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# Verdict

January 8, 2013

Joanna L. Grossman

## **When Good Courts Go Bad: The Iowa Supreme Court Issues an Absurd Decision on Sexual Jealousy and Employment**



In 2009, the Iowa Supreme Court made national news for its surprising and unanimous decision in *Varnum v. Brien*, in which it held that the state's ban on same-sex marriage violated the state constitution's guarantee of equal protection. Iowa was not the first state to legalize same-sex marriage—Massachusetts came first in 2004, followed by a handful of others in 2008—but it was the first to do so outside of the liberal confines of the Northeast.

Iowa's high court made headlines again in 2010, when three of the justices who joined the *Varnum* opinion were recalled from the bench because of the decision. The three included the court's only woman; all three vacancies were filled by men.

Now the court is back in the news—or at least, it should be—for an illogical decision that misinterprets governing civil rights statutes and reaches a preposterous result. In this ruling, in *Nelson v. Knight*, the court held that a male dentist did not violate a law banning sex discrimination when he fired his very competent female dental assistant because he found her to be an “irresistible attraction” whose very presence might incite him to commit sexual harassment and, perhaps ultimately, cost him his marriage.

In this column, I'll explain why this ruling hearkens back to mistakes of the 1970s, when courts, including the U.S. Supreme Court, struggled to figure out just exactly what “sex discrimination” is. But forty years of anti-discrimination law later, we know it when we see it. And this is definitely it. The Iowa court has done women's workplace equality a colossal injustice by allowing men's inability to control themselves to define women's employment rights.

### **A Day in the Life of Dr. Knight's Dental Office**

In 1999, dentist James Knight hired Melissa Nelson to be a dental assistant in his office. She was 20 years old and had just received a two-year college degree. She worked in that position for over ten years and was, according to Dr. Knight, a “good assistant.” She, in turn, said he was a person of “high integrity” and that he generally treated her in a respectful manner. Both Knight and Nelson were both married with children.

The tenor in the office seemed to change in the last year-and-a-half of Nelson's employment. (The opinion does not reveal Knight's age, but a mid-life crisis jumps out as one possible explanation.) Knight began to comment to Nelson that her clothing was "distracting," too tight, or too revealing. Nelson denied that her clothing was inappropriate, but did put on a lab coat whenever he complained. (Nelson states in a video interview with CNN, given after the verdict, that she wore t-shirts and scrubs to work.)

At some point, Knight and Nelson began texting each other about both work and personal matters. Some of these matters were innocuous—such as updates on their respective children's activities—and others were more intimate. According to the available evidence, the in-person comments and texts of a sexual nature seemed to emanate exclusively from Dr. Knight. Knight admits that he once told Nelson if she saw his pants "bulging" then she would know she was dressed in too sexy a manner. He texted her once to complain that the shirt she wore that day was too tight. Nelson replied that she thought his complaint was unfair. His surreply? He told her it was a good thing she did not wear tight pants too, because then he would get it coming and going.

A comment by Nelson about infrequency in her sex life met with this retort from Knight: "That's like having a Lamborghini in the garage and never driving it." And Knight admits that once he texted Nelson to ask how often she experienced orgasms. Nelson did not complain about such comments, nor did she ask Knight to stop making them, but neither did she reciprocate with sexual innuendo of her own.

If this had been the end of the story, one might assume that Nelson had brought this case in order to complain about persistent sexual harassment by her supervisor, who was also the head of the office. She might not have won her case—either because a jury might have found that Knight's conduct was not unwelcome or, if unwelcome, was not sufficiently severe or pervasive to be actionable. But, if brought, it would not have been a frivolous case.

### **Enter Mrs. Knight and the Family Pastor**

In 2009, Knight took his children to Colorado for a vacation. His wife, Jeanne, who also worked in his dental office, stayed behind. While home, Jeanne discovered that her husband had been texting with Nelson. She was upset about that, and also was concerned by Nelson's clothing and Nelson's alleged flirting with Knight. Jeanne also testified in court that Nelson would hang out at the office after work hours, which Jeanne characterized as "strange"—she questioned why Nelson "after being at work all day and away from her kids and husband . . . would not be anxious to get home like other [women] in the office."

Jeanne viewed Nelson as "a big threat to our marriage" and demanded that her husband fire her. Thus, in January 2010, Knight called Nelson to his office in order to terminate her employment. He brought a pastor with him as a witness, and read Nelson a prepared statement, which said that Nelson had become a detriment to his marriage and that it was in the best interests of the Knight and Nelson families for the two not to work together. Nelson cried upon learning that she had been let go, because she loved her job.

That night, Nelson's husband, Steve, called Dr. Knight to ask why his wife had been fired. They met in person—again, with the pastor as a witness—to discuss the situation. Knight told Steve that Nelson was the best dental assistant he had ever had, and that she had done nothing wrong or inappropriate. But Knight told Steve that he was getting too attached to her and, in the court's words, "feared he would try to have an affair with her down the road if he did not fire her."

Knight replaced Nelson with another female dental assistant. He had never, in his practice, had a male assistant.

### **Is this Sex Discrimination? The Right Answer Is Yes, but the Court Fails to Recognize That**

Nelson filed suit under the Iowa Civil Rights Act, a statute analogous to Title VII, the main federal anti-discrimination law. (Iowa courts have held repeatedly that the Iowa act is co-extensive with Title VII and should be interpreted the same way.) She did not sue for sexual harassment, although, as mentioned above, she might well have included such a cause of action. Instead, she simply sued for sex discrimination, arguing that she was terminated because of her gender.

The Iowa Supreme Court held, by a vote of 7-0, that Nelson's firing did not constitute sex discrimination. The court's reasoning reveals an almost comical misunderstanding of the concept of sex discrimination, though. The question under Title VII—and the analogous Iowa statute under which this claim was brought—is whether Nelson was fired “because of sex.” Under the statutes the question then, is this: Would Nelson have been fired if she were a man? The answer is clearly no. In reaching the opposite conclusion, the court made a series of logical and doctrinal missteps, which I will describe below.

### **When Is Discrimination “Because of Sex”?**

Under Title VII, an employment action is unlawful if sex is a motivating factor, even if other factors were relevant.

In many employment discrimination cases, the employer's true reasons behind an adverse employment action are unknown—or at least unadmitted. The plaintiff-employee thus has to rely on a procedure established by the U.S. Supreme Court called “pretext analysis.” This procedure is designed to smoke out the employer's true motivations for taking the adverse employment action in question. To utilize this approach in a wrongful termination case, the plaintiff must make out a prima facie case by showing that she was subject to an adverse employment action, that she was qualified for the job, and that a person of the opposite sex was not fired or was hired to replace her. The burden of producing evidence then shifts to the employer, who must articulate a legitimate, nondiscriminatory reason for her termination. The plaintiff then bears the ultimate burden of proving that the employer's reason is unworthy of credence, or that discrimination is the real reason for the firing.

Here, however, the employer's reasons were admitted by him. (Although this case was decided on summary judgment, which means that a full airing of the facts never occurred, most of the key facts appear to be undisputed.) Knight concedes that he fired Nelson, in the court's words “because of the nature of their relationship and the perceived threat to Dr. Knight's marriage.” The question, then, is whether the employer's reason for firing the employee (here, Knight) is discriminatory under the statute or not.

Knight argues that this had nothing to do with Nelson's sex. Nelson, on the other hand, contends that “neither the relationship nor the alleged threat would have existed if the employee had been male.” The Iowa court erroneously resolved this dispute in favor of Knight by making three basic mistakes, which I will now describe.

### **Why This Is Not Analogous to a Case of Sexual Favoritism**

First, the Iowa court looked to “sexual favoritism” precedents to say that actions based on sexual relationships in the workplace are not “based on sex.” Sexual favoritism occurs when a supervisor is engaged in a consensual, romantic relationship with a subordinate and provides her with benefits, or protects her from employment detriments, because of the relationship. Although this seems unfair, especially to other subordinate employees who are losing out on the perks of sleeping with the boss, courts have struggled to figure out how this conduct can be deemed “because of sex” vis-à-vis the adversely affected employees. In most cases, the subordinate will have been chosen for the relationship because of sex, but the co-workers who suffer its effects will typically be of both sexes. Thus the discrimination—being treated less favorably than a co-worker—does not really occur because of sex.

The EEOC issued a policy guidance on sexual favoritism that has been largely followed by courts. According to the guidance, isolated incidents of sexual favoritism are not actionable. Sexual favoritism that is rampant or widespread, however, can violate Title VII by creating a sort of implicit quid pro quo—giving other female employees the impression that they must sleep with the boss to get ahead—or creating a hostile environment for all members of one sex. (This guidance and an example of a case in which sexual favoritism was found actionable are discussed [here \(http://writ.news.findlaw.com/grossman/20050728.html\)](http://writ.news.findlaw.com/grossman/20050728.html).)

The Iowa court makes two mistakes with this body of law. First, it reasons that if it is not actionable to treat an employee favorably because of a consensual sexual relationship, then it is also not actionable to treat an employee unfavorably because of a consensual relationship that may have triggered personal jealousy or created other complications at work. The two situations, however, are not analogous.

In the former case, as explained above, the discrimination complaint comes from third parties who have been adversely affected by the favoritism. The “because of sex” problem relates to their claim, not to a claim by the subordinate in the relationship who presumably was chosen “because of sex.”

In the latter case—the employee suing for discrimination is the one chosen by the boss for a personal relationship—a selection that very much turned on gender.

Moreover, and perhaps even more importantly in the *Knight* case, the subordinate employee who is treated unfavorably was not involved in a consensual sexual relationship with her supervisor. Knight and Nelson were not sexually or romantically involved and, to the extent that their relationship involved sexual innuendo or explicit sexual conversation, that innuendo and sexual conversation was both initiated and carried out by Knight. Nelson was thus not fired because of her relationship with her boss. As she correctly argued to the Iowa Supreme Court, she “did not do anything to get herself fired except exist as a female.”

### **Why This Case Is More Akin to a Sexual Harassment Case Than a Sex Discrimination Case**

When the head of a company sexually harasses a subordinate employee, the company is automatically liable (there are no affirmative defenses) based on an alter ego theory of liability—he is the company.

And if that same man engaged in a series of unwelcome sexual advances against that same female subordinate, we would have no trouble concluding that his actions were “because of sex.” The law is clear that if a man is motivated to harass a woman because of heterosexual desire, then he is discriminating against her on the basis of sex. (The law would say likewise about a homosexual supervisor who harassed a subordinate of the same sex. In either case, the targeted employee has had the terms and conditions of his or her employment altered because of sex.)

Dr. Knight’s actions fit neatly into this conception of sex discrimination. He found Nelson “irresistibly attractive” because she was a woman. He feared he might try to have an affair with her (as he allegedly told her husband) because she was a woman. And his wife was jealous of Nelson’s presence in the office because Nelson was a woman.

If a supervisor’s sexually harassing an employee constitutes sex discrimination, why doesn’t his firing her to stop himself from sexually harassing her constitute discrimination as well? In either case, a similarly-situated male dental assistant would not find himself subjected to such consequences. (I can’t help but recall here being told once by a male lawyer that he doesn’t work with women because if they are attractive, he’s too tempted to come on to them, and if they’re not attractive, what’s the point?)

If the Iowa court has this right, then could a man with a very jealous wife be excused for having a “No women in the office” policy? The Iowa court claims it would be a “different case” if Knight had fired more than one woman because of “alleged personal relationship issues.” But why?

### **Sex-Plus Discrimination is Still Unlawful Discrimination**

The Iowa court seems impressed by the fact that after Nelson was fired, Dr. Knight hired another woman as a dental assistant. And, in fact, Dr. Knight had only ever employed women in that position. Thus, the court inquired, how could Nelson’s firing be “because of sex?” The answer is that whether Nelson was preceded or succeeded by another woman is irrelevant. Such evidence can be relevant to a prima facie case that relies on pretext analysis, because it helps support an inference that the adverse action was taken “because of sex.” Here, as discussed above, pretext analysis was unnecessary, because Dr. Knight freely admitted his reasons for firing Nelson.

Moreover, an employer who discriminates against a subset of one gender—e.g., women with small children—violates anti-discrimination law just as clearly as if it had discriminated against all members of one gender. This type of discrimination, termed “sex-plus discrimination,” has been clearly held to violate Title VII and analogous state anti-discrimination laws. Thus, even if Dr. Knight fired Nelson not merely because she is a woman, but also because she is an attractive, sexy woman, his conduct is still actionable.

## With the Iowa Supreme Court Ruling in Knight's Favor, And No Title VII Claim at Issue, Nelson Has No Further Legal Recourse, Though She Ought To

When the first cases alleging sexual harassment as a violation of Title VII were brought in the 1970s, courts did not know what to make of them. The question that troubled them was whether unwelcome sexual advances were a form of "discrimination." A few early opinions from federal courts said things like this (and here I'm paraphrasing): (1) sexual harassment is a necessary consequence of letting women into the workforce unless men are to suddenly become asexual; and (2) rape isn't a form of employment discrimination just because it happens to occur in an office rather than a back alley.

We look on those cases now with horror, or at least with an understanding that they were reflective of courts' fumbling their ways through uncertain legal terrain. But those days are gone. When women are treated worse than men because they are women, as was the case for Nelson, then discrimination law must come to the rescue.

Because this suit was brought only under the Iowa anti-discrimination law, without a parallel claim under Title VII, it cannot be appealed any further. The Iowa Supreme Court is the final arbiter of the meaning of Iowa statutes, even if they are interpreted by analogy to Title VII. Thus, Ms. Nelson has no further avenues to complain about being fired for being, in her employer's eyes, too sexy for this job.



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