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MONDAY, JANUARY 09, 2012

NYT on the Iowa Discrimination Decision

By Paul Horwitz

The New York Times has a piece up on its website about the recent Eighth Circuit decision in the case in which an applicant for a legal writing position charged that she was denied a job at the University of Iowa's law school because of her conservative politics. Get your danders down; it's not by David Segal. (Disclosure: I taught there for a semester as a visitor a number of years ago. I have no personal knowledge of anything having to do with this case.) It's an interesting story and worth a couple of observations.

First, the article contains this sentence: "Ms. Wagner's lawyer, Stephen T. Fieweger, said the decision was a victory for an important sort of academic freedom." I should make clear that if the facts were as alleged and assuming that the plaintiff was passed up only because of her politics, I would disagree strenuously with the law school's decision. But I'm not sure the lawyer is right; or, to put it differently, I'm not sure what "sort" of academic freedom we're talking about here. My vision of academic freedom is that it is first and foremost not a matter of legal rights for individuals, but a means of preserving the autonomy of the *academy* as against improper internal and external influence. That's not to deny that it may have implications for individual academics, either as a matter of current doctrine or in terms of what I think that doctrine ought to say; just to say that its primary value is the preservation of institutional autonomy. This decision certainly does not support *that*"sort" of academic freedom. Now, academic freedom as a principle *within* universities, rather than as a legal rule, absolutely suggests (but see below) that decisions ought to be made on a *disciplinary* basis, not on the basis of extrinsic factors, including politics. If Iowa failed in this regard, it should be held to task by the academy and the public, vocally and vigorously. But we can do this while *still* worrying about the import of this *legal* decision.

I should add that the still-dominant view of academic freedom, whether as a legal value or as an institutional principle within universities, is that hiring decisions should be made free of political and similar considerations. I personally favor a little more pluralism than that: I think that given the virtually uncountable number of universities in the United States, there is room for more than one vision of a particular university's mission, and in some cases that can include

things like religiously affiliated schools, and schools that have a particular political orientation. Mine is probably a minority view: there are many people who think *no* universities should be political at all, and more than a few who believe *all* universities should be political (although usually they think all universities should share the *same* politics). There are fewer people who believe that academic freedom is capacious enough to contain some variety in university missions. There is room for debate over these issues! But this should be an intramural debate, or an extramural one to the extent that it involves *public* criticism; it generally should not involve the courts, whose primary job should be to maintain the institutional autonomy of the university rather than to police it according to their own fixed, and often stagnant, vision of what academic freedom means. On that view, the Eighth Circuit opinion can be cause for some alarm even for those who would wholly disagree with the law school's decision here, if it is as alleged.

It's worth noting that Walter Olson, who is a conservative critic of universities, makes something of the same point in the story: "'I have serious misgivings about asking the courts to fix this through lawsuits,' Mr. Olson said. 'It threatens to intrude on collegiality, empower some with sharp elbows to sue their way into faculty jobs, invite judges into making subjective calls of their own which may reflect their assumptions and biases, all while costing a lot of money and grief.'" Olson nonetheless can't resist adding: "'Law faculties at Iowa and elsewhere have been enthusiastic advocates of wider liability for other employers that get sued. They're not really going to ask for an exemption for themselves, are they?'" Well, yes, many faculties have taken that view. But not everyone agrees.

Finally, I should note a telling point here. The decision emphasizes, in accordance with the politically neutral vision of academic freedom, that the whole point is that, as a legal writing instructor, the plaintiff's politics should have been irrelevant. But in the Times story, the plaintiff's lawyer complains that the law school "espouse[s] cultural diversity but won't consider the conservative viewpoint." "Ms. Wagner would have added some balance, her lawyer said," the story continues, leading to this quote: "'My client is an ideologue,' Mr. Fieweger said. "'She does believe in conservative values.'" So presumably Mr. Fieweger thinks that universities and law schools, rather than holding politics aside,*should* consider applicants' ideologies, and that his client's politics *would* have influenced her job as a legal writing instructor. That argument is certainly inconsistent with what the Eighth Circuit itself said. And once you make it, I think it's much harder to argue that there is no room within the academy for predominantly liberal or conservative faculties. On the other hand--in another nice illustration of the ways in which the judicial concept of academic freedom has moved over time from cases like *Sweezy* to cases like *Grutter*--Fieweger has just made a nice argument for race-, gender-, sexual orientation-, and etc.-conscious hiring in law schools and elsewhere.