourself and I think you both have done an excellent job for your clients so I just hope the jury gives us a verdict. Thank you. Tom, thank you for – Judge Shields, thank you for all your help.

(A recess was taken from 11:33 a.m. until 1:11 p.m.)

(In the presence of the jury.)

JUDGE SHIELDS: Please be seated. We are in open court and we are on the record in the matter of Teresa R. Wagner versus Carolyn Jones, et al. Ladies and gentlemen of the jury, my name is Tom Shields. I'm the Chief United States Magistrate Judge for this District. Judge Pratt has returned to

Des Moines which is his duty station. Several matters I want to talk with you about right now.

[1077] First of all, I want to note that I did receive the note regarding the use of cell phones during the lunch break. My response was that the particular juror who had a sick child could use the cell phone during the lunch break and that note will be filed.

Also at the direction of Judge Pratt I want to read this instruction to you and after I have completed reading this instruction, then you will return to the jury room and pursuant to this instruction continue your deliberations.

The instruction is as follows: "As stated in my instructions, it is your duty to consult with one another and to deliberate with a view to reaching agreement, if you can do so, without violence to your individual judgment. Of course, you must not surrender your honest convictions as to the weight or effect of the evidence solely because of the opinions of other jurors or for the mere purpose of returning a verdict. Each of you must decide the case for yourself, but you should do so only after consideration of the evidence, with your fellow jurors.

"In the course of your deliberations you should not hesitate to re-examine your own views and to change your opinion if you are convinced it is wrong. To reach a unanimous result, you must examine questions submitted to you openly and frankly, with proper regard for the opinions of others and with the willingness to re-examine your own views.

"Finally, remember that you are not partisans. You [1078] are judges, judges of the facts. Your sole interest is to seek the truth from the evidence. You are the judges of the credibility of the witnesses and the weight of the evidence. You may conduct your deliberations as you choose, but I suggest that you carefully reconsider and consider all the evidence bearing upon the questions before you.

"You may take all the time that you feel is necessary. There is no reason to think that another trial would be tried in a better way or that a more conscientious impartial or competent jury would be selected to hear it. Any future jury must be selected in the same manner and from the same source as you. If you should fail to agree on the verdict, the case is left open and must be disposed of at some later time.

"Please now go back to finish your deliberations in a manner consistent with your good judgment as reasonable persons. Thank you." All rise, please.

(A recess was taken from 1:16 p.m. until 4:30 p.m.)

(In the presence of the jury.)

JUDGE SHIELDS: Be seated, please. We are in open court, we are on the record in the matter of Teresa R. Wagner versus Carolyn Jones and Gail Agrawal, et al. This is Case No. 3:09-cv-10. We are in open court.

I have received a message signed by Ms. Tracy and I believe Mr. Braun. This note says, "We are still

unable to come to a unanimous verdict. I do not see us ever agreeing. One [1079] juror has conflict and needs to leave at 4:30 today and another juror with a sick child may not be able to attend on Thursday. Please advise where we go from here."

Ladies and gentlemen, is this the consensus of all of you as to the contents of this note? I will ask Mr. Weston, is that –

MR. MICHAEL PATRICK WESTON: Yes.

JUDGE SHIELDS: Ms. Scott?

MS. MARILYN RHEA SCOTT: Yes.

JUDGE SHIELDS: Mr. Braun?

MR. KURTIS PAUL BRAUN: Yes.

JUDGE SHIELDS: Ms. Chapman?

MS. BRENDA KAY CHAPMAN: Yes.

JUDGE SHIELDS: Ms. Willits?

MS. SUSAN MARIE WILLITS: Yes.

JUDGE SHIELDS: Ms. McCluskey?

MS. MICHELLE RENEE McCLUSKEY: Yes.

JUDGE SHIELDS: Mr. Mayes?

MR. DON WEBSTER MAYES: Yes.

JUDGE SHIELDS: Ms. Campbell?

MS. TEIAH ELIZE CAMPBELL: Yes.

JUDGE SHIELDS: Mr. Laing? I'm sorry. I couldn't read the writing.

MR. BRIAN JOHN LAING: Yes.

JUDGE SHIELDS: Ms. Pilkington?

[1080] MS. STELLA MARIE PILKINGTON: Yes.

JUDGE SHIELDS: Ms. Tracy?

MS. CAROL LYNN TRACY: Yes.

JUDGE SHIELDS: And Ms. Hoogheem?

MS. PAMELA SUE HOOGHEEM: Yes.

JUDGE SHIELDS: I am going to declare a mistrial and I want to say a few things. I don't want to keep you, I know this has been a long period for you. Judge Pratt wants you to know he really appreciates everything that you have done in working as hard as you have. He wanted me to assure you that this is not a failure. These things happen. There is no guarantees in a lawsuit what will happen, what will not happen. Sometimes there are just the inabilities for people to agree as to verdicts and we recognize that. That is why there is a mistrial.

There is nothing at all that any of you should feel that lessens your service here. We appreciate this. We know this is a – a serious imposition on your personal and your business lives, no question. I will tell you,

after I was a judge, I served on a jury in State Court so it is not as if I do not understand firsthand exactly what jurors go through. I do. Not to the extent that you have gone through your discussions in this case and that brings up my other point.

There are letters on the seat of your chairs. We would request and Judge Pratt specifically has asked that you do [1081] complete those and send them back to us. That is important to us. Believe me. You are why we are here and we – if we need to do a better job, then we want to know that. If there's something about this case that we need to know about, this is your opportunity to tell us.

Now, under the Rules of this Court no lawyers and no employees for lawyers or agents for lawyers may contact you without prior written approval from the Court. If you are contacted, you have every right to say I do not want to talk about this. If it is a persistent issue or if someone is pushing on that, you should feel free to call and ask for me, I am the Chief Magistrate Judge, I promise you, I will resolve that issue. You have the right not to talk to anyone about this case and that is your choice; but the lawyers specifically know that they cannot contact you and should not in that regard.

I will have this note filed, it will be part of the record. All I can tell you is that the case will move on and we will either set another trial or it will be resolved in another way. I don't know, no one knows at this point in time; but again, I want to emphasize, I

don't want to overemphasize this, but we need trials, this is one way society sends the message as to what is right, what is wrong as things go on, and that's why we certainly don't want you to feel that there has been any lack of attention on your part or any failure on your part. It is just what it is and the case will move on and I do appreciate [1082] your service more than I can tell you. I do hope that you take away from this week and a half, almost two weeks an appreciation of how good our system really is and this is part of what the system is all about. Believe me.

I am happy to answer any questions that I can if any of you want to ask me questions. If you don't, I appreciate that too and you can leave. Thank you all. Safe trips back to your home and as I said, if there's anything that we can do or anything you need from us, do not hesitate to call. You are excused.

(A recess was taken.)

JUDGE SHIELDS: Be seated, please. Again, I apologize. We are back on the record in Case No. 3:09-cv-10. Ms. Tracy, you were the foreperson?

MS. CAROL LYNN TRACY: I was.

JUDGE SHIELDS: What I failed to ask you for on the record was there were two counts in the Complaint filed by Ms. Wagner against the Defendants and the indication of the jury was that you were unable to reach an agreement. Was that as to both Counts 1 and 2?

MS. CAROL LYNN TRACY: The one that we were unable to reach was on form two.

JUDGE SHIELDS: I'm sorry?

MS. CAROL LYNN TRACY: Form two.

JUDGE SHIELDS: The – as to form one?

[1083] MS. CAROL LYNN TRACY: We were able to reach a verdict for the Defendant, Carolyn Jones. Do you need me to read what it was?

JUDGE SHIELDS: I will need to – is that form signed?

MS. CAROL LYNN TRACY: No.

JUDGE SHIELDS: We will – I will ask you to sign that and we will file that; but, ladies and gentlemen, then not to belabor this, it is a crazy week for all of us, I want to ask each of you, Mr. Weston, was that your verdict as to form one?

MR. MICHAEL PATRICK WESTON: Yes.

JUDGE SHIELDS: Okay. Ms. Scott, was that your verdict?

MS. MARILYN RHEA SCOTT: Yes.

JUDGE SHIELDS: All right. Mr. Braun, was that your verdict?

MR. KURTIS PAUL BRAUN: Yes.

JUDGE SHIELDS: Ms. Chapman, was that your verdict?

MS. BRENDA KAY CHAPMAN: Yes.

JUDGE SHIELDS: Ms. Willits, was that your verdict?

MS. SUSAN MARIE WILLITS: Yes.

JUDGE SHIELDS: Ms. McCluskey, was that your verdict?

MS. MICHELLE RENEE McCLUSKEY: Yes.

JUDGE SHIELDS: Mr. Mayes, was that your verdict?

MR. DON WEBSTER MAYES: Yes.

JUDGE SHIELDS: Ms. Campbell, was that your verdict?

[1084] MS. TEIAH ELIZE CAMPBELL: Yes.

JUDGE SHIELDS: Mr. Laing, was that your verdict?

MR. BRIAN JOHN LAING: Yes.

THE COURT: Ms. Pilkington, was that your verdict?

MS. STELLA MARIE PILKINGTON: Yes.

THE COURT: Ms. Tracy, was that your verdict?

MS. CAROL LYNN TRACY: Yes.

JUDGE SHIELDS: Ms. Hoogheem, was that your verdict?

MS. PAMELA SUE HOOGHEEM: Yes.

JUDGE SHIELDS: And, ladies and gentlemen, as we discussed before, as to form two, there was no ability to reach a unanimous decision on form two?

MS. CAROL LYNN TRACY: There was not.

JUDGE SHIELDS: Then I am amending my Order only to the extent that the mistrial that I have ordered is as to form two or Count 2 and not Count 1 so again, I think your work was not for naught because that verdict stands, but the mistrial as to Count 2 or form two leaves that part of the case still open in my opinion. Okay. Good.

Now, I think I am done; but any – I am trying to think about this and the problem, of course, it is not my case and I didn't try it so I am trying to do the best I can from what I know. Any other questions right now? Good. Thank you all. I am not moving from here. Leave.

I need all you of you [sic] to sign Count 1.

[1085] MS. CAROL LYNN TRACY: All of us? It just states here –

JUDGE SHIELDS: Is it just for the foreperson? Then that's fine. Some verdict forms require all jurors to sign, but if that one only has yours, then that's fine, Ms. Tracy, then it is done. Thank you.

(A recess was taken from 4:40 p.m., October 24, 2012, until 11:24 a.m., October 25, 2012. The Court and counsel present by telephone.)

THE COURT: Mr. Fieweger, good morning.

MR. FIEWEGER: Good morning, Judge.

THE COURT: I have Mr. Carroll on the phone, Judge Shields and myself are in Des Moines. I am having this conference because early on this morning I got an e-mail from Mr. Carroll asking if he could make a record regarding the case so – and then I have seen since that e-mail that I got a Motion from Mr. Fieweger, I don't think we need to discuss that, but in any event, I wanted to let Mr. Carroll make his record that he requested. Mr. Carroll?

MR. CARROLL: Yes. You know, the way this happened yesterday, I actually have to have a record on the – that the Court would direct a mistrial on the second claim and everything was going by e-mail so I just wanted to make that record, that Defendant objected to having a mistrial.

The second thing, if necessary at this point, I am [1086] renewing our Motion for Directed Verdict and at the close of evidence on the equal protection claim, and it is not quite a JNOV, this is this middle thing, and so I want to make it clear that that is probably our intention to file those kind of Motions, but I want to make sure since I view this as kind of a hybrid issue since the jury didn't reach a verdict that our intention is to file Motions and/or briefs to say we

think the Court should take away the equal protection claim.

THE COURT: Okay. Well, judgment has not yet been entered by the clerk under Rule 58 so I think you will have time to file your Motion, although I will treat this as a renewal. I think the record shows I reserved ruling on all of the Motions, save the Motion on due process which I granted.

MR. CARROLL: Yes, it does. At this point, Your Honor, I am just being cautious.

THE COURT: Mr. Fieweger, did you want to make any record at this time?

MR. FIEWEGER: I was not aware at any time that Mr. Carroll had made any written or oral response to our request for a mistrial. I haven't received an e-mail from him, I didn't receive a telephone call from him, and so I – I'm for the first time hearing that he requested a mistrial only on the Count 2 equal protection claim.

THE COURT: I think rather than go into it, I think the record will reflect whatever it reflects and trying to go [1087] back now and make a record on what happened at that time, we have the e-mails, and I know this has been difficult for you to both e-mail and call, but I think we've made a sufficient record at this point so rather than argue about what was said, whatever was said was said and I know that's redundant, but we will just let the record speak for itself. I am sure Ms. Egbers will prepare the record for us and

we can proceed from there and so why – if there's any other record that either of you want to make, you certainly should feel free to do so.

MR. FIEWEGER: I think I have made my record with respect to the objection to the entry of the Judgment by my written pleading at this stage. I can't add anything more to that.

THE COURT: Thanks very much. Thank you, Linda. (Proceedings concluded at 11:30 a.m., October 25, 2012.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

CLERK'S COURT MINUTES

PRESIDING: HONORABLE Thomas J. Shields

Case No. 3:09-cv-10 : Court Reporter:
: Linda Egbers
: Interpreter:
: Civil Matters Video
: Recorded: ☑

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Plaintiff(s)	:	Defendant(s)
TERESA R. WAGNER	:	CAROLYN JONES

.....

Plaintiff(s) Counsel: Steven Fieweger, not present

Defendant(s) Counsel: George Carroll, Jordan Esbrook, both counsel not present

Issues before the Court: Jury Trial Day 6
Motion(s) for Ruling: Ruling / Ruling Reserved

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Proceedings:

In open court at 1:14 pm, without counsel, Court addressed the jury. Court reads jury instruction to jury. Jury returns to deliberate at 1:18pm.

At 4:31 pm in open court, without counsel, Court addressed the jury, Court reads jury note. Jury declares a mistrial. Court thanks the jury at 4:35pm. At 4:37pm, without counsel, in open Court, Court again addressed the jury. Jury finds for defendant on count 1 but cannot reach a verdict on count 2. Court declares a mistrial on count 2. Court thanks jury and jury excused 4:42pm.

Time State: 1:14pm

Time End: 4:42pm /s/ Brian Phillips

Date: October 24, 2012 Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

TERESA R. WAGNER, Plaintiff, v. CAROLYN JONES, Dean of Iowa College of Law (in her individual capacity); GAIL B. AGRAWAL, Dean of the Iowa College of Law (in her official capacity), Defendants.	*	3:09-cv-10 ORDER (Filed Oct. 11, 2012)

Before the Court are the following motions: 1) Carolyn Jones' ("Jones") and Gail Agrawal's (collectively "Defendants") Motion in Limine, filed September 10, 2012 (Clerk's No. 76); 2) Teresa Wagner's ("Wagner" or "Plaintiff") Motion in Limine, filed September 25, 2012 (Clerk's No. 77); 3) Defendants' Second Motion in Limine, filed September 28, 2012 (Clerk's No. 84); and 4) Defendants' Third Motion in Limine, filed October 9, 2012 (Clerk's No. 98). Plaintiff filed responses to Defendants' First and Second Motions on September 25, 2012 and October 4, 2012, respectively. Clerk's Nos. 78, 96. Defendants filed a response to Plaintiff's Motion on September 28, 2012. Clerk's No. 80. Plaintiff has not yet filed a response to Defendants' Third Motion in Limine; however, the

Court does not believe that a response is necessary given the generalized nature of the Motion. The matters are fully submitted.

I. FACTUAL BACKGROUND

In October 2006, Wagner applied for one of two full-time Legal Analysis, Writing and Research ("LAWR") instructor positions at the University of Iowa ("University"). *See Wagner v. Jones,* 664 F.3d 259, 264 (8th Cir. 2011). Wagner, Matt Williamson ("Williamson"), and one other individual interviewed for the positions. *Id.* at 265. On January 26, 2007, Plaintiff was informed that the University would only be hiring one full-time LAWR instructor, and that Wagner had not been selected. *Id.* at 267. Instead, the University hired Williamson, purportedly because Williamson was perceived to have performed better during the interview process than Wagner.[1] *Id.*

The University opted to fill the second full-time LAWR position with an adjunct appointment and asked Wagner if she would be interested. *Id.* Wagner was interested, and on approximately February 27, 2007, her name was forwarded to the University's appointment committee for consideration for the adjunct position. *Id.* Wagner, however, was neither granted an interview nor hired for the adjunct position. *Id.*

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[1] In particular, Defendants contend that Wagner gave a poor answer to one primary question and two follow-up questions about teaching legal analysis.

Instead, in approximately March 2007, the University hired Steve Moeller and Dawn Anderson ("Anderson") as part-time adjuncts. *Id.* at 267-68. Wagner applied two additional times for adjunct positions, in June 2008 and January 2009. *Id.* at 268.[2] She was not interviewed for either position, nor was she hired. *Id.* When Williamson resigned from the full-time LAWR position in August 2008, Wagner also applied to replace him. Am. Compl. ¶¶ 64-65. Wagner was not interviewed and the position was given to Anderson. *Id.* ¶ 65.

II. MOTIONS

A. *Defendants' Motion in Limine*

In their first Motion in Limine, Defendants request that the Court exclude from trial in this case: 1) performance or student evaluations of employees that were selected, instead of Plaintiff, for positions at the University of Iowa; 2) the application and/or appointment of Plaintiff to any Boards or

[2] The Eighth Circuit states in its opinion that Wagner "applied, and was rejected, four additional times for an adjunct position: January 2007, March 2007, June 2008, and January 2009." 664 F.3d at 268. It appears, however, that the first two referenced dates are the dates Wagner was rejected for the full-time and first adjunct positions, respectively. *See* Am. Compl. ¶ 62 ("The plaintiff since March 2007 also applied in June 2008 and January 2009 for an adjunct writing instructor position and the University did not grant plaintiff an interview for any of the adjunct positions and Dean Jones refused to consider her for hiring.").

Commissions subsequent to the hiring for the positions at issue; 3) the procedural history of the case; and 4) news coverage, political commentary, or political campaigns occurring after the hiring decisions in this case. Clerk's No. 76. Plaintiff does not resist exclusion of the third and fourth items. Clerk's No. 78 at 2. Plaintiff also "does not resist, pending ruling on plaintiff's motion in limine regarding mitigation of damages," exclusion of the second item.[3] Accordingly, Defendants' Motion is granted as to those items; only the first item in Defendants' Motion in Limine requires further discussion.

1. *Matt Williamson*.

As noted, Williamson was awarded the first full-time LAWR position for which Wagner applied in early 2007. Following his first semester of teaching, Williamson received poor reviews from his students, offered to resign, but was encouraged to continue teaching in Spring 2008. *See* Am. Compl. ¶ 63. Plaintiff intends to present at trial Williamson's Fall 2007 evaluations. Pl.'s Mem. of Law in Supp. of Resistance to Defs.' Mot. in Limine at 1.

Defendants argue that Williamson's performance in Fall 2007 is irrelevant because, at the time Jones decided to hire Williamson rather than Wagner, she

[3] To the extent that Plaintiff qualifies her resistance to Defendants' second in limine item, the Court will address the matter in its discussion of Plaintiff's Motion in Limine.

"could not have known how Williamson or any other individual would perform. All she knew were the qualifications the individuals presented and the recommendations she received from the faculty. The legality of her decision must be judged by the facts existing at the time of the decision." Defs.' Br. in Supp. of Mot. in Limine at 1-2. According to Defendants, "[e]vidence about the subsequent performance of the individuals hired . . . does not make it more or less likely that Wagner was discriminated against." *Id.* at 2.

Plaintiff counters that she is not offering Williamson's poor performance reviews to demonstrate that Jones made the wrong decision in hiring him. Rather, Plaintiff argues that Williamson's performance reviews are "being offered to show that Dean Jones' reason for continuing to reject [Plaintiff] for not only the original full-time position in January, 2007, but the positions thereafter, is pretextual." Pl.'s Mem. of Law in Supp. of Resistance to Defs.' Mot. in Limine at 2. In particular, Plaintiff points out that Jones testified in deposition that Plaintiff "flunked" her job talk during her interview process and that this was the reason she was not considered for positions with the University. *Id.* at 2-3. According to Plaintiff, Williamson's reviews demonstrate pretext because Williamson was given "second chances [to continue teaching in the LAWR position] after absolutely abysmal student ratings in his first semester in the fall of 2007," whereas Plaintiff was never given another chance to be considered for any position with

the University after allegedly answering a single set of questions poorly in her January 2007 interview.

Federal Rule of Evidence 401 provides that evidence is relevant if it "(a) has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." The Court agrees with Plaintiff that Williamson's evaluations *may* be relevant to show pretext. Jones generally contends that Plaintiff's poor job talk precluded her from consideration for the initial LAWR position and also from any subsequent position. A reasonable jury, however, confronted with Williamson's "second chance" after his exceedingly poor performance in the LAWR position, could conclude that Jones' stated reason is unworthy of credence, particularly when it comes to Plaintiff's attempts to obtain LAWR positions *after* Williamson's poor reviews. *See Dreger v. Mid-Am. Club,* No. 95C4490, 1998 WL 102931, at *3-4 (N.D. Ill. Mar. 5, 1998) (overruling a motion in limine that sought to exclude evidence of performance by plaintiff's replacement); *Durso v. Wanamaker,* 38 F.E.P. 1127, 1127 (E.D. Pa. 1985) ("The relevance of such evidence stands on a different footing than the evidence defendants wish to introduce: the facts of poor performance by a successor and better treatment of that successor despite his poor performance were relevant to a showing of differential treatment, which in turn was relevant to plaintiff's claim of pretext." (citation omitted)); *Berggruen v. Caterpillar, Inc.,* No. 92C5500, 1995 WL 708665, at *5 (N.D. Ill. Nov.

29, 1995) ("[T]he Court cannot discount the possibility that [evidence of subsequent performance by individuals selected over plaintiff for promotions] may be relevant to proving pretext."). Accordingly, at this early stage of the proceedings, Defendants' Motion in Limine regarding Williamson's reviews is denied. Should Plaintiff seek to offer such evidence during trial, Defendants remain free to make any necessary record, and to request an appropriate limiting instruction if trial objections regarding admissibility are overruled.

2. *Dawn Anderson*.

Plaintiff seeks to offer at trial Anderson's teaching evaluations from Fall 2006, Spring 2007, and Fall 2007. Defendants again argue that such evaluations are irrelevant to any issue in the case. Plaintiff correctly points out, however, that Anderson's evaluations from Fall 2006 *predate* the decision process for the adjunct position that Anderson was awarded in March 2007, and that the Spring and Fall 2007 evaluations *predate* the decision process for the full-time LAWR position awarded to Anderson in January 2009. As such, the Court must agree with Plaintiff that Anderson's evaluations are "doubly relevant – they are relevant to Dawn Anderson's qualifications at the time she was awarded [positions] over [Plaintiff],

and further relevant to the issue of pretext."[4] Pl.'s Mem. of Law in Supp. of Resistance to Mot. in Limine at 6.

B. *Plaintiff's Motion in Limine*

Plaintiff moves in limine that the Court exclude from evidence at trial: 1) any reference to settlement discussions or negotiations; 2) that any amount recovered by Plaintiff will or will not be subject to taxation; 3) any opinion testimony not disclosed in discovery by Defendants as required by Federal Rule of Civil Procedure 26(a) and the deadlines of the Pre-Trial Order in this case; 4) any evidence or testimony from any witness not specifically disclosed in discovery by Defendants; 5) any reference to Plaintiff's failure to mitigate damages; 6) Defendants' Exhibits 153-63; 7) any reference to job duties and responsibilities of Plaintiff in her present employment position; 8) arguments to the jury or questions of witnesses concerning the financial impact that a judgment entered against the defendants may or would have on taxpayers of the State of Iowa; 9) any reference to or jury instruction regarding Defendants' qualified immunity as to the 2008 and 2009 job openings.

[4] As was the case with Williamson, a reasonable jury could find that Jones' refusal to give Plaintiff a "second chance" for a position with the University on the basis of her "failed" job talk is unworthy of credence given the fact that Jones opted to give Anderson multiple "second chances," even in the face of poor student evaluations.

Plaintiff also requests that the Court enter a pretrial ruling permitting her to show the jury her published works, but not provide such published works to the jury directly for review. Defendants do not resist the first, second, and eighth items in Plaintiff's Motion. Plaintiff's Motion is, therefore, granted as to those items. The Court will address the remaining items in turn.

1. *Plaintiff's third and fourth items.*

Plaintiff argues that Defendants should be prohibited from offering at trial any previously undisclosed opinion testimony (third item) and any evidence or testimony from witnesses not specifically disclosed in discovery (fourth item). Defendants contend they cannot properly respond to Plaintiff's Motion without more information about *what* evidence or testimony Plaintiff contends would be inadmissible. Defs.' Br. in Supp. of Resistance to Pl.'s Mot. in Limine at 1. The Court agrees that no ruling in limine is possible on the basis of the present record. Should Defendants offer testimony or evidence at trial that Plaintiff finds improper, however, Plaintiff is free to lodge an objection.

2. *Plaintiff's fifth item.*

Plaintiff argues that Defendants should be barred from presenting any testimony or evidence at trial in support of Defendants' affirmative defense that Plaintiff has failed to mitigate her damages. Pl.'s

Mem. of Law in Supp. of Mot. in Limine #5 (Clerk's No. 77-1) at 1-4. According to Plaintiff, Defendants have not produced any evidence of Plaintiff's failure to mitigate, and have not disclosed any witnesses who have personal knowledge of facts that would support Defendants' affirmative defense. *Id.* at 1. In particular, Plaintiff points out that Jones indicated no knowledge of Plaintiff's failure to mitigate in her deposition, and that Defendants have identified only Plaintiff herself as a witness who can testify regarding mitigation. *Id.* at 3. "Defendants cannot meet their burden of proving that Plaintiff failed to mitigate her damages simply by calling Plaintiff to testify that she was unsuccessful in obtaining any alternative employment." *Id.* at 3-4 (citing *Prine v. Sioux City Cmty. Sch. Dist.,* 95 F. Supp. 2d 1005, 1012-13 (N.D. Iowa 2000)).

Defendants agree that they carry the burden of proving Plaintiff's failure to mitigate, but argue that "Plaintiff's argument is premature" given that "Defendant[s] [have not yet had] the opportunity to present evidence regarding mitigation." Defs.' Resp. to Pl.'s Mot. in Limine (Clerk's No. 80) at 1-2. "There is no burden that Defendants must meet at this time to be permitted to present evidence. No dispositive motions are pending. Defendants properly pled the affirmative defense [and] intend to present evidence to support that defense at trial." Defs.' Br. in Supp. of Resistance to Pl.'s Mot. in Limine (Clerk's No. 80-1) at 2.

None of the cases cited by Plaintiff in her brief support a conclusion that Defendant should be barred from presenting evidence in support of their mitigation defense at trial. *See Kehoe v. Anheuser-Busch, Inc.,* 96 F.3d 1095, 1106 (8th Cir. 1996) (affirming trial court's award of front pay made *after trial,* and finding that defendant had not sustained burden of proving that plaintiff failed to mitigate damages); *Smith v. World Ins. Co.,* 38 F.3d 1456, 1465 (8th Cir. 1994) (finding that mitigation instruction given at trial was insufficient to adequately apprise jury of substantive law); *Prine,* 95 F. Supp. 2d at 1012-13 (determining *after trial,* in considering a front pay award, that defendant had failed to meet its burden to prove that plaintiff had failed to mitigate damages); *Gilster v. Primebank,* No. C10-4084, 2012 WL 3518507, *26-27 (N.D. Iowa Aug. 14, 2012) (awarding front pay *after trial* and after concluding that defendant had not presented sufficient evidence of failure to mitigate); *Vasconez v. Mills,* 651 N.W.2d 48, 53 (Iowa 2002) (affirming trial court's conclusion that the trial record contained insufficient proof to support giving a jury instruction on mitigation).[5] Indeed, the

[5] Plaintiff cites *Rusch v. Midwest Industries Inc.* as stating, "Defendant has the burden to produce substantial evidence supporting a failure-to-mitigate claim prior to the admission of evidence related thereto." Pl's Mem. of Law in Supp. of Mot. in Limine #5 at 2 (quoting *Rusch,* No. 10-cv-4110, 2012 WL 2873871, at *1 (N.D. Iowa July 12, 2012) (citing *Vasconez,* 651 N.W.2d at 53-54)). The issue before the court in *Rusch,* however, was whether defendants' expert would be permitted to testify that the plaintiff had failed to make a good faith or reasonable

(Continued on following page)

proper approach is to permit Defendants to present whatever evidence they may have at trial. Should Defendants fail to proffer sufficient evidence to sustain their burden of proof, the Court will decline to instruct the jury on Defendants' mitigation defense.

3. *Plaintiff's sixth item*.

Plaintiff seeks in her sixth item to bar Defendants from presenting Exhibits 153-63 at trial, arguing that "Paragraph 2 of defendants' motion in limine states: 'The application and/or appointment of Plaintiff to any Boards or Commissions subsequent to the hiring for the position at issue. Evidence of Plaintiff's qualifications after the hiring decisions were made is not relevant.'"[6] Pl.'s Mot. in Limine at 2. Defendants counter that, though dated after January 2009, all of

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effort to secure a job. 2012 WL 2873871, at *1. The court determined that the expert testimony could not be permitted under *Daubert* "[u]ntil such time as Defendant [first] submits additional information with this Court indicating how they plan to produce substantial evidence that other work was available to Plaintiff." *Id.* at *1-3 (discussing *Daubert v. Merrell Dow Pharm. Inc.,* 509 U.S. 579, 589-90 (1993)). The *Rusch* court did not hold that courts should routinely bar defendants from putting on *any* evidence at trial without first making a pretrial showing of likely success, as Plaintiff seems to suggest.

[6] Plaintiff also asserted that if Defendants were barred from presenting any mitigation defense at trial, these same exhibits should be excluded. Pl.'s Mot. in Limine at 2. However, as discussed in § II.B.2, the Court will not bar Defendants from attempting to present evidence of this defense at trial.

these exhibits are relevant to Defendants' mitigation defense. Defs.' Resp. to Pl.'s Mot. in Limine at 3.

At this point, the Court sees no reason to prevent Defendants from offering Exhibits 153-63 at trial. Should Plaintiff have a continued dispute over admission of these exhibits once they are viewed in the context of Defendants' mitigation evidence at trial, Plaintiff remains free to object.

4. *Plaintiff's seventh item*.

Plaintiff requests that the Court preclude Defendants from offering at trial any reference to Plaintiff's job duties and responsibilities in her present employment positions. Pl.'s Mot. in Limine at 3. Specifically, Plaintiff asserts that her "three part-time jobs are only relevant on the issue of her present earnings which may be considered by the jury in assessing lost earnings." *Id.*

Defendants respond Plaintiff has worked in the University's Writing Center since 2006. Defs.' Resp. to Pl.'s Mot. in Limine at 3. "Her job duties in that position are relevant to her qualifications for the LAWR positions at issue in this case. Defendants are entitled to explore Wagner's job performance and ability." *Id.*

The Court agrees that, since Wagner has held the Writing Center job since 2006, her job duties and responsibilities in that position are relevant to her qualifications for the positions she claims she was

improperly denied. The Court also agrees that Plaintiff's earnings in any of her three part-time positions are relevant for the jury's consideration of lost earnings. Accordingly, given that the Court is unaware of precisely how far Defendants intend to delve into these matters, the best approach at this point is to deny Plaintiff's motion in limine. Plaintiff may, of course, lodge an objection or request a limiting instruction should she believe that Defendants' presentation of evidence delves into unnecessary or irrelevant subject matter.

5. *Plaintiff's ninth item.*

Plaintiff requests that the Court preclude any reference to or jury instruction regarding Defendants' affirmative defense of qualified immunity. Pl.'s Mot. in Limine at 3. Defendants counter that they are entitled to qualified immunity from Wagner's claims that her due process and equal protection rights have been violated because "[n]o reasonable person in the Dean's position would have known that her conduct violated Wagner's constitutional rights." Defs.' Resp. to Pl.'s Mot. in Limine at 3 (citing *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982)).

Though Plaintiff points to the Eighth Circuit's decision in this case as precluding Defendants' qualified immunity defense, that decision notably dealt only with Plaintiff's 42 U.S.C. § 1983 claim to the extent that Plaintiff "allege[d] that Dean Jones violated her First Amendment rights of political belief

and association." *Wagner,* 664 F.3d at 268. The Circuit opinion did not address qualified immunity to the extent Plaintiff asserts § 1983 claims premised on equal protection or due process. *See generally id.* Indeed, those terms do not even appear in the Eighth Circuit's opinion.

Because the Court is uncertain whether Plaintiff is still attempting to pursue independent due process and equal protection § 1983 claims in addition to her First Amendment § 1983 claim, the Court cannot say that Defendants are flatly prohibited from raising any qualified immunity issues. Nonetheless, the parties shall refrain from mentioning qualified immunity in the presence of the jury without first seeking leave of Court.

6. *Plaintiff's request to show published works to the jury, but not provide them to the jury for review*.

Plaintiff finally requests that she be granted leave to "demonstrate to the jury Plaintiff's published works, (i.e., books and articles she wrote/published as well as book[s] she edited)," but "would further request that these publications *not* be produced to the jury." Pl.'s Mot. in Limine at 5. According to Plaintiff, her "conservative political views are clearly an issue in this case," and her published works demonstrate that her stance on "conservative/pro-life causes" would have been readily apparent to the faculty considering her employment. *Id.* Plaintiff is

concerned, however, that if the works themselves are published to the jury, the trial could be converted into a "referendum on the pro-life movement, for or against." *Id.*

Defendants respond that they are "unclear what Plaintiff is requesting on this issue. It is not permissible to show material to the jury that has not been admitted into evidence." Defs.' Resp. to Pl.'s Mot. in Limine at 3. The Court must preliminarily agree with Defendants and conclude that Plaintiff's request is not the proper subject of a motion in limine. Plaintiff's counsel is encouraged to work with Defendants' counsel to reach some sort of stipulation on this issue. If no such stipulation can be reached, the parties can bring the matter to the Court's attention on the record during trial, but outside the presence of the jury.

C. *Defendants' Second Motion in Limine*

Defendants request that the Court preclude Plaintiff from offering at trial: 1) any evidence or testimony from a witness that was not timely disclosed under Federal Rules of Civil Procedure 26(a), 33, and 34; and 2) any negative inference from the destruction of the tape recording of Plaintiff's job talk. Defs.' Second Mot. in Limine at 1. Defendants' motion is granted as to the first item because Plaintiff does not resist it. Pl.'s Resp. to Defs.' Second Mot. in Limine at 1.

As to its second request, Defendants contend that the destruction of Plaintiff's job talk tape does not give rise to any negative inference because Judge Wolle found in his summary judgment ruling that no such negative inference should be given. Defs.' Br. in Supp. of Second Mot. in Limine at 2. "Plaintiff did not appeal this ruling, and therefore, it is the law of this case. . . . Wagner may not now ask for an adverse inference based on the destruction of the videotape, since this issue has already been decided." *Id.*

Plaintiff resists Defendants' request, pointing out that they are "simply wrong that this is 'the law of this case.'" Pl.'s Mem. of Law in Supp. of Resistance to Second Mot. in Limine #2 at 2. The Court must agree. Judge Wolle explicitly stated in an Order on Plaintiff's Motion to Alter or Amend the grant of summary judgment in favor of Defendants that his summary judgment order "did not go beyond determining that defendant Jones was entitled to qualified immunity," noting that the "court limited itself to the evidence in the record and the sole question presented: did [Jones] act in conformity with what a reasonable official in her position would believe was constitutionally permissible when she accepted the faculty recommendation not to hire Wagner." Clerk's No. 52.

To the extent that Defendants would otherwise seek to prevent Plaintiff from mentioning the destruction of the job talk tape, their request is denied. Plaintiff is free to examine witnesses regarding the existence and destruction of the tape, just as

Defendants are free to offer evidence showing that the tape was recycled in accordance with normal University procedures. The question of whether an adverse inference instruction will ultimately be given the jury, however, remains for the Court to decide after presentation of all evidence in the case.[7]

D. *Defendants' Third Motion in Limine*

Defendants Third Motion in Limine seeks "an order instructing counsel not to present evidence, testimony, or statements" regarding "[a]ny exhibits not yet admitted into evidence" and "deposition

[7] The Court notes that the bar for giving such an instruction is quite high because an "adverse inference instruction is a powerful tool in a jury trial. When giving such an instruction, a federal judge brands one party as a bad actor, guilty of destroying evidence that it should have retained for use by the jury. It necessarily opens the door to a certain degree of speculation by the jury. . . ." *Morris v. Union Pac. R.R.,* 373 F.3d 896, 900-01 (8th Cir. 2004). Thus, "there must be a finding of intentional destruction indicating a desire to suppress the truth" before an adverse inference instruction is justified. *Stevenson v. Union Pac. R.R. Co.,* 354 F.3d 739, 746 (8th Cir. 2004) (stating also that when documents are destroyed pursuant to a document retention policy, the Court should additionally consider whether the document retention policy is reasonable considering the facts and circumstances surrounding those documents); *see also Greyhound Lines, Inc. v. Wade,* 485 F.3d 1032, 1035 (8th Cir. 2007) (rejecting a spoliation instruction where data was destroyed even though "litigation was likely," because the "ultimate focus for imposing sanctions for spoliation of evidence is the intentional destruction of evidence indicating a desire to suppress the truth, not the prospect of litigation.").

transcripts." Defs.' Third Mot. in Limine. The Court notes that Defendants did not file a brief in support of the Motion or cite any authorities, as required by the Local Rules. *See generally* LR 7. Regardless, the Court denies the Motion in Limine at this point in time. Should Plaintiff attempt to present a previously undisclosed exhibit or deposition transcript at trial, Defendants are free to lodge an appropriate objection.

III. CONCLUSION

For the reasons stated herein, Defendants' Motion in Limine (Clerk's No. 76), Plaintiff's Motion in Limine (Clerk's No. 77), and Defendants' Second Motion in Limine (Clerk's No. 84) are all GRANTED IN PART and DENIED IN PART, consistent with the terms of this Order. Defendants' Third Motion in Limine (Clerk's No. 98) is DENIED.

IT IS SO ORDERED.

Dated this 11th day of October, 2012.

/s/ Robert W. Pratt
ROBERT W. PRATT, Judge
U.S. DISTRICT COURT

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 10-2588

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.

Submitted: June 16, 2011
Filed: December 28, 2011

Before MURPHY and SMITH, Circuit Judges, and SCHREIER,[1] District Judge.

SCHREIER, District Judge.

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[1] The Honorable Karen E. Schreier, Chief United States District Judge for the District of South Dakota, sitting by designation.

Teresa Wagner appeals the district court's grant of summary judgment dismissing her 42 U.S.C. § 1983 suit against Carolyn Jones, who was then the Dean of the University of Iowa's College of Law. Wagner alleges that Dean Jones discriminated against her in violation of her First Amendment rights of political belief and association when Wagner was not hired to be a full-time Legal Analysis, Writing, and Research (LAWR) instructor or a part-time adjunct LAWR instructor. The district court granted summary judgment to Dean Jones on her official capacity and individual capacity claims. On appeal, Wagner only challenges the grant of summary judgment to Dean Jones in her individual capacity based on qualified immunity. We reverse the district court's grant of summary judgment based on qualified immunity.

A grant of summary judgment on the basis of qualified immunity is reviewed de novo. *Borgman v. Kedley,* 646 F.3d 518, 522 (8th Cir. 2011). The evidence is viewed in the light most favorable to the nonmoving party with all reasonable inferences being drawn in her favor. *Id.* Summary judgment is only appropriate if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a

matter of law." Fed. R. Civ. P. 56(c)(2).[2] In the context of a First Amendment claim, we must "make an independent examination of the whole record" to assure ourselves that "the judgment does not constitute a forbidden intrusion on the field of free expression." *Doe v. Pulaski Cnty. Special Sch. Dist.,* 306 F.3d 616, 621 (8th Cir. 2002) (en banc).

I. Background

Wagner, a registered Republican, has actively advocated for socially conservative causes. Wagner graduated from the University of Iowa College of Law (University) in 1993. Two years later, Wagner moved to Washington, D.C., where she worked with the National Right to Life Committee, which opposes abortion and euthanasia, and the Family Research Council, which advocates for conservative social views. Wagner also taught Advanced Legal Research, Writing & Analysis at George Mason University School of Law in Washington, D.C. for two years.

The law school faculty at the University is viewed as being liberal. Only one out of 50 professors is a registered Republican.

In August of 2006, Wagner returned to the University and worked as a part-time associate director

[2] While Federal Rule of Civil Procedure 56 changed in 2011, we apply the rule as it existed at the time the district court granted summary judgment.

in the University's writing center. That same month, the University posted an advertisement announcing an opening for two full-time LAWR instructors. The advertisement specifically sought candidates with prior successful teaching experience. Wagner applied for the LAWR position on October 4, 2006. Wagner listed on her resume her work with the National Right to Life Committee and the Family Research Council.

The University's Faculty Appointments Committee, which reviews applications and invites candidates for an initial interview with the Committee, reviewed Wagner's application. The Committee members were Mark Janis, the Committee chair, Dean Jones, and four other professors. On October 21, 2006, Janis e-mailed Wagner to unofficially inform her that her application was well received by the Committee.

On November 7, 2006, the Committee invited Wagner for an initial interview. During this interview, Professor N. William Hines, a Committee member, asked Wagner what differences she perceived between writing and analysis. Wagner replied that she understood the writing center's focus was on writing and LAWR instructors taught writing and analysis. On November 17, 2006, Janis e-mailed Wagner and told her that the Committee "enjoyed meeting with you and we're very enthusiastic about your candidacy for a full-time position in the LAWR Program." From the fifty applicants, the Committee selected five candidates, including Wagner, for a second, full-day

interview. Three of those candidates, including Wagner, interviewed for the position.

In January of 2007, Wagner met with then-Associate Dean John Carlson[3] to discuss her full-day interview, which was scheduled for Wednesday, January 24, 2007. Associate Dean Carlson explained the interview process. Wagner informed Associate Dean Carlson that she had previously gone through a similar interview process. Associate Dean Carlson asked where and Wagner told him Ave Maria School of Law, where she received an offer for a tenure-track law school teaching position. Associate Dean Carlson suggested to Wagner that she conceal this fact during the interview process because Ave Maria is viewed as a conservative school.

Wagner also informally met with prior Associate Dean Eric Andersen and asked him if the faculty would hold her conservative political views against her in the hiring process. Associate Dean Andersen answered that he did not know. Associate Dean Andersen spoke with Dean Jones before Wagner's full-day interview and relayed Wagner's concerns that her political beliefs might be a factor in the hiring decision.

Wagner had her full-day interview on January 24, 2007, which included a presentation or "job talk"

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[3] Eric Andersen was Associate Dean for the fall 2006 semester and John Carlson became Associate Dean for the spring 2007 semester.

to the full faculty, interviews with students and selected faculty, and a private interview with Dean Jones. During the interview with the faculty, Professor Randall Bezanson asked Wagner if she struggled in distinguishing between a document's writing and its analysis. Wagner responded that she understood the difference between writing and analysis and that documents can be evaluated for both their form (writing) and content (analysis). Wagner and Professor Bezanson elaborated on these distinctions during the interview.

Professor Todd Pettys asked Wagner whether analysis or writing was more important to the LAWR position. Wagner responded that both were important to the job. When Professor Pettys later asked Wagner if she had to choose between writing or analysis as to which was more important, Wagner responded that the question was unfair because both were important, but if she had to choose, she would pick writing. She further noted that all classes at the University teach legal analysis.

Wagner's notes from the job talk make two references to legal analysis. First, her notes state that she planned to use a textbook entitled *Legal Writing and Analysis,* which she had previously used at George Mason. Second, Wagner's notes reflect that she would ask students to absorb and analyze new information.

Seven faculty members complimented Wagner on her job talk. Professor Sheldon Kurtz e-mailed at 2:59

p.m. on January 24, 2007, and stated, "Great. Lets [sic] hire her." At 4:28 p.m. that same day, Ted Potter, the University's Reference Librarian, noted that Wagner was not as insightful as some other candidates but agreed that she should be hired:

> Teresa is enthusiastic about working with law students to help them become good legal writers. She has teaching and writing experience, and is familiar with the law school. She made some good comments about how she would teach LAWR . . . [h]er strategies for LAWR were practical . . . I feel Teresa is well-qualified for the position and I would recommend her.

Ellen Jones, a reference librarian and instructor in the writing program, said that both Wagner and Matt Williamson should be hired. Professors Peggy Smith and Michelle Falkoff told Wagner at a faculty dinner later that night that her presentation had gone well. Associate Dean Carlson and Associate Dean Andersen both supported hiring Wagner.

Student feedback from Wagner's interview was also positive. The students gave Wagner the highest possible ratings and ranked her higher than Williamson.

On January 25, 2007, the faculty discussed the applicants with Dean Jones present. The faculty voted to recommend that Dean Jones only hire Williamson, even though Dean Jones had informed the faculty that she could hire two full-time LAWR

instructors. Williamson was an adjunct LAWR instructor, had never practiced law, had no legal publications, and had no prior successful teaching experience. Williamson portrayed himself as a liberal to other employees at the Writing Center. During the January 25 meeting, the faculty did not consider Wagner for an adjunct position.

On January 26, 2007, Janis informed Wagner via e-mail that the University would not be hiring her. Wagner learned from Associate Dean Carlson on January 29, 2007, that Professor Bezanson had been the primary, vocal opponent to hiring her. In his deposition, Professor Bezanson could not recall whether Wagner's politics were discussed before the faculty voted, but he remembers some person mentioning that Wagner was conservative during the meeting. Professor Bezanson testified that Wagner's politics were possibly discussed after the faculty voted not to hire Wagner. Professor Bezanson had clerked for Justice Blackmun during the time *Roe v. Wade* was written, has written tributes to Justice Blackmun and his abortion jurisprudence, and has published legal articles advocating a pro-choice viewpoint on abortion. In contrast, Wagner's legal career has focused, in part, on protesting abortion and the cases that established a constitutional right to abortion.

On January 26, 2007, at 4:55 p.m., Associate Dean Carlson sent Dean Jones an e-mail stating that Wagner had expressed an interest in the summer LAWR program. Associate Dean Carlson questioned

whether Wagner's politics had played a role in the faculty's hiring decision and whether her politics would play a role in future hiring decisions:

> I don't know whether you have yet spoken to Teresa about the outcome of the faculty meeting. If not, there is something you should know – yesterday I received an email from Teresa (which I only just read) in which she indicated a willingness to teach the LAWR program in the summer. I don't know where Matt Williamson stands on this (he has not replied to my email inviting him to speak with me about summer teaching), and it may emerge that we would like to use Teresa during the summer. The problem is that I don't understand the significance of the faculty's unwillingness to vote on approving Teresa as an Adjunct. It seemed that there might be an undercurrent of opposition even to that.
>
> Frankly, one thing that worries me is that some people may be opposed to Teresa serving in any role in part at least because they so despise her politics (and especially her activism about it). I hate to think that is the case, and I don't actually think that, but I'm worried that I may be missing something.
>
> In any event, I think that we need to move fairly soon on this if we expect to have Teresa available as an adjunct either this summer or next fall. I believe that she may begin looking for more permanent and substantial work outside the College of Law after she

> learns that she will not receive an LAWR position.

At 5:14 p.m. that same day, Janis informed Wagner via an e-mail that the University would only be hiring one full-time LAWR instructor and that Wagner had not been selected. In that e-mail, Janis asked Wagner if she would be willing to work as an adjunct LAWR instructor because the law school would be filling the second LAWR opening with adjunct appointments:

> During the meeting, a number of faculty expressed the hope that you might be willing to be considered for a possible adjunct position. Dean Jones has asked me to follow up with you to inquire whether, indeed, that would be something that might be of interest to you. If it is of potential interest (and I hope it is!), please let me know, so that I can inform the committee to keep you under consideration.

On February 25, 2007, the University provided Wagner with a "Hiring Justification Summary" for the faculty's recommendation to hire Williamson. The summary stated that Wagner's interview was less successful than Williamson's interview possibly because the faculty perceived Wagner to be less familiar with the analysis component of the University's LAWR program. The faculty again encouraged Wagner to apply for an adjunct position: "It was observed that Ms. Wagner might benefit from an opportunity to teach as an Adjunct in the College's

program so that she may gain experience in (and assess her interest in) that important [analysis] component of the program."

Wagner did pursue an adjunct position. On February 27, 2007, Janis sent an e-mail to the Committee stating that Wagner had expressed interest in the adjunct position and that he wanted to forward her name to the faculty for consideration at the next faculty meeting. Janis received unanimous support from the Committee members who responded to his e-mail. Wagner's name was forwarded to the faculty for consideration. Wagner did not receive an interview for the adjunct LAWR position.

On March 22, 2007, the faculty voted not to hire Wagner as a part-time adjunct LAWR instructor and provided no explanation for their decision. Associate Dean Carlson informed Wagner on March 23, 2007, that she had been rejected as an adjunct instructor and that Professor Bezanson had been the primary opponent to her appointment. Associate Dean Carlson also told Wagner that a minority of faculty members can block a vote, and he suggested that she not apply again for an LAWR position.

Instead of hiring Wagner and pursuant to the faculty's recommendations, Dean Jones hired Steve Moeller and Dawn Anderson as part-time adjuncts. Both had served as adjunct instructors during the fall 2006 semester. Neither Moeller nor Dawn Anderson had had prior law school teaching experience. In fact, Moeller, who was Professor Bezanson's research

assistant, had just graduated from law school. Because they both had received low student evaluation scores for the fall 2006 semester – in the low twos on a scale of one to five – neither had been considered qualified for the full-time position.

In December of 2008, Wagner had a discussion with Professor David Baldus. Wagner worked with Baldus and assisted him in editing his legal publications. Baldus told Wagner that he was surprised she had not been hired as an adjunct because adjunct candidates usually come recommended to the faculty from the Committee. He had never heard of the faculty rejecting a candidate who had been recommended by the Committee.

Wagner applied, and was rejected, four additional times for an adjunct position: January 2007, March 2007, June 2008, and January 2009. The University did not grant Wagner an interview for any of the adjunct positions.

Wagner brought a § 1983 suit against Dean Jones in her individual and official capacities in January of 2009. The district court granted summary judgment in favor of Dean Jones. The only issue on appeal is whether Dean Jones, in her individual capacity, is entitled to qualified immunity on Wagner's First Amendment discrimination claim.

II. Discussion

Section 1983 provides a civil cause of action against any person who, under color of state law, causes a deprivation of the rights, privileges, or immunities secured by the Constitution and laws of the United States. 42 U.S.C. § 1983; *McRaven v. Sanders,* 577 F.3d 974, 979 (8th Cir. 2009). In an individual capacity suit under § 1983, a plaintiff seeks to impose personal liability on a state actor for actions taken under color of state law. *Monell v. Dep't of Soc. Servs.,* 436 U.S. 658, 690 n.55 (1978).

When a state actor is sued in her individual capacity, she can plead an affirmative defense of qualified immunity. *Serna v. Goodno,* 567 F.3d 944, 952 (8th Cir. 2009). "In analyzing qualified immunity, we ascertain (1) whether the facts alleged, construed in the light most favorable to the nonmoving party, establish a violation of a constitutional right, and (2) whether such right was clearly established so that a reasonable [dean] would have known her actions were unlawful." *El-Ghazzawy v. Berthiaume,* 636 F.3d 452, 456 (8th Cir. 2011) (citing *Doe v. Flaherty,* 623 F.3d 577, 583 (8th Cir. 2010)). The court has the discretion to choose which prong to analyze first. *Pearson v. Callahan,* 555 U.S. 223, ___, 129 S. Ct. 808, 821-22 (2009) (overruling the mandatory two-prong analysis established in *Saucier v. Katz,* 533 U.S. 194 (2001)).

A. Constitutional Violation

The threshold question is whether the facts, taken in the light most favorable to Wagner, show that Dean Jones's actions violated a constitutional right. *Sexton v. Martin,* 210 F.3d 905, 909 (8th Cir. 2000). Wagner alleges that Dean Jones violated her First Amendment rights of political belief and association when Wagner was not hired for any of the LAWR positions.

The First Amendment is binding on the states through the Fourteenth Amendment. *Healy v. James,* 408 U.S. 169, 181 (1972). "'[P]olitical belief and association constitute the core of those activities protected by the First Amendment.'" *Rutan v. Republican Party of Ill.,* 497 U.S. 62, 69 (1990) (quoting *Elrod v. Burns,* 427 U.S. 347, 356 (1976)). In *Rutan,* the United States Supreme Court extended *Branti v. Finkel,* 445 U.S. 507 (1980) and *Elrod v. Burns,* 427 U.S. 347 (1976) and held that the First Amendment prohibits a state from basing hiring decisions on political beliefs or associations with limited exceptions for policymaking and confidential positions. *Rutan,* 497 U.S. at 79. The state can neither directly nor indirectly interfere with an employee's or potential employee's rights to association and belief. *Id.* at 78.

Academic freedom is a "special concern of the First Amendment." *Keyishian v. Bd. of Regents of Univ. of N.Y.,* 385 U.S. 589, 603 (1967). "No more direct assault on academic freedom can be imagined

than for the school authorities to [refuse to hire] a teacher because of his or her philosophical, political, or ideological beliefs." *Bd. of Regents v. Roth,* 408 U.S. 169, 187-88 (1972) (Douglas, J., dissenting). But this court has recognized that respect for the "singular nature of academic decision-making" is also warranted because courts "lack the expertise to evaluate tenure decisions or to pass on the merits of a candidate's scholarship." *Okruhlik v. Univ. of Ark.,* 395 F.3d 872, 879 (8th Cir. 2005). The Supreme Court has also emphasized the respect due to academic judgment. *See Regents of Univ. of Mich. v. Ewing,* 474 U.S. 214, 225 (1985) ("When judges are asked to review the substance of a genuinely academic decision, . . . they should show great respect for the faculty's professional judgment."). Thus, judicial review of such decisions is limited to whether the "decision was based on a prohibited factor." *Brousard-Norcross v. Augustana Coll. Ass'n,* 935 F.2d 974, 976 (8th Cir. 1991).

Wagner has stated a claim of First Amendment political discrimination rather than a claim of retaliation because it is based on her status or affiliation. *See Burlington N. & Santa Fe Ry. Co. v. White,* 548 U.S. 53, 63 (2006) (reasoning that in the Title VII context the discrimination "provision seeks to prevent injury to individuals based on who they are, *i.e.,* their status. The antiretaliation provision seeks to prevent harm to individuals based on what they do, *i.e.,* their conduct."). We have considered multiple First Amendment retaliation claims in the past. *See, e.g.,*

Hughes v. Stottlemyre, 506 F.3d 675, 677-78 (8th Cir. 2007) (former state highway patrol sergeant alleged that his employer retaliated against him by demoting him and transferring him in violation of his First Amendment speech rights after he opposed changes in the highway patrol's policy); *Davison v. City of Minneapolis, Minn.,* 490 F.3d 648, 651 (8th Cir. 2007) (fire captain who spoke out against a city's budget plan brought a § 1983 claim alleging First Amendment retaliation after she was repeatedly denied promotions); *Altonen v. City of Minneapolis, Minn.,* 487 F.3d 554, 558 (8th Cir. 2007) (police investigator who supported a different police chief than the one ultimately appointed brought a § 1983 suit based on First Amendment retaliation after she was reassigned). But this is our first opportunity to address a political discrimination claim.

The First Circuit Court of Appeals, which has extensive case law in the area of political discrimination claims, applies the following test to nonpolicymaking employees:

> In political discrimination cases, nonpolicymaking employees have the threshold burden to produce sufficient direct or circumstantial evidence from which a rational jury could find that political affiliation was a substantial or motivating factor behind the adverse employment action. At that point the employer must articulate a nondiscriminatory basis for the adverse employment action and prove by a preponderance of the evidence

> that it would have been taken without regard to plaintiff's political affiliation.

Rodriguez-Rios v. Cordero, 138 F.3d 22, 24 (1st Cir. 1998). *See also Morales-Tanon v. Puerto Rico Elec. Power Auth.,* 524 F.3d 15, 19 (1st Cir. 2008) (same) and *Hatfield-Bermudez v. Aldanondo-Rivera,* 496 F.3d 51, 61 (1st Cir. 2007) (same). This is an extension of the substantial or motivating factor test articulated by the United States Supreme Court for First Amendment retaliation claims in *Mount Healthy City School District v. Doyle,* 429 U.S. 274, 287 (1977). Other circuits have employed a similar test. *See, e.g., Hall v. Babb,* 389 F.3d 758, 762 (7th Cir. 2004); *Stephens v. Kerrigan,* 122 F.3d 171, 181 (3d Cir. 1997).

In *Hughes v. Stottlemyre,* 506 F.3d 675 (8th Cir. 2007), we established a similar test for First Amendment retaliation claims. *Id.* at 678-79. A plaintiff alleging First Amendment retaliation must first make a prima facie showing that (1) she engaged in conduct protected by the First Amendment; (2) she suffered an adverse employment action; and (3) the protected activity was a substantial or motivating factor in the employer's decision to take the adverse employment action. *Id.* at 678. If a plaintiff makes this prima facie showing, then "a presumption of retaliation arises and the burden shifts to the defendant to advance a legitimate reason for the employment action." *Id.* at 679.

The *Mt. Healthy* burden-shifting analysis differs from the *McDonnell Douglas* burden-shifting analysis, which is used in Title VII discrimination cases, because

> under the *Mt. Healthy* burden-shifting mechanism applicable to a First Amendment political discrimination claim, the burden of persuasion itself passes to the defendant-employer once the plaintiff produces sufficient evidence from which the fact finder reasonably can infer that the plaintiff's protected conduct was a "substantial" or "motivating" factor behind her dismissal. Accordingly, once the burden of persuasion shifts to the defendant-employer, the plaintiff-employee will prevail unless the fact finder concludes that the defendant has produced enough evidence to establish that the plaintiff's dismissal would have occurred in any event for nondiscriminatory reasons.

Acevedo-Diaz v. Aponte, 1 F.3d 62, 67 (1st Cir. 1993). We find the First Circuit's test on First Amendment discrimination to be well reasoned, based on Supreme Court precedent, and utilized in a similar manner by other circuits. Thus, we adopt the test as set forth above.

1. Prima Facie Showing

The parties do not dispute that Wagner's political affiliation with the Republican Party and her work on behalf of socially conservative organizations is

protected by the First Amendment. It also is undisputed that Wagner was not hired for either the full-time position or the part-time adjunct LAWR positions. If a state actor refuses to hire an individual because of her political associations, then the individual has suffered an adverse employment action. *See Rutan,* 497 U.S. at 77 (reasoning that the "denial of a state job is a serious deprivation."). Thus, Wagner suffered an adverse employment action. Furthermore, it is undisputed that none of the positions were policymaking positions.

Next, we examine whether Wagner's political beliefs and associations were a substantial or motivating factor in Dean Jones's decision not to hire her. A substantial or motivating factor can be proven through either direct or indirect evidence. *Davison,* 490 F.3d at 655 n.5. A plaintiff need only prove that the employer's discriminatory motive played *a part* in the adverse employment action. *See id.* at 657 (reasoning that plaintiff presented sufficient evidence for jury to infer that failure to promote was motivated *in part* by his constitutionally protected activities).

Wagner presented evidence that only one out of 50 faculty members at the University is a registered Republican. She, on the other hand, is a registered Republican and a social conservative who has worked for socially conservative organizations.

Prior to her interview, Wagner was warned by Associate Dean Carlson to conceal the fact that she had received a similar tenure-track job offer from

Ave Maria School of Law, which was perceived to be a conservative school. Former Associate Dean Andersen told Dean Jones prior to Wagner's interview that Wagner was concerned that her conservative political views might be held against her during the hiring process.

During the January 25, 2007, faculty meeting, which Dean Jones attended, someone mentioned that Wagner holds conservative beliefs. It is disputed as to whether this occurred before or after the faculty voted to recommend that Wagner not be hired and that Williamson, a self-portrayed liberal, be hired.

The day after the faculty vote, Associate Dean Carlson sent Dean Jones an e-mail inquiring whether Wagner's politics had been considered by the faculty when they voted not to hire Wagner.

Even though Wagner was encouraged to and did apply for part-time adjunct positions, Wagner was not given an interview and the faculty voted not to hire her. The two individuals hired for the adjunct positions had less prior teaching experience than Wagner and low student evaluation scores.

When the facts are viewed in their totality with all reasonable inferences being drawn in favor of Wagner, we believe that Wagner has presented sufficient evidence for a fact finder to infer that Dean Jones's repeated decisions not to hire Wagner were in part motivated by Wagner's constitutionally protected First Amendment rights of political belief and association.

2. *Mt. Healthy* Defense

Because Wagner has met her prima facie burden, the burden now shifts to Dean Jones to show that she would have made the same hiring decisions regardless of Wagner's political affiliations and beliefs. *Davison,* 490 F.3d at 658. This is "commonly referred to as the *Mt. Healthy* defense." *Padilla-Garcia v. Guillermo Rodriguez,* 212 F.3d 69, 74 (1st Cir. 2000) (citing *Mt. Healthy,* 429 U.S. at 287).

Dean Jones's proffered reason for not hiring Wagner for the full-time position was that she always adopts the faculty's recommendation, and the faculty did not recommend hiring Wagner because Wagner did not understand the analysis portion of the LAWR program. When Professor Steven Burton asked Wagner about the relationship between teaching legal analysis and legal writing, Dean Jones alleges that Wagner responded it would be the job of doctrinal faculty, not her, to teach legal analysis. In response to follow-up questions about whether Wagner would teach legal analysis, Dean Jones alleges that Wagner continued to state that she would not teach analysis. The faculty's hiring justification summary noted that they perceived Wagner to be less familiar with the analysis portion of the LAWR program and, as a result, she was viewed less favorably than Williamson.

Dean Jones's proffered reason for not hiring Wagner for the part-time adjunct positions was that the faculty did not recommend hiring her and she

always follows their recommendation. No further explanation was given.

Wagner disputes Dean Jones's proffered reasons. "In a political discrimination case, the plaintiff may discredit the proffered nondiscriminatory reason, either circumstantially or directly, by adducing evidence that discrimination was more likely than not a motivating factor." *Padilla-Garcia,* 212 F.3d at 77 (citations omitted). "In this way, the burden-shifting mechanism is significantly different from the device used in other employment discrimination contexts, such as Title VII cases, where a plaintiff is required to come forward with affirmative evidence that the defendant's nondiscriminatory reason is pretextual." *Id.* (citations omitted).

Wagner argues that Dean Jones's proffered reason for not hiring her has no factual basis. Wagner claims that during her interview, Professor Pettys asked her a follow-up question to Professor Burton's questions about whether analysis or writing was more important. Wagner responded that both were important. When Professor Pettys asked Wagner if she had to choose whether analysis or writing was more important, Wagner responded that it was an unfair question because both were important but, if she had to choose, she would emphasize writing. In her initial interview with the Committee, Wagner states she correctly differentiated between the Writing Center, which focuses on writing, and the LAWR program, which teaches both writing and analysis. Her job talk notes, the only remaining documentation

of the job talk, reference analysis twice. Wagner also maintains she knows analysis is important because she taught legal analysis as an instructor in George Mason's writing program.

Wagner further contends that all of the contemporaneous documentation from her interview process was positive and recommended that Wagner be hired. Seven professors complimented her on her interview, and her student feedback was more positive than the feedback Williamson received. Wagner received no negative feedback from her interview until February 25, 2007, when she received the faculty's hiring justification summary.

Moreover, Dean Jones told the faculty that she could hire two full-time LAWR instructors. Only three candidates were granted final interviews for the two positions and the third candidate was widely viewed as unsuccessful. While the hiring justification summary stated that, "Wagner's on-campus interview was less successful than Mr. Williamson's," the faculty provided no reason why they chose to recommend only Williamson to Dean Jones for the two full-time LAWR positions, when they could have recommended both Wagner and Williamson. Additionally, no justification has been provided for the faculty's failure to recommend Wagner for the multiple part-time adjunct positions for which she has applied. And Wagner has evidence that the faculty has never rejected a candidate who was recommended by the Committee for an adjunct position.

In reviewing the evidence, the district court adopted Dean Jones's version of the facts and concluded that Wagner failed to meet her burden of proof that Dean Jones failed to hire her based on her political affiliations and beliefs. But on a summary judgment motion, the court must view the facts in the light most favorable to the nonmoving party. *Borgman,* 646 F.3d at 522. The district court erred in viewing the facts in the light most favorable to Dean Jones and resolving issues of fact in Dean Jones's favor.

After considering all the evidence, it is apparent that a dispute exists regarding a material issue of fact, namely whether Dean Jones would have made the same hiring decisions in the absence of Wagner's political affiliations and beliefs. Thus, the facts viewed in the light most favorable to Wagner are sufficient to establish a violation of her First Amendment rights.

B. Clearly Established Law

The second question in the qualified immunity analysis is whether the right that Dean Jones allegedly violated was clearly established at the time of the violation. "Qualified immunity is an affirmative defense for which the defendant carries the burden of proof. The plaintiff, however, must demonstrate that the law is clearly established." *Sparr v. Ward,* 306 F.3d 589, 593 (8th Cir. 2002). It is not enough that a right be established in an abstract sense; rather "the

contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Mathers v. Wright,* 636 F.3d 396, 399 (8th Cir. 2011) (citing *Anderson v. Creighton,* 483 U.S. 635, 640 (1987)).

It is well established that "[t]he First Amendment prevents the government, except in the most compelling circumstances, from wielding its power to interfere with its employees' freedom to believe and associate, or to not believe and not associate." *Rutan,* 497 U.S. at 76. Thus, the First Amendment prohibits a state from basing hiring decisions on political beliefs or associations with limited exceptions for policymaking and confidential positions. *Id.* at 79. The state can neither directly nor indirectly interfere with an employee's or potential employee's rights to association and belief. *Id.* at 78.

The Supreme Court decided *Rutan* in 1990. Dean Jones does not contend that either the full-time or adjunct LAWR positions were policymaking or confidential positions and acknowledges that Wagner had a First Amendment right not to have her hiring decision based on her political beliefs and associations. Thus, Wagner has met her burden to prove that, at the time the hiring decisions were made, the law was clearly established that an employee seeking employment with the state cannot be denied a job based on her political associations or beliefs unless the position is a policymaking or confidential position.

Because Wagner has shown that the First Amendment generally prohibits a state from basing its hiring decision on political beliefs or associations, the question now is "whether a reasonable [dean] could have believed [not hiring Wagner] to be lawful, in light of clearly established law and the information [that the dean] possessed." *Anderson,* 483 U.S. at 641.

Dean Jones had several indications that Wagner's political beliefs and associations may have played a role in the faculty's hiring decisions. Only one law school faculty member out of 50 is a registered Republican. As dean, Dean Jones generally should have been aware of her faculty's point of view and its political tendencies.

Associate Dean Andersen contacted Dean Jones before Wagner interviewed for the full-time position and relayed Wagner's concerns about whether her politics would make it difficult for her to be hired. Dean Jones apparently did nothing to ensure that the faculty did not impermissibly consider Wagner's politics in making its recommendation as to whom she should hire even though Dean Jones was present for the faculty discussion on January 25, 2007.

After the faculty voted not to recommend Wagner for the full-time position, Associate Dean Carlson sent an e-mail to Dean Jones questioning whether Wagner's politics played a role in the faculty's vote and if Wagner's politics would play a role in voting on whether she could teach the summer LAWR program

or serve as an adjunct. Dean Jones apparently completed no further investigation other than speaking to Associate Dean Carlson. More importantly, Dean Jones took no steps to ensure that the faculty did not take Wagner's political associations and beliefs into consideration when the faculty voted on whether to recommend her for an adjunct LAWR position. Dean Jones supported Wagner's serving as an adjunct instructor because she asked Janis to follow up with Wagner to determine whether she was interested in the adjunct position. But Dean Jones refused to hire Wagner and instead relied on the faculty's recommendations. Dean Jones did not provide Wagner with any explanation as to why she chose not to hire her for any of the adjunct positions.

Dean Jones argues that the University has a standard policy for hiring law school faculty. The Committee receives the applications, screens the candidates, conducts the initial interviews, and then chooses candidates for a full-day interview. The faculty attends the job talk portion of the candidate's full-day interview and votes on whether to recommend hiring candidates to the dean. Dean Jones argues that as the dean, she has to hire the person whom the faculty recommends and that this has been the practice for the last 50 years.

The district court found "that Jones acted in strict conformity with longstanding hiring policy" and "deans routinely and consistently exercised no independent personal judgment in making hiring decisions but acted entirely on the advice and

recommendations of a Faculty Appointments Committee." Wagner, however, presented evidence that at least one other dean in the past 50 years chose not to hire the person whom the faculty recommended. In her deposition, Dean Jones also conceded that she was free to refuse to hire the person recommended by the faculty and would do so in unusual circumstances:

> Q. So you have no authority whatsoever to do anything but authorize the faculty recommendation?
>
> A. I would imagine if there were some unusual circumstances, but, basically, I work at the authorization of the faculty if the process is working.

Jones Dep. 69:15-21. Dean Jones produced no evidence that this policy is a written policy, that her job position requires her to follow the policy, or any other evidence that the policy is a mandatory policy.

Whether Dean Jones had the ability to hire Wagner absent the faculty's vote is a genuine issue of material fact that the jury, not the court, should decide. Furthermore, Dean Jones was notified that the "process" may not have been working properly and the faculty may have violated the First Amendment, but she still made her hiring decision based solely on the faculty's suggestions. By her own admission, Dean Jones had the ability to hire someone whom the faculty had not recommended but chose not to do so. Dean Jones's conduct confirmed the faculty's

recommendations, which a jury ultimately could conclude violated the First Amendment. Consequently, Dean Jones has not shown that a reasonable university dean in her position would have believed that failing to hire Wagner was lawful in light of clearly established law.

C. Liability as a Supervisor

Dean Jones acted in her capacity as a supervisor. A supervisor incurs § 1983 liability

> for a violation of a federally protected right when the supervisor is personally involved in the violation or when the supervisor's corrective inaction constitutes deliberate indifference toward the violation. The supervisor must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what [he or she] might see.

Ottman v. City of Independence, Mo., 341 F.3d 751, 761 (8th Cir. 2003) (alteration in original) (citation and internal quotations omitted). "[A] supervisor can act with 'deliberate, reckless indifference' even when [s]he does not act 'knowingly.'" *Kahle v. Leonard,* 477 F.3d 544, 551-52 (8th Cir. 2007). "A supervisor can be found liable under § 1983 for deliberate indifference if [s]he is aware of 'a substantial risk of serious harm,' even if [s]he is not aware that the harm has, in fact, occurred." *Id.* (quoting *Farmer v. Brennan,* 511 U.S. 825, 842 (1994)).

But a supervisor "'is only liable for [her] . . . own misconduct' and is not 'accountable for the misdeeds of [her] agents' under a theory such as respondeat superior or supervisor liability." *Whitson v. Stone Cnty. Jail,* 602 F.3d 920, 928 (8th Cir. 2010) (quoting *Ashcroft v. Iqbal,* 556 U.S. 662, ___, 129 S. Ct. 1937, 1949 (2009)). "'A supervisor may be held individually liable under § 1983 if [s]he directly participates in the constitutional violation. . . .'" *Riehm v. Engelking,* 538 F.3d 952, 962-63 (8th Cir. 2008) (alterations in original) (quoting *Brockinton v. City of Sherwood, Ark.,* 503 F.3d 667, 674 (8th Cir. 2007)). Wagner's claim against Dean Jones is based on Dean Jones's own actions and omissions during the hiring process. Wagner has alleged facts establishing that even though Dean Jones was on notice that Wagner's political beliefs and associations may have impermissibly affected the faculty's hiring recommendation, she still refused to hire Wagner for any position. Accordingly, Dean Jones's position as a supervisor does not shield her from § 1983 liability.

The district court erred in finding that qualified immunity protects Dean Jones from liability in her individual capacity. We reverse the district court's grant of summary judgment as to Carolyn Jones in her personal capacity, and we remand for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

TERESA R. WAGNER

Plaintiff

v

CAROLYN JONES

Defendant

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 3:09-cv-00010 CRW-TJS

☐ JURY VERDICT. This action came before the Court for trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ DECISION BY COURT, This action came before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

Defendant's Motion for Summary Judgment is granted. Judgment is entered for Defendant and against Plaintiff. This lawsuit is dismissed with prejudice. Costs are assessed to Plaintiff.

Date: March 30, 2010

CLERK, U.S. DISTRICT COURT

/s/ R Johnson
By: Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 13-1650

Teresa R. Wagner

Appellant

v.

Carolyn Jones, Dean Iowa college of Law
(in her official and individual capacities) and
Gail B Agrawal, Dean Iowa college of Law
(in her official and individual capacities)

Appellees

Appeal from U.S. District Court
for the Southern District of Iowa – Davenport
(3:09-cv-00010-RP)

ORDER

The petition for rehearing en banc is denied. The petition for panel rehearing is also denied.

Judge Colloton did not participate in the consideration or decision of this matter.

August 25, 2014

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

TERESA R. WAGNER, Plaintiff, vs. CAROLYN JONES, Former Dean of Iowa College of Law (in her official and individual capacities), GAIL B. AGRAWAL, Dean of the Iowa College of Law, in her official capacity, Defendants.	)	Law No. 3:09-cv-10 **AFFIDAVIT OF STEPHEN T. FIEWEGER**

STATE OF ILLINOIS)
) ss.
COUNTY OF ROCK ISLAND)

I, Stephen T. Fieweger, P.C., state as follows for my Affidavit:

1. I am the attorney for plaintiff Teresa Wagner in the above-captioned matter and have personal knowledge of the facts set forth in this Affidavit.

2. On November 6, 2012, I received the letter which is attached hereto as Exhibit 1. Attached as Exhibit 2 is a photocopy of the envelope in which this letter arrived.

3. This letter came to me unsolicited – I have made no contacts or attempts to contact any jurors. I did not type any of the information contained in the letter. I have not changed any of the statements contained in Exhibit 1.

Further affiant sayeth naught.

_____
Stephen T. Fieweger

Subscribed and sworn to before me, a Notary Public, this 19th day of November, 2012.

_____
Notary Public

For: [NOTARY SEAL]

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EXHIBIT 1

Teresa Wagner vs Former Dean, Carolyn Jones.

First, why are you only suing Carolyn Jones? It was clearly the faculties of U of I Law are the ones that politically discriminated against Teresa Wagner.

- Did not prove why Carolyn Jones was to blame for all the discrimination against Teresa Wagner.
- There were differences in the understanding of what 'color of the law' meant.
- There were differences in the understanding of the 14th amendment.
- There were differences in the understanding of what 'purposefully' meant.
- Many felt that Carolyn Jones didn't discriminate against Wagner; she was just incompetent at how to perform her job.
- Was there a policy or guidelines that Carolyn Jones position should have followed when faced with the implication of political or any other kind of discrimination?
- Some of the Juror's, ones that held or at some time in their lives held positions of management, found it difficult to allow for the plaintiff for fear that they would be changing the law and making it so that they, themselves could be sued for discrimination when interviewing someone for an opening within the company they work for.

ALL felt Teresa Wagner was discriminated against. But as you can see there was several issues that divided the Juror's apart.

I hope that you continue on with this lawsuit. And I hope that Teresa is able to find herself a position, somewhere, that will leave her happy and fulfilled with all the goals in life.

Katz, Huntoon & Fieweger, PC

Stephen T. Fieweger

John Deere Corridor
1000 36th Avenue
Moline, IL 61265-7126

EXHIBIT 2

[U.S. POSTAGE STAMP]

Katz, Huntoon & Fieweger, PC
Attn: Stephen T. Fieweger
John Deere Corridor
1000 36th Avenue
Moline, IL 61265-7126

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

TERESA R, WAGNER, Plaintiff, v. CAROLYN JONES, Former Dean Iowa College of Law (in her individual capacity), Defendant.	* * * * * * * * * *	3:09-cv-10 VERDICT FORMS

Form One:

On Plaintiff's claim for political discrimination, as explained in Instruction No. 6, we find in favor of:

_____ Plaintiff Teresa Wagner

__X__ Defendant Carolyn Jones

If you found in favor of Plaintiff Teresa Wagner on Form One, please answer Question One, if you found in favor of Defendant Carolyn Jones on Form One, *do not* answer Questions One or Two; instead, move on to Form Two,

* ***Question One*:**

As explained in Instruction No. 7, Has Defendant proved by the greater weight of the evidence that she would have made the same decision (i.e., would not

have hired the Plaintiff as a LAWR instructor) regardless of Plaintiff's political beliefs and affiliations?

_____ No

_____ Yes

If your answer to Question One is "no," you must answer Question Two with the amount of damages you award Plaintiff. If your answer to Question One is "yes," you must answer Question Two by entering "none" as the amount of damages to award Plaintiff.

* ***Question Two*:**

We find Plaintiff Teresa Wagner's damages (as defined in Instruction Nos. 10-11) for political discrimination to be:

$ _____ Wages and fringe benefits

$ _____ Other past damages (such as emotional pain, etc.)

$ _____ Future damages (such as emotional pain, etc.)

(in each blank, state the amount or, if none, write the word "none," or if you find that Plaintiff's damages have no monetary value, set forth a nominal amount such as $1.00).

Form Two:

On Plaintiff's claim for violation of equal protection, as explained in Instruction No. 8, we find in favor of:

_____ Plaintiff Teresa Wagner

_____ Defendant Carolyn Jones

If you found in favor of Plaintiff Teresa Wagner on Form Two, please answer Question Three. If you found in favor of Defendant Carolyn Jones on Form Two, *do not* answer Question Three; instead, have your foreperson sign and date the verdict forms, and inform the Court Security Officer that you have reached your verdicts.

* ***Question Three*:**

We find Plaintiff Teresa Wagner's damages (as defined in Instruction Nos. 10-11) for violation of equal protection to be:

$ _____ Wages and fringe benefits

$ _____ Other past damages (such as emotional pain, etc.)

$ _____ Future damages (such as emotional pain, etc.)

(in each blank, state the amount or, if none, write the word "none," or if you find that Plaintiff's damages have no monetary value, set forth a nominal amount such as $1.00).

_____

Foreperson Date