

TRANSCRIPT OF KEYNOTE SPEECH

HON. CANDY W. DALE

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TRANSCRIPT OF KEYNOTE SPEECH

HON. CANDY W. DALE

Thank you, Professor Rumel for your introduction. I also want to thank Molly and Ingrid for asking me to speak today and also recognize Dean Adams and the other members of the Idaho Law Review staff. I enjoyed talking this morning with some of the members of the law review staff and recalling my time as Editor-in-Chief and the celebration we had when “white out” was invented and we could use it when editing the typewritten notes, comments or articles submitted to us! I also want to commend the exemplary presentations during this morning’s sessions—I am looking forward to what I am certain will be the same quality of presentations this afternoon.

After listening this morning to the presentations, I am hoping I can weave in a few things that I heard into my speech this afternoon. When I was asked to give a keynote, I wondered what was expected as a keynote during a law review symposium? So I did what now most Americans do when they have a question like this and I Googled “keynote.” I learned that a keynote is a presentation that is consistent with the underlying theme of a celebration, symposium, or educational conference, *and* also that it typically costs a lot to secure the speaker to give the keynote address. I thought, “Okay, Molly, you led me astray”—clearly I am not getting \$225,000 and I am sure my comments are not going to be worthy of anything near that—but I will give it my best shot.

I did wonder, what can I add? I did not want to talk about my time as Editor-in-Chief. Then I realized it was highly likely that I was asked to talk at this Symposium because of the many, and I emphasize “many,” years I have been working in the employment law area – first as an attorney for twenty-five years and later on the bench. I just celebrated eight years as a United States Magistrate Judge and was reappointed to a second eight-year term. So I have had the opportunity to weigh in on employment cases that have been assigned to me and also conduct settlement conferences as the mediator in a variety of employment law cases. I obviously have an ongoing interest in learning about developments in the ever evolving and challenging area of Employment Law. It has been good to hear from those that are experts in this field today, as I no longer consider myself an expert in any particular field, given the variety of matters that come before the United States District Court on any given day.

What I thought I would do this afternoon is give you an overview of some of the employment laws that I have actually lived through and helped interpret for clients when I was in practice and for the litigants and public while I have had the privilege to serve on the federal bench. I will not review these laws in excruciating detail, and will conclude by giving you some tips or best practices that come from my years of experience, although I am sure most everyone in this room already knows and follows them. By providing this overview, I hope to illustrate the

spectrum of what was old or new then and what now is not so new. So the title of my speech is “Something Old, Something New,” and I also will talk about “something borrowed” and also “something blue,” to maintain consistency with the folklore many of you may recall that is attached to weddings, as my theme. I also may touch briefly upon trends we are seeing in Federal Court in Idaho, although I am not sure the trends in our Court are much different than around the country.

First, I thought I would put “old” in context, in other words, meaning me, and start by telling a story about a personal experience that came to mind this morning when I was listening to the presentations about pregnancy discrimination and the Equal Pay Act. When I was about six months pregnant—and this would have been in early 1990—my senior partner and mentor at the law firm we recently had started, Hall Farley Oberrecht & Blanton, had an interesting conversation. At the time, I was working with him a lot on medical malpractice cases while I also was working in the employment law area and developing that practice. I can still visualize the day when he brought one of our doctor clients into my office and said to the doctor: “I’m sure you remember Candy,” as I stood up from my desk chair, moved away from my desk and approached the doctor to shake his hand. At that point, my senior partner says: “And look, she’s pregnant.” The doctor probably could have figured that out on his own, because I was past the point in my pregnancy when any casual observer otherwise might not want to ask. My law partner went on to tell our client: “Don’t worry, she’s going to be back and she’s going to keep working on your case.” And he continues to praise me by sharing his opinion with the doctor: “I think she’s going to be, or actually already is, the best woman trial attorney in this state.”

After the client leaves, I tell my partner, “We need to talk. First of all, our client could tell I was pregnant. You did not need to tell him I was pregnant, and you did not need to tell him not to worry about whether I was coming back to work. You could have left that conversation to me and to a more appropriate context.” Next, I shifted the burden, so to speak, to factors other than sex and said: “By the way, I hope you introduce me someday as the best trial attorney in the state and not the best *woman* trial attorney.”

Okay, now I will continue with putting my career in the context of “old.” You have heard already that I graduated from the College of Law in 1982 and was Editor-in-Chief in 1981-82. At the time, of course, we had the Civil Rights Act of 1964 (Title VII). We also had the Age Discrimination in Employment Act of 1967. We had, as you have heard, the Equal Pay Act of 1963 and, of course, the Fair Labor Standards Act—talk about old, the FLSA is the oldest employment law statute, having been enacted in 1938. We also had Section 504 of The Rehabilitation Act (predecessor in many ways to the ADA) and the Pregnancy Discrimination Act of 1978 that you have heard about this morning. When I was in law school, we did not learn a lot about any of these laws; in fact, I do

not readily recall whether, or where, or to what extent Title VII was covered, although it probably was included in our constitutional law classes in a chapter or half of one.

I did take a Labor Law class and really enjoyed it, so I expressed early on to one of my supervising attorneys at Moffatt Thomas that I was interested in working on labor law projects for the firm. This supervising attorney, who also was one of my mentors, had served as a staff attorney for the NLRB during the early years of his career. Well, most of you that know Idaho know that, if you want to be a labor lawyer in Idaho, you might starve unless you do something like Professor Rumel did with the Idaho Education Association or some other associations. There is labor law work here in Idaho, but there is not necessarily enough work to keep more than one or two attorneys busy full time.

Shortly after I reminded my supervising attorney that I was interested in labor law, two fortuitous events occurred. First, the EEOC filed a lawsuit, along with an individual plaintiff, against Bonner County in North Idaho and Moffatt Thomas was asked to defend the case. Second, and around the same time, a wrongful discharge case was filed against Union Oil and we were asked to defend that case as well. My supervising attorney asked me to work on both of these cases, asking me first whether I knew anything about the EEOC as a plaintiff and next whether I knew whether wrongful discharge was a tort or contract claim. These were cases of “first impression” for the firm, and to a certain extent for Idaho. Remember that this was during the mid-1980’s. Anyway I started to figure out the statutory framework of Title VII and the procedural guidelines of the EEOC, as well as researched the daylights out of case law in other jurisdictions regarding wrongful discharge. The assignment of these two cases to me as the associate, unbeknownst at the time, truly set my career in employment law in motion. Also, remember this case filed by the EEOC was filed before the 1991 amendments to Title VII. So in hindsight, I figure the firm may have asked me to work on the EEOC case because they believed there was not much damage I could do or that much I could lose for the client, because noneconomic damages and punitive damages were not available under Title VII, nor was there a right to jury trial, prior to 1991.

And the wrongful discharge case involved an employee of Union Oil who was charged with and convicted of DUI and placed on probation by the State. The problem in the case that eventually was addressed by the Idaho Court of Appeals involved a letter my client gave the plaintiff when placing him on probationary status in his job that incorporated many of the conditions of his criminal probation. The legal question was whether the probation letter established a contractual exception to the employment at-will rule. The case was *Holmes v. Union Oil*, and if you look it up, you will note that Don Burnett, former Dean of the UI College of Law and former interim President of the University of Idaho wrote the majority opinion for the Court of Appeals. Of course, this piece of trivia dates me (as well as my dear friend Don Burnett).

There are some other cases I was involved with that I would like to touch upon, as they involved issues of first impression in the Idaho appellate courts and you may find them when you research certain employment law topics under Idaho law. *Ostrander v. Farm Bureau* was a case that went to the Idaho Supreme Court in 1993. The question in that case was whether an independent contractor has a right to sue for employment discrimination. I remember practicing my argument and how I would explain to the appellate judges that true independent contractors, who are human beings after all, should not be protected by the employment discrimination statutes. The end result was that I was successful, on behalf of my client, and true independent contractors have no ability to file a claim under the Idaho Human Rights Act like employees are able to file—they do not have the same rights as employees under Idaho law in this regard.

Another case I want to talk about is *Paterson v. State of Idaho*, a case that was decided by the Idaho Supreme Court in 1996. The plaintiff was an employee of the Department of Administration who was interviewed in connection with an internal sexual harassment investigation and later decided to make a claim herself against the supervisor who was the subject of the investigation. In her lawsuit, filed under the Idaho Human Rights Act, Paterson alleged she was a victim of inappropriate language and conduct in the work place by the supervisor. The case was tried to a jury and resulted in a favorable verdict for Paterson against both the State of Idaho and the supervisor who was individually named as a defendant.

I was not the defense attorney at trial, but was asked to represent the State on appeal: primary issues of first impression were presented. First, the question was whether the \$98,000 in punitive damages awarded against the State of Idaho, which included \$1,000 for 98 “willful” violations of the Idaho Human Rights Act, should be set aside. Essentially, the jury awarded \$1,000 in punitive damages for each inappropriate comment (or “dirty joke”) the supervisor had made according to a record or notes created by the plaintiff that was not contemporaneous with the events she recorded. Well, the Idaho Supreme Court accepted my argument and found that the \$1,000 cap on punitive damages for willful violations of the Idaho Human Rights Act precluded an award for more than \$1,000 for the hostile work environment claim the jury found Paterson had proved at trial. In other words, the court found a hostile work environment claim based on sex or other protected classification is one, not multiple, violations of the IHRA.

The other significant holding in the case was that the supervisor could not be held individually liable under the IHRA. Therefore, the entirety of the \$43,500 verdict against the supervisor was set aside. With regard to the verdict against the State of Idaho, it was reduced from \$103,000 to a total of \$6,000—\$5,000 for the noneconomic damages award to Paterson (which was affirmed) and \$1,000 in punitive damages. It clearly was a win for my client and a victory for me as counsel in

the case. But the cap on punitive damages remains, despite the much higher cap under federal law, and may be subject to ongoing debate.

The next case that went to the Idaho appellate court I would like to touch upon is *Parker v. Boise Telco*, decided by the Idaho Supreme Court in 1996. This case involved my client, an employer who had taken a lawyer's advice and added disclaimers to their policy manual or employee handbook to preserve the employment at-will status of the employees. The language was not in the original handbook provided to the plaintiff upon her hire, but she later was required to acknowledge receipt of the new handbook and her at-will status to remain employed. She claimed in her lawsuit that the after-the-fact disclaimers were not enforceable or effective. However, the appellate court accepted my argument and the case was dismissed, affirming the proposition that an employer can change an employee's status from not at-will to at-will, if they do it correctly. One of the reasons I mention this case is that one of the recent trends we have seen in Federal Court is public employees challenging their otherwise "at-will" status based on language that is in (or not in) policy manuals.

The last Idaho state case I want to talk about is *Jeremiah v. Yanke Machine Shop*. It was a hostile work environment and retaliation case brought by a former machinist who was Romanian. This was in 1998, when we were seeing some of the first retaliation claims in Idaho that have grown tremendously in number over the past several years here in Idaho and nationally. I believe it is safe to say that more discrimination cases than not involve a retaliation claim as well. Jeremiah claimed he was discriminated and retaliated against based on his race, and filed his lawsuit under both Title VII and the IHRA.

Most of the workers in the machine shop were men—not much different than most machine shops in the country at the time. And in this case, there was a lot of hazing and horseplay that went on in the machine shop. And there was evidence of how rude the co-workers were to Jeremiah, as well as the horseplay he initiated himself. However, some of it clearly had a racist bend, such as a fake green card made out of green rubber that was left on his tool or lunch box and references to him as a "goat-f...er." Allegedly, this nickname was either chosen by or given to Jeremiah as a deviation from jokes or name calling of other names, such as "sheep-f...er." Now, those of you attending this Symposium that are not from Idaho will not necessarily understand the significance of sheep here in Idaho, but we can talk about it later if you would like.

As a strategy for trying the case, my client and my readings on trial strategy suggested that I needed to desensitize the jury and readily repeat the "goat-f...er" name in open court enough times that it would sound less and less offensive. So I did that, but it did not work out as well as intended! And just this morning, seriously, when I was reviewing some reports on a judiciary news list serve, I saw a report of a case where a judge had failed to throw an attorney off a case in response to the other side's request after the attorney had written a letter or sent an

email to the opposing party stating something like: “I don’t give a hoot about your f-ing settlement offer.”

It can appear ironic when things like this come full circle, right? But so far I have not been asked to remove a lawyer or award sanctions for using the f-word, and I suppose it would take egregious circumstances for me to do that. After all, I used the word in open court, although it was evidence in the case! Anyway, back to the case itself that went on appeal, after a verdict adverse to my client, to the Idaho Supreme Court. Of significance to issues that confront employment lawyers, the Idaho Supreme Court affirmed the trial judge’s ruling that a “no probable cause” finding by the EEOC or the Idaho Human Rights Commission is not admissible. The appellate court agreed with the trial judge that a “no probable cause” determination is not admissible, whereas a “probable cause” determination likely is admissible.

So, these were some of the employment law cases I was involved with during my years of private practice and now I would like to turn to discuss briefly the new laws or statutory amendments that came about in the 1990s and later.

The Americans with Disabilities Act of 1990 brought a significant change to the landscape regarding discrimination based on physical and mental ability or inability, and the legal duty of reasonable accommodation. Previously, we had the Rehabilitation Act that provided certain protections to handicapped individuals, albeit the protections were extremely limited. The ADA was amended in 2008 (ADAAA), around the same time that I started on the bench, so I have not had an opportunity yet to look closely at the changes. However, I do believe the amendments, by broadening the definition of disability, may have reversed the trend of lawsuits being filed with “regarded as” disabled claims that I was seeing during my practice. But I will leave this to the experts in the room.

The Civil Rights Act of 1991, as I previously mentioned, brought huge changes in Title VII and continues to present a lot of opportunities for trial attorneys to make a difference in this area of the law. I have already touched upon the fact that Title VII now allows for noneconomic and punitive damages, as well as trial by jury.

The FMLA was adopted in 1993, so I did a lot of training about what it meant for, first the larger employers, and then the smaller employers. The 1938 Fair Labor Standards Act developed in the late 1990’s with the addition of exemptions from overtime for highly compensated computer professionals and next for highly compensated executives and administrators. And one of the jury trials I have had since I have been on the bench involved the highly compensated exemption for administrators and executives. I can tell you it is a challenge to draft jury instructions in these cases because standardized instructions that cover these exemptions are rare, or were at the time of this trial. But as you all know or should know, the jury instructions should be the starting place and ending place for full prosecution or defense of these claims,

just like every lawsuit. I cannot over emphasize, however, how important good jury instructions are and how much they are appreciated and followed by the jurors.

Before I mention the final case I want to talk about today and before I walk through a really fast check list of tips that incorporates the spectrum of old and new employment laws, I want to reference what the “borrowed” is for my folklore theme: the borrowed are concepts or legal principles from labor law that have been injected into employment law. Most specifically, retaliation and what constitutes protected activity, and industrial due process. I dealt with these concepts as they evolved while I was in private practice and you can find them when you read judicial decisions around the country.

The last case I want to talk about today, in part because it weaves back into the *Latta v. Otter* marriage equality decision that I authored and that Professor Rumel referenced during his introduction of me a few minutes ago, is the case of *Dew v. Edmunds*, a recent decision that I authored that was not appealed (so I can talk a bit about it). Mr. Dew applied for the position of Director of the Idaho Commission on Human Rights, the position Linda Goodman who is here today holds currently, and later filed a lawsuit contending he was discriminated against, based on his sexual orientation and his disability. He had flown to Boise from Iowa after an initial telephone interview to interview in person with the Commissioners and others. He first was interviewed by several of the Commissioners before he interviewed with the then director of the Idaho Human Rights Commission and the Director of the Department of Labor (Edmunds).

Dew claimed in his lawsuit that he was asked a lot of questions by the Director of the Department of Labor about an organization he had started in Iowa that he was working with in Iowa at the time he applied for the position in Idaho. That organization was an advocacy organization for LGBT individuals with disabilities. He claimed that, at the point in time he started talking about his affiliation with this organization and disclosed the fact that he, himself, had suffered from a seizure disorder that he was no longer suffering from, the Director of the Department of Labor’s tone and questions turned very negative. He claimed, and I will quote, that Edmunds’s “facial expression contorted like he just smelled a dirty diaper.” Dew claimed he felt degraded during and after the meeting with Edmunds and after being “left at the curb” to return to his hotel in Boise upon being told the full Commission needed to meet to discuss his application. Prior to his meeting with the Edmunds, he was very positive about all the prior interviews and went into the meeting with Edmunds pretty much believing he had the job. But, rather than staying in Boise and spending the weekend exploring Boise as previously planned, he thought long and hard about what he had just experienced and decided that very next day, or the next Monday, to withdraw his application for the director’s position because he thought it was a futile gesture to keep his application alive because of the attitude con-

veyed by Edmunds and the fact he did not receive an offer after that last interview.

Shortly after the complaint was filed, the state Defendants filed a motion to dismiss. They made two primary legal arguments based on the pleadings: first, they argued that there was no adverse employment action to support Dew's claims of discrimination because he affirmatively withdrew his application before the hiring process was completed; and second, even if Dew could allege facts supporting constructive withdrawal, the Defendants were entitled to qualified immunity because there was no clearly established law, at the time, that protected employees from discrimination in employment based on sexual orientation.

In opposition to the qualified immunity argument, Dew pointed to the *Latta* decision, and the *Smithkline* decision by the Ninth Circuit, addressing classifications based on sexual orientation. So I was presented with an opportunity to explain the rationale and scope of the *Latta* decision in my October 2015 decision granting defendants' motion to dismiss Dew's Section 1983 claim.

In my decision, I explained that *Latta* could not be used to argue that the law was clearly established at the time Dew applied for the position at the ICHR to prohibit employment discrimination based on sexual orientation. Instead, the debate in Idaho and nationally, other than perhaps for federal employees, was continuing and the defendants in this case could not be held liable for an alleged violation of a constitutional right that was not clearly established at the time they allegedly discriminated against Mr. Dew. Although I did find dismissal based on qualified immunity was appropriate, I have since reflected on the awkward, yet appropriate, argument counsel for the ICHR made during the hearing on defendants' motion. By arguing that the law was not clearly established regarding employment discrimination based on sexual orientation, the lawyer was in essence arguing inconsistent with what she and her client may have believed the law should be or might be someday soon. In fact, Dew himself had included a reference in his lawsuit to the advocacy for the "Add the Words" campaign by the Director of the ICHR he sought to succeed but then sued. As I listened to the ICHR attorney's argument, I thought about my own argument in the *Ostrander* case I mentioned earlier that some could have said suggested independent contractors are not humans.

But what I saw in the *Dew* case was advocacy on both sides of the issue: it is incredibly rewarding as a judge when I see that advocacy put forth for both the employee and employer in very effective ways, along with inherent respect for the rule of law.

Now, here quickly I will review some best practice tips: First, it is crucial to have a complete understanding of the statutory framework, including regulations and guidelines (from the EEOC, Department of Labor, etc.), and case law of the employment issues you are dealing with. Next, understand there are different statutes of limitation in Idaho and at the Federal level for filing discrimination, wage claims or oth-

er suits Next, and this may be the most important—you need a solid understanding of the burdens of proof. And this is an area where we could talk about what once was new is now old and what now is new is still evolving—the theme of this symposium. But think about the elements to a prima facie case, burden shifting under *McDonnell Douglas*, and affirmative defenses. Research and understand pretext—what constitutes significant and substantial that has to be proved by the plaintiff? When I was in practice, we tried hard to parse through whether the plaintiff was asserting disparate treatment or disparate impact, or some combination. As I learned this morning, now the discussion revolves around the distinction between conscious intent and implicit bias. How different are these legal concepts or principles from disparate treatment or impact? Next on my list is the need to understand retaliation. As I previously mentioned, retaliation claims, either under a statute or Idaho case law, are probably the trend we see the most in employment lawsuits filed in Federal Court. Determining what is protected activity and what protected activity means vis-a-vis the case law or the statutes is crucial. Next, having a full understanding about what damages are available is crucial. In the *Jeremiah vs. Yanke* case I mentioned earlier, the verdict and award of damages to the plaintiff was analyzed in post trial motions by the court under both under the Idaho Human Rights Act And Title VII. Given there were different caps on certain damages, the judge did a comparison and the one that was most favorable for the plaintiff was the one that prevailed. And, also on my list of best practices is e-discovery and social media. We could have a symposium, a two-day symposium, just talking about these issues and how they come into play, not just in the area of employment law, but in the practice of law as a whole. Finally, I will mention employment practices liability insurance that was relatively new when I was in private practice but continues to inject some interesting dynamics to the defense and prosecution of employment cases.

Today, I have talked about the spectrum of old, new, and borrowed relative to employment law. So that leaves me to conclude by talking about something blue. And you may be thinking, “Oh, this is going to be blue, this is going to be a downer, pessimistic blue.” Right? I am not going to do that and instead I want you to look outside the window here and look at the gorgeous blue color of the sky today. I prefer most times to put a positive spin on things if I can do so. So, the blue today that I want you to think about is the incredibly good work you all are doing as lawyers practicing employment law, either here in Idaho or elsewhere. It does not matter whether you are representing an employee, or an employer, or labor or management. Think of the privilege that all of us in this room have, and some of the law students may choose in the future, to be making a difference in the workplace.

And I thought Dean Adams, when he kicked off the Symposium this morning, made some really good comments about how important a quality work life, not just a quantity of work life, means to all of us. He

mentioned how being the dean and being called “Dean” everywhere he goes adds relevancy and meaning to his work, not just identity. So much is attached to our workplace and work life experiences, including self-esteem and self-worth. And for me, I am called Judge virtually everywhere other than home. It identifies my workplace, but much more than that. Unfortunately, there are times when we all can lose sight of all the good things we are doing, and have the privilege of doing, by virtue of our law degrees and our trusted relationships with clients and the public. So this is how I want to end my speech today—by commending all of you and asking also that you think about the type of cases you have worked on and the unique factual scenarios you have experienced in your practice—truly, you cannot make that stuff up! But seriously, I appreciate the presentations this morning and that is the *blue*. Something blue is the good stuff and the good work that you are doing, that we all are doing, to make the workplace better and better for everyone. You are making a difference. Thank you.