

## July 2023 – FIRE & EMS LAW NEWSLETTER

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE.]



Lawrence T. Bennett, Esq.  
Professor-Educator Emeritus  
Program Chair, Fire Science & Emergency Management  
Cell 513-470-2744  
Lawrence.bennett@uc.edu

- **NEWSLETTERS:** If you would like to be added to UC Fire Science listserv, just send him an e-mail. [View current and past newsletters via Fire Science webpage.](#)
- **TEXTBOOK:** Updating 18 chapters of my textbook (2018 to current). FIRE SERVICE LAW (SECOND EDITION), Jan. 2017: [View textbook via Waveland site.](#)

These cases will be added to **ONLINE LIBRARY** (case summaries 2018 - present):

[View cases via Scholar@UC](#)

**SPECIAL ADDITION – REVIEW OF THREE (3) U.S. SUPREME COURT DECISIONS**

File: Chap. 8, Race Discrimination

## **U.S. SUP. CT: HARVARD / UNC ADMISSIONS – RACIAL STEREOTYPING, LACK MEANINGFUL END POINTS**

On June 29, 2023, in [Students For Fair Admissions, Inc. v. Harvard College, and Students For Fair Admissions, Inc. v. University of North Carolina](#), the U.S. Supreme Court held (6 to 3), in opinion by Chief Justice John G. Roberts, Jr., the current admissions processes where race is a “plus factor” violates the 14<sup>th</sup> Amendment’s Equal Protection clause (ratified in 1868 in the wake of the Civil War). “For the reasons provided above, the Harvard and UNC admissions programs cannot be reconciled with the guarantees of the Equal Protection Clause. Both programs lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points. We have never permitted admissions programs to work in that way, and we will not do so today. At the same time, as all parties agree, nothing in this opinion should be construed as prohibiting universities from considering an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.”

“Founded in 1636, Harvard College has one of the most selective application processes in the country. Over 60,000 people applied to the school last year; fewer than 2,000 were admitted. Gaining admission to Harvard is thus no easy feat. It can depend on having excellent grades, glowing recommendation letters, or overcoming significant adversity.... It can also depend on your race. \*\*\* In the Harvard admissions process, ‘race is a determinative tip for’ a significant percentage ‘of all admitted African American and Hispanic applicants.’

\*\*\*

Like Harvard, UNC’s ‘admissions process is highly selective.’ In a typical year, the school “receives approximately 43,500 applications for its freshman class of 4,200.’

\*\*\*

Trial in the Harvard case lasted 15 days and included testimony from 30 witnesses, after which the Court concluded that Harvard’s admissions program comported with our precedents on the use of race in college admissions.... The First Circuit affirmed that determination. See 980 F. 3d, at 204. Similarly, in the UNC case, the District Court concluded after an eight-day trial that UNC’s admissions program was permissible under the Equal Protection Clause.

\*\*\*

But we have permitted race-based admissions only within the confines of narrow restrictions. University programs must comply with strict scrutiny, they may never use race as a stereotype or negative, and—at some point—they must end. Respondents’ admissions systems—however well-intentioned and implemented in good faith—fail each of these criteria. They must therefore be invalidated under the Equal Protection Clause of the Fourteenth Amendment.”

Dissent: Justice Sonia Sotomayor, joined by Justice Elena Kagan and Justice Ketanji Brown Jackson. (Justice Jackson participated only in UNC case since she graduated from Harvard as undergrad and from its law school.)

“Today, this Court stands in the way and rolls back decades of precedent and momentous progress. It holds that race can no longer be used in a limited way in college admissions to achieve such critical benefits. In so holding, the Court cements a superficial rule of colorblindness as a constitutional principle in an endemically segregated society where race has always mattered and continues to matter.

\*\*\*

Notwithstanding this Court’s actions, however, society’s progress toward equality cannot be permanently halted. Diversity is now a fundamental American value, housed in our varied and multicultural American community that only continues to grow. The pursuit of racial diversity will go on. Although the Court has stripped out almost all uses of race in college admissions, universities can and should continue to use all available tools to meet society’s needs for diversity in education. Despite the Court’s unjustified exercise of power, the opinion today will serve only to highlight the Court’s own impotence in the face of an America whose cries for equality resound. As has been the case before in the history of American democracy, ‘the arc of the moral universe’ will bend toward racial justice despite the Court’s efforts today to impede its progress. Martin Luther King “Our God is Marching On!” Speech (Mar. 25, 1965).”

Justice Jackson’s dissent:

“To demand that colleges ignore race in today’s admissions practices—and thus disregard the fact that racial disparities may have mattered for where some applicants find themselves today—is not only an affront to the dignity of those students for whom race matters. It also condemns our society to never escape the past that explains how and why race matters to the very concept of who ‘merits’ admission.

\*\*\*

With let-them-eat-cake obliviousness, today, the majority pulls the ripcord and announces ‘colorblindness for all’ by legal fiat. But deeming race irrelevant in law does not make it so in life. And having so detached itself from this country’s actual past and present experiences, the Court has now been lured into interfering with the crucial work that UNC and other institutions of higher learning are doing to solve America’s real-world problems.”

**Legal Lesson Learned: Employers, including Fire & EMS Departments, may still have racial and gender diversity goals; if your Department still has a Federal consent decree where goals have been met, consult with legal counsel about filing motion to dissolve the decree.**

**Note: [See article, June 24, 2020: ‘City of Buffalo updating training procedures: rolling out diversity training for every department.](#)**

See [IAFC article \(March 16, 2015\): “Department of Justice, Consent Decrees and the Fire Service.”](#)

“There are many consent decrees affecting fire departments across the country related to hiring practices, affecting several fire departments, including FDNY, Baltimore, Austin and San Francisco. [A consent decree affected Leesville, La.](#), which had gone on over 32 years for hiring practices violating Title VII of the Civil Rights Act of 1964. Probably the longest is a forty-year consent decree involving the city of Buffalo, N.Y. The city is requesting a 1974 DOJ consent decree be set aside after complying with the consent decree related to mandated hiring quotas overseen by a U.S. District Court judge.”

File: Chap. 16, Discipline

## **U.S. SUP. CT: FACEBOOK CYBERSTALKING POSTS TO FEMALE SINGER – PROS. PROVE DEF. INTENDED THREAT**

On June 27, 2023, in [Counterman v. Colorado](#), the U.S. Supreme Court held (7 to 2) in an opinion by Justice Elena Kagan, that Billy Cunningham, who was convicted by a jury under state stalking statute, and sentenced to 4 ½ years in prison, after sending hundreds of Facebook posts to a local singer / musician. Several of his posts expressed anger at C. W. and envisaged harm befalling her: “Fuck off permanently....” “Staying in cyber life is going to kill you....” “You’re not being good for human relations. Die.” The Court reversed the conviction since state prosecutors did not introduce any evidence, other than his Facebook posts, of his intentions to harm the singer. If state decides to try him again, they must include proof that the “defendant had some understanding of his statements’ threatening character.”

“From 2014 to 2016, petitioner Billy Counterman sent hundreds of Facebook messages to C. W., a local singer and musician. The two had never met, and C. W. never responded. In fact, she repeatedly blocked Counterman. But each time, he created a new Facebook account and resumed his contacts. Some of his messages were utterly prosaic “Good morning sweetheart”; “I am going to the store would you like anything?”—except that they were coming from a total stranger.... Others suggested that Counterman might be surveilling C. W. He asked “[w]as that you in the white Jeep?”; referenced “[a] fine display with your partner”; and noted “a couple [of] physical sightings....” And most critically, a number expressed anger at C. W. and envisaged harm befalling her: “Fuck off permanently....” “Staying in cyber life is going to kill you....” “You’re not being good for human relations. Die.”

\*\*\*

The messages put C. W. in fear and upended her daily existence. She believed that Counterman was ““threat[ening her] life”; ‘was very fearful that he was following’ her;

and was ‘afraid [she] would get hurt....’ As a result, she had ‘a lot of trouble sleeping’ and suffered from severe anxiety.... She stopped walking alone, declined social engagements, and canceled some of her performances, though doing so caused her financial strain.... Eventually, C. W. decided that she had to contact the authorities.

\*\*\*

True threats of violence are outside the bounds of First Amendment protection and punishable as crimes. Today we consider a criminal conviction for communications falling within that historically unprotected category. The question presented is whether the First Amendment still requires proof that the defendant had some subjective understanding of the threatening nature of his statements. We hold that it does, but that a mental state of recklessness is sufficient. The State must show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence. The State need not prove any more demanding form of subjective intent to threaten another.

\*\*\*

We follow the same path today, holding that the State must prove in true-threats cases that the defendant had some understanding of his statements’ threatening character. The second issue here concerns what precise *mens rea* standard suffices for the First Amendment purpose at issue. Again, guided by our precedent, we hold that a recklessness standard is enough.

Dissent by Justice Amy Coney Barrett:

“The bottom line is this: Counterman communicated true threats, which, ‘everyone agrees, lie outside the bounds of the First Amendment’s protection....’ He knew what the words meant. Those threats caused the victim to fear for her life, and they ‘upended her daily existence....’ Nonetheless, the Court concludes that Counterman can prevail on a First Amendment defense. Nothing in the Constitution compels that result. I respectfully dissent.”

**Legal Lesson Learned: Fire & EMS Departments should review employee handbooks and confirm there is a section on threatening conduct, including online posts.**

Note: [See photo of this stalker, and the victim](#): “Counterman had a history of making violent threats to women and was on supervised release from one such federal conviction during the two years he continuously messaged Whalen.”

On June 30, 2023, the U.S. Supreme Court has decided another First Amendment case: [303 Creative LLC et al. v. Elenis, et al.](#), holding (6 to 3) that Colorado Anti-Discrimination Act (CADA) cannot require wedding website owner to design websites for gay couples. “Specifically, she worries that, if she enters the wedding website business, the State will force her to convey messages inconsistent with her belief that marriage should be reserved to unions between one man and one woman. \*\*\* The First Amendment envisions the United States as a rich and complex place where all persons

are free to think and speak as they wish, not as the government demands. Because Colorado seeks to deny that promise, the judgment is Reversed.”

Note: Online threatening conduct can take many forms. On June 30, 2023, a former Deputy U.S. Marshal was sentenced to 10 years in prison for cyberstalking, perjury and obstruction.

“According to court documents and evidence presented at trial, Ian R. Diaz, 45, of Glendora, California, and his then-wife, an unindicted co-conspirator (CC-1), posed as a person with whom Diaz was formerly in a relationship (Jane Doe). In that guise, they sent themselves harassing and threatening electronic communications that contained apparent threats to harm CC-1; solicited and lured men found through Craigslist ‘personal’ advertisements to engage in so-called ‘rape fantasies’ in an attempt to stage a purported sexual assault on CC-1 orchestrated by Jane Doe; and staged one or more hoax sexual assaults and attempted sexual assaults on CC-1. Diaz and CC-1 then reported this conduct to local law enforcement, falsely claiming that Jane Doe posed a genuine and serious threat to Diaz and CC-1. Their actions caused local law enforcement to arrest, charge, and detain Jane Doe in jail for nearly three months for conduct for which Diaz and CC-1 framed her.”

File: Chap. 9 - ADA

## **U.S. SUP. CT: EVANGELICAL POSTMAN - OFF ON SUNDAYS – POSTAL SERVICE MUST PROVE REAL “UNDUE HARDSHIP”**

On June 29, 2023, in [Groff v. DeJoy, Postmaster General](#), the U.S. Supreme Court held (9 to 0) in an opinion by Justice Samuel Anthony Alito Jr., that U.S. Postal Service must accommodate a rural postman’s religious request to not work on Sundays delivering Amazon products, unless the “burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business.” Under Title VII of the Civil Rights Act of 1964, federal law bars employers from discriminating against workers for practicing their religion unless the employer can show that the worker’s religious practice cannot “reasonably” be accommodated without “undue hardship.”

“Gerald Groff is an Evangelical Christian who believes for religious reasons that Sunday should be devoted to worship and rest, not ‘secular labor’ and the ‘transport[ation]’ of worldly ‘goods...’ In 2012, Groff began his employment with the United States Postal Service (USPS), which has more than 600,000 employees. He became a Rural Carrier Associate, a job that required him to assist regular carriers in the delivery of mail. When he took the position, it generally did not involve Sunday work. But within a few years, that changed. In 2013, USPS entered into an agreement with Amazon to begin facilitating Sunday deliveries, and in 2016, USPS signed a memorandum of understanding with the

relevant union (the National Rural Letter Carriers' Association) that set out how Sunday and holiday parcel delivery would be handled.

\*\*\*

With Groff unwilling to work on Sundays, USPS made other arrangements. During the peak season, Sunday deliveries that would have otherwise been performed by Groff were carried out by the rest of the Holtwood staff, including the postmaster, whose job ordinarily does not involve delivering mail. During other months, Groff's Sunday assignments were redistributed to other carriers assigned to the regional hub. Throughout this time, Groff continued to receive 'progressive discipline' for failing to work on Sundays.... Finally, in January 2019, he resigned.

\*\*\*

A few months later, Groff sued under Title VII, asserting that USPS could have accommodated his Sunday Sabbath practice "without undue hardship on the conduct of [USPS's] business." 42 U. S. C. §2000e(j). The District Court granted summary judgment to USPS...

\*\*\*

We hold that showing 'more than a de minimis cost,' as that phrase is used in common parlance, does not suffice to establish 'undue hardship' under Title VII. \*\*\* We think it is enough to say that an employer must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business. \*\*\* What is most important is that "undue hardship" in Title VII means what it says, and courts should resolve whether a hardship would be substantial in the context of an employer's business in the common-sense manner that it would use in applying any such test.

\*\*\*

[U.S. Supreme Court orders the case remanded.] Without foreclosing the possibility that USPS will prevail, we think it appropriate to leave it to the lower courts to apply our clarified context-specific standard, and to decide whether any further factual development is needed."

**Legal Lesson Learned: While this is a Title VII religious accommodations case, this decision may impact employers, including Fire & EMS, when an employee seeks light duty or other accommodations for a disability. If you decline an accommodation request, after discussion with the employee, thoroughly document the "undue hardship" to the department, including impact on operations and costs.**

Note: [The EEOC has described "undue hardship" under ADA.](#)

"It is not necessary to provide a reasonable accommodation if doing so would cause an undue hardship. Undue hardship means that an accommodation would be unduly costly, extensive, substantial or disruptive, or would fundamentally alter the nature or operation of the business. Among the factors to be considered in

determining whether an accommodation is an undue hardship are the cost of the accommodation, the employer's size, financial resources and the nature and structure of its operation.

If a particular accommodation would be an undue hardship, you must try to identify another accommodation that will not pose such a hardship. If cost causes the undue hardship, you must also consider whether funding for an accommodation is available from an outside source, such as a vocational rehabilitation agency, and if the cost of providing the accommodation can be offset by state or federal tax credits or deductions. You must also give the applicant or employee with a disability the opportunity to provide the accommodation or pay for the portion of the accommodation that constitutes an undue hardship.”

Note also: The ADA's implementing regulations by EEOC state that, “[t]o determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the qualified individual with a disability in need of accommodation.’ 29 C.F.R. § 1630.2(o)(3).