

ORAL ARGUMENT - 2/14/96
95-1195
CITY OF SHERMAN V. HENRY

CLARK: May it please the court. My name is Ron Clark of Sherman, Texas, and I am representing the City of Sherman in this case. Ironically we are here on Valentine's Day to decide whether adultery is a constitutionally protected right. Constitutionally protected to the extent that a chief of police cannot decide that he has a valid reason to pass an officer over for promotion when that officer is having an adulterous affair with the police dispatcher in the same department who is married to another police officer in that department.

ABBOTT: Do you think that it would be possible to resolve this case without addressing the constitutional issues by addressing only the issues about whether or not the police department has the right to not promote someone on the basis of what is good or bad for morale without getting into the constitutional issues?

CLARK: That would be possible especially given the evidence of disruption in this particular case.

GONZALEZ: What evidence that the city's _____ disruption?

CLARK: Alright you first of all have I think as a matter of law the disruption between the three individuals involved. You have the disruption of the relationship between Officer Henry and Officer Pollard. You have the disruption of the relationship they were employees.

GONZALEZ: I said what evidence. You are talking about matters of law, but what evidence of disruption was submitted?

CLARK: The evidence was that when Pollard found out about this affair on one or two occasions he came very close to trying to hunt down Henry and start a fight with him. You also have the evidence of Officer Pollard, how upset he was when he found out about it, and disrupted the relationship between himself and his wife, who again are both employees of the department. Then you have the evidence of Sgt. Blankenship who was a shift sergeant who testified that the men on his shift were discussing the matter, taking sides on the matter, going back and forth on the matter. Then you have the evidence of Officer Henry himself who, and this is ironic complained to the Chief that he was being harassed by other officers because of his affair. And one of the examples was this poster that was going around: "If you can't trust an officer with your wife - how can you trust them with your life?"

GONZALEZ: That was posted somewhere in the building?

CLARK: Well the CA, and it is very interesting said it was just posted in one place. But the record is quite clear it was put on a bulletin board, it was put in the mailboxes of various officers. And Officer Henry's letter of complaint said that it was on at least 2 different occasions in a number of different places. So even though, and I pointed out in my brief, but I think the CA (perhaps I didn't point it out clearly enough to them) misread that. Then you have the evidence of the Chief himself when he testified talking about the disruption that would occur when you promote someone who is involved in this, involved in an adulterous affair like this.

SPECTOR: Was there any discipline against Olson and Pollard for keeping their marriage secret?

CLARK: No. There was not discipline for keeping their marriage secret because there was no...

SPECTOR: I thought there was a written policy against officers being married; is that incorrect?

CLARK: They understood that. But that was not correct. They understood that there was supposed to be some kind of discipline would be taken against them. But they were not both police officers. So I do not think that that would have...

SPECTOR: They were not both police officers?

CLARK: Well one is a dispatcher. So that's not a certified peace officer. Had both of them been police officers, I think there could have been some problem. They were members of the department, but not both peace officers. A radio dispatcher is not a peace officer, but she was working in the same department, in the same building.

The additional evidence is the evidence of the Chief of Police about the disruption that would occur. And then finally the evidence of the expert witness, Mr. Barber, who was a teacher of criminal justice, who also pointed out that when you have this kind of a situation it is going to lead to a disruption in morale.

CORNYN: Does your case depend on proof of actual disruption?

CLARK: No, it doesn't. Because what we are talking about is a promotion in the future. And when you are dealing with a military organization like this you have to be concerned about what is going to happen. The fact is that there is evidence of actual disruption, but I think just the evidence of what is likely to occur. And in the opinion of these experts: the chief, and Mr. Barber what is likely to occur when you are talking about discretion, and that's what we are dealing with here, the chief of police should have the discretion in a matter of promotion. And we are dealing with as this court pointed out in the Texas Employers MHMR case a different situation than other kinds of employees, other kinds of public employees. These are employees directly dealing with public safety.

ABBOTT: And because of that isn't the standard of review different?

CLARK: I believe so. I believe that a differential standard has to be, and not just that I believe, the courts have stated both the federal courts and state courts have stated the standard of review is much more differential to the chief of police and the administrative agency.

ABBOTT: Do you think the CA followed that standard of review?

CLARK: No, I don't. I think it is quite clear from their opinion that they did not follow even the substantial evidence rule of standard of review. They reviewed the entire case both facts and law de novo. And the examples of that are: when they said there was virtually no evidence of disruption; only one notice posted on one bulletin board. For example they said: "well the chief was asked whether or not an affair between officer Pollard and another officer would result in discipline to him." And the CA said: "the Chief well it depended on the situation." The question the chief was asked by Mr. Richardson: What would happen if Officer Pollard had an affair with a deputy sheriff? Well that's a different department. That's a complete different agency. And the chief said it would depend on the situation. We are not dealing with a case here of a chief trying to interfere with the personal sexual lives of everyone in the department. And we're not dealing with a case where he's trying to say well you can't have sex with anybody outside of the

department. It's not that kind of control. What we are focusing on here is all 3 persons involved are in the department and it's disrupting the department itself.

ABBOTT: So your position then is you're not worried about who can have sex with whom. What you are worried about is what type of conduct impacts morale?

CLARK: In the department. That's right. And I think it was quite clear from that question that he was not trying to interfere with the privacy rights outside of the department. I mean that is a different case that we don't have to address right here.

GONZALEZ: Are all 3 of the individuals still in the department?

CLARK: Yes, they are. And ironically after Mr. and Mrs. Pollard got divorced after this incident they later on remarried. Subsequently Sgt. Henry came up on another promotion list and was promoted to sergeant.

PHILLIPS: Is that in the record?

CLARK: It happened while the case was on appeal.

GONZALEZ: This case may be moot. He wanted to be a sergeant and he's a sergeant already?

CLARK: That part of the case is moot, but he is still seeking the back pay and wages from the time which he wasn't sergeant, which was something like a year, plus the attorney's fees. So for that purpose it's not moot.

GONZALEZ: But he's already a sergeant for the City of Sherman?

CLARK: Yes. And I think that's the point, there was a change in chiefs of police too at that time, or prior to that time. All that happened here was he was not told he could never be promoted. The order of the civil service commission was: We are going to uphold the chief and we're going to return his name to the promotion list. The idea being if he could ever learn self control, if he could ever learn self discipline to keep his hands off the spouses of other officers, the rest of his record is quite good.

SPECTOR: Do you think there is any parameters to the chief's discretion in determining a valid reason for...

CLARK: I think there are going to be outside parameters just like we have when you review a lower court's case for abuse of discretion there are outside parameters. But that's what we are talking about is abuse of discretion. And those parameters are quite wide.

ABBOTT: What if the chief of police decided it would be bad for morale to hire someone of a different race or something like that?

CLARK: There you are talking about a status, not a conduct. And I think your into an entirely different kind of analysis. I think that would not be allowed, but that is a constitutionally protected status. And no case has ever held that pure adultery is a constitutionally protected conduct. We are talking about voluntary conduct which does not go to either marriage, abortion or contraception. And those are the areas involving sex that have been protected by various cases.

BAKER: Under the Texas constitution?

CLARK: The cases I've read, both the Texas and the federal constitution.

CORNYN: This is brought under the Texas constitution is it not?

CLARK: Yes it is. If I'm not mistaken I believe that he also urged as a secondary matter federal constitutional issues, which is why I am addressing both.

OWEN: What about the argument that there were no written guidelines, or written policies about what was inbounds and what was out of bounds?

CLARK: I think the 5th circuit addresses that in a case called Shago v. Spradlin, which is in my brief, and it basically says that spare notice may sometimes be required, but it may be well and possible for the mind to imagine or the hand to transcribe every sort of human misconduct that might fairly call for discipline. And if we were going to say that you can do anything that isn't written down, you are going to wind up with discipline manuals and policy manuals that are huge. And in effect wind up not getting _____. You can't possibly think of every kind of conduct. And when you are talking about interference with a marriage relationship, and the marriage relationship between Mr. and Mrs. Pollard is a legally recognized almost contractual legal relationship, which is constitutionally protected. And to say that Officer Henry didn't know that he should not interfere with that I think once again gets into the chief's discretion of: Well then he doesn't have enough common sense understanding the law to be a sergeant.

PHILLIPS: Is there any evidence in the record that he even knew they were married?

CLARK: Yes there is.

PHILLIPS: Is that a disputed fact?

CLARK: No, it is not. I had filed this morning of a listing of a chronology of the facts. And counsel in his response to my motion for summary judgment basically said that for the purpose of this summary judgment these facts are accepted as true. And it is true that Sergeant Pollard married her on Sept. 3, that the affair began before the marriage was announced as public. They were living together but they weren't publicly announcing their marriage. They announced their marriage and the affair continued. And it continued from July, 1991 to Feb. 1992 when the Pollards finally got divorced. And I think that's the crux of the matter continuing on with this affair knowing that they are married. In fact Henry admitted that the affair was still going as of the time of the civil service hearing. So it was going on. And that's what's so odd about this case, all these facts are uncontested and they rely completely on the idea that adultery is a constitutionally protected right.

CORNYN: If they weren't married does it make any difference?

CLARK: I thin in that case what you would have...

CORNYN: If various members of the police force are having sexual intercourse with one another, does that change things?

CLARK: I think if various members of the department are having sex with each other on their own time, off duty with no disruption of the department, then you are going to be getting into a protected area of privacy.

CORNYN: You say with no disruption. You say here your case doesn't depend on actual disruption. But I guess on an anticipated disruption because of the marital relationship. Are you saying it's

different if they are not married?

CLARK: I think when you interfere with the marital relationship you have a much stronger anticipation of disruption than you do when you just have boyfriend/girlfriend or unrelated people. But even in the case of people having sex on their own time off duty and they are unmarried, if the two officers...if it starts deteriorating their performance on the job, if they are fighting with each other for example...

CORNYN: So there you would mean actual disruption?

CLARK: I think you would have to have some showing. And I think some of the cases, the federal cases especially say that. You are going to have to have some kind of showing of something rather than merely an affair that happened in the past that was legal.

CORNYN: But the fact these folks were married gives the chief the discretion not to promote based upon anticipated disruption; is that correct?

CLARK: That's not the facts we have here. You are assuming there is not evidence. But yes I think that the fact that they are married...the one way that you might get around that is if it was quite clear that the husband and wife consented to bring in this third person. You had a consensual menage a trois, then perhaps that wouldn't be the chief's problem.

CORNYN: So then you would have to have actual disruption?

CLARK: I think in that kind of a case whether the court is going to go to the point of saying that that is a constitutionally protected activity I don't know, but that would be I guess an outside limit that you could look at.

PHILLIPS: You say in your brief that promotion or delay of promotion calls for a different standard than termination. Do you have case authority for that distinction?

CLARK: No, I don't. I think we are looking at different issues though when you talk about taking away someone's job and livelihood as compared with the fact that...

PHILLIPS: That has some common sense appeal to it, but in terms of the government taking action over and against an asserted constitutional right - the government taking action or not taking action is there any distinction that other cases have drawn between the severity of the issue _____?

CLARK: I have not found a case where that balancing was made but there are a number of cases where the balancing is different because it involves discipline in a police department. And I think there would be a difference between firing somebody because of the severity of that kind of discipline in the police department and temporarily holding back on the promotion.

GONZALEZ: Did I understand you to say that Kelly Olson and Tom Pollard got married, didn't announce their marriage, and then the adulteress affair, and then divorce, and now remarried again? Who was she married to: Cop #1 or cop #2?

CLARK: She was married to Mr. Pollard. I don't know if you have this 1-page summary. She was married to officer Pollard, the adulteress affair starts, it's announced, it continues on, Henry is denied his promotion. After Henry is denied his promotion, Kelly and Pollard are divorced. That's after all the promotion is denied. But the affair had continued on during that time. The Chief makes his decision to deny the promotion based on this man not having common sense enough to avoid this kind of

entanglement. And then they get divorced. Now as it happens later on while this case is on appeal, Kelly and Pollard have remarried, a new chief has come in, Henry comes back up on the list, the affair has stopped, and he is promoted. But that last set of facts came up on appeal.

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RESPONDENT

RICHARDSON: May it please the court. The facts of this case drive it and the facts of this case drive it hard. The Dallas CA is certainly no bastion of liberalism and in fact the opinion of the court below leaves holes that most public employers can drive a truck through if they will simply develop written rules and regulations that make some sense, and have some useful purpose. The facts are not just somewhat exaggerated by the City in the chart that is now before the court are totally misconstrued.

PHILLIPS: If there's a constitutional right as you assert how does the developing a written policy negate that constitutional right? If your argument was a due process one, that is you can't fire somebody without them knowing in advance...you can't not promote somebody without them knowing in advance what the parameters are going to be. But that's not your argument...

RICHARDSON: It's not my argument and it is the position apparently of the Dallas court.

PHILLIPS: You disagree with that?

RICHARDSON: I do.

PHILLIPS: You think if there was a constitutional right being exercised here by Mr. Henry and that no written policy...the written policy in fact would make it easier to challenge it from a constitutional standpoint?

RICHARDSON: In a somewhat different proceeding but certainly it would. Yes your honor.

PHILLIPS: I just wanted to make sure. I understood you disagree with the CA opinion.

ABBOTT: So you are saying that there is a constitutional right to have sex with whomever you want, and you should not be denied a promotion simply because you're having sex with that person; is that your position?

RICHARDSON: I believe that's the position of the constitution.

ABBOTT: And wouldn't you say then that a person has a constitutional right to have sex with their spouse?

RICHARDSON: No question about it.

ABBOTT: But yet this particular police department has the right to not only not promote but to not hire someone simply because they are married to someone already in the department?

RICHARDSON: That's questionable. I do not believe that issue has been decided. The Dallas court as a matter of fact just before we argued this case had upheld such a rule in one of the Dallas area cities, but no constitutional challenge had been made. I believe that issue has yet to be addressed in the state.

ABBOTT: So if we follow your analogy or perhaps your analysis then that would lead us down

a road overturning nepotism policies as being unconstitutional?

RICHARDSON: I think there is a rationale and a rule of reason within particularly a small department say that a police captain male or female is married to a police patrolman -boss/employee. I think the city should have the right without running afoul of the constitution to prevent the mischief that that type of situation would cause.

PHILLIPS: How is a marital relationship in terms of the mischief you just alluded to any different from a serious on-going non-marital relationship or even an infatuation?

RICHARDSON: Well number 1, it must be remembered that Kelly Olson was not a police officer. She was a civilian employee: a secretary, dispatcher, desk work. She was not a sworn police officer, was not supervised by police personnel. The reason I say that this case is driven hard by the undisputed facts, and the facts are undisputed, Officer Henry who going outside the record just a little more is now Lieutenant Henry. I don't know if counsel knew that.

PHILLIPS: Given the chain in everybody's status has there been any attempt to mediate this case by the plaintiff and the city?

RICHARDSON: Not by the city. The plaintiff of course has made many settlement overtures over the years, but the city seems adamant that it wants a final and binding decision.

HECHT: If there were evidence of actual disruption: one officer said I just can't work with this person anymore given what's happened, would that justify the decision here?

RICHARDSON: We have made a point in the brief, we've made a point in the argument in the court below, yes, it would then be arguable. Here's the problem though: if a constitutionally protected right was being exercised which offended the chief and which offended the brother officers, granted again if the city had put 25 police patrolman on the stand or 10 saying I can't possibly work for this guy; I've lost respect for him; I couldn't possibly follow his orders and I would run the risk of being fired myself for insubordination before I, then there's at least an arguing point. That didn't happen.

HECHT: Somewhere between that level of evidence and what we have here is the lie?

RICHARDSON: But nevertheless how about a constitution...suppose for instance that a person of the Jewish faith were first in line for promotion, and those same 10 or 25 cops took the stand after the chief had made the decision: I can't possibly promote this person because it would destroy the morale and efficiency of the department.

PHILLIPS: Is this right to privacy that you claim exists here then on the same level of strict scrutiny as race, or religion, or ethnicity in your opinion?

RICHARDSON: I will concede that there are probably comes to first, second and third level of constitutional rights and constitutionally protected privileges.

PHILLIPS: It seem to be at least that in the federal system.

RICHARDSON: I can't cite your honor any cases.

PHILLIPS: You are asking us to write in this area, or maybe you didn't ask for it but you got it, what level of protection should we accord to this constitutional right if we find that it exist in this case?

We are well familiar and our law is settled as it is in the federal system, if this person were being passed over for promotion because they were a member of a certain racial group, what type of justification the government would have to show to uphold that decision and it is of course deservedly very high? What type of justification would have to be shown to uphold the government's decision in the face of this asserted constitutional right?

RICHARDSON: I don't think any court and particularly this honorable court has to find a justification to uphold and enforce the constitution of the State of Texas or the US of America in protecting individual rights any protected individual rights.

PHILLIPS: I obviously didn't state the question right. A distinction can be made on virtually any grounds if there is a sufficiently compelling governmental reason to do so. Racial distinctions can be made by the government with a sufficiently compelling grounds for that. Now what degree of compelling grounds must the gov't show to make a distinction on the constitutional grounds you assert here? What level of scrutiny I guess?

RICHARDSON: Basically you are asking me to argue the City of Sherman side of the case. I don't know. Presumably if it were shown that Officer Henry were a sexual addict and had notwithstanding it was a _____ private time attempting to seduce the wife and/or girlfriend of every police officer on the force, we might be getting into a situation where his mental capacity could be challenged. But nevertheless from a sexual standpoint I presume that some basis could be developed along those lines which would justify the city in interfering in the officer's private life, inquiring into his private legal conduct.

PHILLIPS: I gather from what you say the constitutional right you assert here running headlong into a lot of the sexual harassment law and policy that the gov't has developed?

RICHARDSON: Well I wasn't thinking in terms of sexual harassment. I cannot imagine a situation particularly in Henry's. Henry never knew while the affair was going on that he was doing anything other than dating and trying to win a single and eligible lady.

GONZALEZ: After he found out he continued the relationship?

RICHARDSON: He did not. That is a misstatement by the City. I was there. I made the stipulation. Let me please explain it to your honor.

GONZALEZ: You can make an explanation but the transcript here at 78, line 155 and 156. Are you familiar with that particular passage in the statement of facts?

RICHARDSON: The stipulation that was made in the administrative tribunal was that sexual liaison had occurred between the two of them prior to the announcement of marriage. And then of course the courts well familiar with the letter from Henry after the marriage was announced: "I'm out of your life, so forth, so forth." Then it was further stipulated that it resumed but if you look in the record your honor...

GONZALEZ: It resumed at the point after he found out she was married to another officer?

RICHARDSON: Oh, yes. But after she was divorced. The City attorney says: "can we further stipulate that it is ongoing?" This was on April 17, 1992. And I believe I stated on the record: "Do you mean by that last night?" And he said yes. And I said we will stipulate. Mrs. Pollard was divorced in Feb. 1992, and that's in the record.

GONZALEZ: How about between July 1991 to Feb. 1992?

RICHARDSON: That was not part of the stipulation. If it appears as part of the testimony of Mrs. Pollard I am just not certain.

CORNYN: I would like to follow up on a question Justice Hecht asked earlier. I think you said that if there were a personality conflict among officers for whatever reasons and there were actual disruption on the police force as a result of that personality conflict, that that is something that the chief could take into consideration in whether to bypass an officer for a promotion. Did I state that correctly?

RICHARDSON: I hope I didn't state...if anything I said left the impression that personality conflicts between officers would justify the...

CORNYN: Maybe I added that. As far as actual disruption among officers is something that could be taken into account. You agree with that don't you?

RICHARDSON: Yes, your honor.

CORNYN: Whether it's caused by a personality conflict, or by someone says I have no respect for this person, can't work with them, that's something that the chief could take into account; would you agree with that?

RICHARDSON: I suppose your honor the chief could

CORNYN: If that's true, then what difference does it make that the personality conflict occurred because an officer was having sexual intercourse with another person there at the police department?

RICHARDSON: The difference under the undisputed evidence this was private, legal, consensual conduct.

CORNYN: But even if it resulted in actual disruption it's still protected, you can't take it into consideration?

RICHARDSON: Disruption as a matter of fact occurred some 6 months after the fact, after the divorce was on file shortly before it was finalized, and only when Officer Henry was number 1 on the promotion list. Then and only then did Sgt. Pollard who saw on the horizon and as it turns out _____ correctly a very fierce competitor for promotion to Lieutenant and the opportunity to utilize a situation that had existed 6 months prior to that fact to derail the man's career. It's just that simple.

And indeed the expert instead of putting on 15 police officers to say we're disrupted and we don't respect Officer Henry they had to bring in a Jr. College law enforcement instructor as an expert to say: Hey, this is disruptive; it has a bad affect on morale. What if Officer Henry didn't know they were married? What if Officer Henry thought he were legally courting an eligible? Well that might be a different story.

ABBOTT: Do you not concede that there was some evidence of disruption?

RICHARDSON: Yes I concede there was evidence of disruption. Sgt. Pollard was certainly disrupted. The evidence is very strong, I think circumstantially convincing that Sgt. Pollard is the guy that tacked up the poster as a matter of fact. Sgt. Pollard was disrupted. That's part of the job. Police officers upset one another every day of the week. I would presume that even members of this court occasionally have disagreements and are upset and disrupted, but I am sure it's very temporary and folks get over it.

It simply is not grounds and certainly not grounds enough to deny Officer Henry the constitutional protection, his private life, his totally private life, his legal consensual private life was entitled to receive.

SPECTOR: How large is the Sherman police force?

RICHARDSON: Around 60 uniformed police officers I believe.

GONZALEZ: Lt. Henry is now a Lt., and how about Mr. Pollard?

RICHARDSON: Mr. Pollard is still a Sgt.

GONZALEZ: So Lt. Henry now has supervisory capacity over Sgt. Pollard?

RICHARDSON: That's correct. And incidentally the police captain who testified: We expect folks to be professional; we expect this is a pari-military organization; we expect folks to obey the lawful orders of their superior; if they don't we have rules having to do with insubordination to take care of that. He's now the chief.

GONZALEZ: Besides this interesting legal issue which is very important, in terms of relief that you are seeking you are seeking attorney's fees, and you are seeking the increased salary that your client did not receive had he been promoted timely is that what we are fighting about here?

RICHARDSON: Yes.

GONZALEZ: How much money approximately are we talking about?

RICHARDSON: A fairly low 4 figure amount.

GONZALEZ: \$5,000 - 10,000?

RICHARDSON: Less than that. The important thing here your honor I suggest is the constitution.

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REBUTTAL

CLARK: I think one thing we are getting away from in all this argument analysis is I think the CA stated it: "that Mr. Henry has the burden of showing that a privacy interest was implicated in the first place. Because all conduct even if it's sexual is not necessarily private or protected by privacy: Prostitution for example, sex with minors for example, fornication in public." So he has the burden of showing that...

GONZALEZ: But that conduct is illegal. And adultery is no longer illegal in Texas.

CLARK: But they are still not constitutionally protected. Just because something is illegal wouldn't mean...I mean a state could pass a law saying something is illegal and many of those laws have been overturned over the years. The idea that just because something involves sex doesn't make it necessarily private. And I think if we go back to one of the seminal cases, Roe v. Wade they say it is clear that only, and I emphasize the word only personal rights that can be deemed fundamental or implicit in the concept of the order of liberty are included in this guarantee of personal privacy.

GONZALEZ: Why isn't adultery one of the fundamental rights?

CLARK: Can we really say that adultery where you are interfering with a constitutionally protected relationship of others is a fundamental or implicit right in a concept of order of liberty. Because adultery per se is interfering with the rights of 2 other people, the marriage contract and relationship of those 2 other people, which is constitutionally protected. And for this court now to come out with an opinion granting adultery of privacy rights status says that now adultery is fundamental to our concept of order and liberty. Then you say okay then what is marriage because adultery is the antithesis of marriage.

And I don't see how you can when you're not just having a relationship with one other person, but you are also affecting a third person that you are now into the realm of privacy. You've already got 3 people. Griswold talks about the sanctity of marriage and contraception should be allowed between a married couple because that's one of the highest callings, one of the noblest purposes of our society. And the same with Roe v. Wade where you are talking about the woman's right to herself. But here you have a man interfering with a relationship, unlike the recent In the interest of JWT case you don't have the concern of the father who has had the child by the other woman. You have simply a relationship.

HECHT: Some of the interference was invited.

CLARK: It's invited by the woman, but not the man. And I will grant you I'm not sure what would happen if both the husband and the wife had invited them into their bed. I haven't worked that through in my mind yet what the Chief of police could do with something like that since bigamy is illegal.

ENOCH: Have you come across any authority where any state court has held that there is a right of privacy that protects adultery?

CLARK: No, I haven't. And the one case I cited in my brief where the court specifically says adultery is not protected, Bower v. Hardwick(?) in 1986 said: Consensual sodomy is not protected. And I believe in a footnote they mentioned that adultery is one of the things that is not protected. But I have found no case that the pure concept of adultery is constitutionally protected. And if there is some kind of privacy interest implicated here, I think we are not talking about strict scrutiny as you would with race or religion. If there is anything at all at the very least you are talking about a rational relationship type test. And that's where we get back down to the discretion of the chief of police.

Consider the policy implications of the CA opinion and upholding that opinion. First adultery becomes a constitutionally protected right. And it takes precedence over the legal relationship of marriage. It becomes part of our fundamental concept of order and liberty. Second, police departments - chief of police - must ignore common sense. And your honor had asked me is there was any authority for the proposition that you treat promotion different than other kinds of discipline, the civil service law itself does that. It says that a chief of police may pass over for promotion an officer if he has a valid reason. But he cannot discipline them, fire them, or suspend them unless it's violation of certain specified rules set out in the civil service law. So the civil service law itself makes that distinction between promotion and other kinds of discipline.

We would ask the case be reversed and rendered and that attorney's fee be also rendered.

OWEN: Is there any evidence other than the page cites that you've given us on this summary that he knew he was in an adulteress relationship?

CLARK: I don't believe so. I believe that's where Henry directly says that he knows it. He just admits it on that page cite 155 and 156. He flat says he knows about it. Knew about it.

