

May 7, 2018

VIA EMAIL

Dear Senator,

On behalf of the National Women's Law Center (the Center), an organization that has fought to promote women's legal rights and protections for 45 years, I write to express serious concerns regarding the nomination of Kurt Engelhardt to the United States Court of Appeals for the Fifth Circuit.

In his current role serving on the U.S. District Court, Judge Engelhardt has both issued rulings and provided commentary in sexual harassment matters in a way that raises serious concerns. A review of four of his relevant opinions dealing with claims of sexual harassment demonstrated a pattern of minimizing the severity and impact of the alleged harassment. Although sexual harassment matters necessarily permit some level of discretion by the district court judge to determine which cases may proceed to a jury and which ones may be decided on the papers, a review of the underlying facts in these cases indicates a desire to find for the employer --- even when an employee endures significant mistreatment in the workplace. These outcomes were certainly not dictated by federal precedent but rather, highlight the harmful impact that judges have on individuals and the law when they fail to take harassment in the workplace seriously.

As one example, in *EEOC v. Rite Aid Corp.*, Tiffany Blackmon brought claims of sexual harassment and retaliation under Title VII.¹ She alleged several physical and verbal incidents, primarily by two other security detectives, including rubbing her behind, cupping her breast, pinching her thigh, and trying to kiss her.² She was also verbally harassed, in that one detective asked what she slept in at night, twice walked up close to her, saying "I wonder what it feel[s] like," and made remarks on "how pretty [she] was, how pretty [her] chest was."³ The detective also suggested several times that he would go to her home without invitation, and another would comment on her figure and ask for her telephone number.⁴ Notably, Ms. Blackmon worked for this employer for "nearly six months," during which time she complained to her supervisor ten or twenty times.⁵ Ms. Blackmon also alleged that sexual comments were directed towards other colleagues in her presence, and that "nasty jokes" were shared in their vicinity.⁶ She also witnessed the detectives zoom their security cameras in on the chests and buttocks of women in the store.⁷

¹ *EEOC v. Rite Aid Corp.*, No. Civ.A. 03-2079, 2004 WL 1488578 (E.D. La., June 30, 2004).

² *Id.* at *1-2.

³ *Id.* at *2.

⁴ *Id.*

⁵ *Id.* at *2.

⁶ *Id.*

⁷ *Id.*

In his decision granting summary judgment to the employer on the sexual harassment claims, Judge Engelhardt concluded that while “the comments made to Blackmon were offensive and sophomoric; however, they were not sufficiently severe or pervasive.”⁸ However, Judge Engelhardt had ample discretion to allow this case to proceed to trial so that a jury could decide if the legal standard for sexual harassment was met.⁹ Instead, by concluding that the conduct failed to show a sexually hostile workplace, he denied Ms. Blackmon her day in court, and allowed the employer to escape liability on the sexual harassment claim.

Similarly, in *Ellzey v. Catholic Charities Archdiocese*, Sharon Ellzey brought claims of sexual harassment, alleging that her supervisor gave her “‘hugs with sensual back rubs’” every one to two weeks and made comments about her clothes, buttocks, weight and hairstyles “in relation [to] her looking sexy” once every week during her employment from about June 2008 through March 2009.¹⁰ In this case, Judge Engelhardt granted summary judgment against Ms. Ellzey on the grounds that she had failed to exhaust her administrative remedies, but went on to conclude in his opinion – even though it was unnecessary to the disposition of the case -- that “these alleged instances and any other unwelcomed physical touching allegations were neither severe nor physically threatening, though quite unwelcome and indeed inappropriate.”¹¹

As yet another example, in *Matherne v. Cytec Corp.*, Cynthia Matherne alleged that a male colleague “commented on her buttocks and then pressed her against a wall, kissed her on the lips, and said, ‘now you ain’t never going to get married.’”¹² She also alleged that male co-workers had “requested sexual favors and had used pornographic movies and websites in the break room and work area.”¹³ Judge Engelhardt again granted summary judgment against the plaintiff, finding that the conduct alleged did “not rise to the level of an objectively abusive environment, as required under Title VII.”¹⁴ Notably, he concluded that “the alleged kiss is the

⁸ *Id.* at *5.

⁹ *Id.* at *5 (citing *Shepherd v. Comptroller of Pub. Accounts*, 168 F.3 871 (5th Cir.), cert. denied, 528 U.S. 963, 120 S.Ct. 395, 145 L.Ed.2d 308 (1999)). While Judge Engelhardt said at his hearing that his decisions followed Fifth Circuit precedent, the conduct alleged by Ms. Blackmon was more severe, and more frequent, than that found insufficient to establish unlawful harassment in *Shepherd*. Judge Engelhardt summarized that case as “finding that several inappropriate comments, including ‘your elbows are the same color as your nipples,’ and touchings, including rubbing his hands down her arm from her shoulder to her wrist, which occurred over the course of two years were ‘boorish and offensive’ but were not objectively severe or pervasive enough to constitute actionable sexual harassment.” *Id.*

¹⁰ 833 F.Supp. 2d 595, 603 (E.D. La. 2011).

¹¹ *Id.* Again, Judge Engelhardt cited the Fifth Circuit’s decision in *Shepherd* to support his conclusion, even though the conduct alleged in *Shepherd* was both less severe and less frequent than that alleged by Ms. Ellzey. See note 9, *supra*.

¹² *Matherne v. Cytec Corp.*, No. Civ.A. 00-2937, 2002 WL 506816, at *1 (E.D. La. Mar. 28, 2002).

¹³ *Id.*

¹⁴ *Id.* at *4. Again, the conduct alleged by Ms. Matherne – including coworkers’ viewing pornography in common areas and a forcible kiss – was more severe than the conduct found to not constitute actionable sexual harassment in *Shepherd*, the Fifth Circuit case cited by Judge Engelhardt in support of his conclusion. See note 9, *supra*.

sort of conduct that, if recurring, can become so severe and pervasive as to create an environment that would undermine a reasonable person's ability to perform her job duties."¹⁵

Finally, in *Kreamer v. Henry's Marine*, Thomas Kreamer brought claims of sexual harassment under Title VII, alleging physical and graphic verbal abuse that spanned from May to August 2002.¹⁶ He stated that one of his coworkers grabbed him around his crotch several times, burned him with a lighter while trying to place it between his legs, entered his sleeping quarters, and directed offensive gestures and whistles at him.¹⁷ During another incident, when he was bent over, the harasser grabbed his torso and said he "would like to f**k that piece of ass."¹⁸

Again, Judge Engelhardt granted summary judgment in favor of the employer. Judge Engelhardt concluded that the co-workers' intent was "to humiliate the plaintiff for reasons unrelated to a sexual interest, rather than actual intent to have sexual contact,"¹⁹ despite the sexual nature of the comments and contact. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998). He further determined that Mr. Kreamer's belief that the alleged harasser was gay was not enough to meet his burden of proof, especially since he concluded that "the instant case does not involve 'conduct [that] goes beyond the casual obscenity.'"²⁰

Taken together, these cases give individuals bringing claims of sexual harassment in the workplace reason to question whether they would receive a fair hearing before Judge Engelhardt, if he were confirmed to the Fifth Circuit. For the foregoing reasons, the nomination of Kurt Engelhardt to a lifetime position on the U.S. Court of Appeals for the Fifth Circuit raises serious concerns for the National Women's Law Center. Please feel free to contact me, or Rachel Easter, Counsel at the Center, at (202) 588-5180, should you have any questions.

Sincerely,



Fatima Goss Graves
President and CEO, National Women's Law Center

¹⁵ *Id.*

¹⁶ *Kreamer v. Henry's Marine*, No. Civ.A. 03-3139, 2004 WL 2297459, at *2-3 (E.D. La. Oct. 7, 2004).

¹⁷ *Id.*

¹⁸ *Id.* at *3.

¹⁹ *Id.* at *6.

²⁰ *Id.* at *7.