



May 7, 2018

United States Senate
Washington, DC 20510

Dear Senator:

On behalf of our hundreds of thousands of members across the United States, People For the American Way urges you to oppose Kurt Engelhardt's nomination to the Fifth Circuit Court of Appeals. He has made a number of very disturbing rulings as a district court judge, and elevating him would disserve justice for every person in Louisiana, Mississippi, and Texas.

Engelhardt has a troubling record as a federal district court judge in the Eastern District of Louisiana. He is perhaps most well known as the judge in the racially charged Danziger Bridge case after hurricane Katrina. Less well known is his record shutting the courthouse door to plaintiffs with discrimination claims. The targets of sexual harassment and other types of unlawful mistreatment have too often been unjustly denied their day in court due to Engelhardt's misreading or misapplication of the law. This letter focuses on two cases as examples.

In *EEOC v. Rite Aid*, Engelhardt did not allow store security officer Tiffany Blackmon's sexual harassment claims against her employer to go to trial.¹ She had alleged that over a period of six months, a male colleague had:

- made sexually inappropriate comments about her under his breath on several occasions;
- rubbed his hand or entire body across her behind after making those comments;
- rubbed his finger across her neck unsolicited and touched her thigh when she jumped in surprise;
- made comments about her chest;
- asked what she slept in;
- asked "what it [would] feel like," which Blackmon interpreted as referring to sex; and
- suggested he would go to her house uninvited.

She alleged that a different male colleague had:

- backed her into a corner several times, asking for her phone number and presumably being flirtatious;
- commented on her figure several times, telling her she had better not gain any weight;
- grabbed her breast while taking her radio from her shirt pocket; and
- suggested he would go to her house uninvited.

Blackmon stated that she reported each incident to her supervisor, who took no apparent action for several months. A few weeks later, she was discharged. She charged Rite-Aid with sex discrimination

and retaliation for complaining to her supervisor about it. Although Judge Engelhardt let the retaliation charge advance to trial, he dismissed her sex discrimination claim on summary judgment.

Engelhardt concluded that no jury could reasonably find that the harassment was so severe and pervasive that it affected the terms and conditions of her employment. He likened this to a Texas case called *Jones v. Seago Manor Nursing Home*, where the plaintiff lost on summary judgment for the same reason.ⁱⁱ But Engelhardt failed to note that the employer in that case took action the day after offensive comments were made, so that the harassment never recurred. Blackmon, in contrast, endured harassment for six months before her employer took remedial action. During that time, the possibility of yet another act was always there, day after day.

Engelhardt also cited a Fifth Circuit precedent in which the court dismissed a claim because the conduct was not sufficiently severe or pervasive to constitute sexual harassment.ⁱⁱⁱ But the harassment Blackmon alleged was far more serious than in that case, which involved obnoxious sexual comments and the touching of the plaintiff's shoulder and arm.

Blackmon's male coworkers cupped her *breast*. They touched her thigh. They backed her into corners. They suggested they would go to her home (where their coworkers would not be present). This all happened for half a year.

A man who concludes that this cannot reasonably be seen as constituting a hostile work environment should not be allowed to become a court of appeals judge who would interpret Title VII or any other law that affects all the millions of women in Louisiana, Mississippi, and Texas.

Engelhardt seems equally blind to discrimination targeting Muslims. In 2012, he dismissed a complaint by Muntaha Sarsour, who was about to sit down for lunch with her daughter-in-law at a shopping mall when a security guard approached her.^{iv} It is undisputed that he told her to remove her hijab or push it away from her face, or else she would have to leave the mall. She refused, and she alleged that the guard told her to leave and followed the women toward the exit.

Sarsour filed a discrimination lawsuit. But Engelhardt ruled that she had not presented sufficient evidence of discriminatory intent on the part of the guard to even present her case to a jury. The mall claimed that security "simply sought to enforce the shopping center's nondiscriminatory policies prohibiting patrons' wearing of any face-obscuring garments on the premises." Although Sarsour claimed that was a pretext, Engelhardt concluded that her belief was based on "nothing more than mere speculation and supposition" and dismissed her case. He cited no evidence that they actually had such a policy or (if they did) had ever enforced it against anyone else.

Unfortunately, we live in a world where Sarsour's assumption cannot be so easily dismissed. In fact, in the decade since Sarsour's experience, incidents of anti-Muslim bias have only increased. Indeed, Engelhardt has been nominated to the Fifth Circuit by a president who vowed to impose a "total and complete shutdown of Muslims entering the United States." Ignoring the reality that Muslims unfortunately experience worsens the situation. A reasonable jury could very well have ruled in favor of Sarsour, but Engelhardt closed the courtroom door.

These cases are just two examples among many. Our federal judiciary exists to provide justice and protect the rule of law, goals that Engelhardt has inappropriately frustrated numerous times. His record does not warrant elevation to a lifetime position on the Fifth Circuit. We urge you to oppose his confirmation.

Sincerely,

A handwritten signature in cursive script that reads "Marge Baker".

Marge Baker
Executive Vice President for Policy and Program

ⁱ *EEOC v. Rite Aid Corp.*, 2004 U.S. Dist. LEXIS 12356, 2004 WL 1488578 (E.D. La., 2004).

ⁱⁱ *Jones v. Seago Manor Nursing Home*, 2002 U.S. Dist. LEXIS 17135 (N.D. Tex., 2002).

ⁱⁱⁱ *Shepherd v. Comptroller of Pub. Accounts*, 168 F.3d 871 (5th Cir., 1999).

^{iv} *Sarsour v. Oakwood Shopping Center*, 2012 U.S. Dist. LEXIS 72543, 2012 WL 1900035.