

REENA RAGGI, *Circuit Judge, concurring in part in the judgment and dissenting in part:*

On this appeal, we consider a judgment in favor of plaintiff Scott Matusick on state law claims of race discrimination and retaliation, as well as a federal claim of infringement of the right of intimate association, all arising out of Matusick's employment with the Erie County Water Authority ("ECWA"). On plaintiff's state law claims, the judgment (1) holds ECWA, as well as defendants Bluman, Kuryak, and Lisinski liable for a racially hostile work environment, but awards no compensatory damages; and (2) holds ECWA, Kuryak, and Lisinski liable for racially discriminatory termination, and awards \$304,775.00 in back pay. On plaintiff's federal claim, the judgment (3) holds ECWA, Mendez, Bluman, Kuryak, and Lisinski liable, awards no actual or nominal compensatory damages, but awards \$5,000 in punitive damages as against each individual defendant.¹

I join my panel colleagues in affirming that part of the judgment holding defendants liable under state law for creating a racially hostile work environment. I also join in the panel decision to reverse that part of the judgment holding liable individual defendants Mendez, Bluman, Kuryak, and Lisinski on Matusick's federal

¹ Because no compensatory damages are awarded on the federal claim, it appears that the jury's intimate association finding pertained only to Matusick's complaint about a hostile work environment, not to his termination.

intimate association claim. I respectfully dissent, however, from the panel decision to affirm the judgment in all other respects.

With respect to Matusick's claims of racially discriminatory termination, I would vacate the judgment and remand for a new trial. Like the majority, I identify error in the district court's failure to preclude Matusick from disputing facts found against him at a disciplinary hearing conducted preliminary to his discharge pursuant to N.Y. Civ. Serv. Law § 75(1), and in the court's failure to charge the jury that it could not second-guess these administrative findings in its own deliberations. See ante at 36–37. Unlike the majority, however, I do not think these errors can be dismissed as harmless.

As to Matusick's intimate association claim against ECWA, I would order dismissal. While I think the circumstances at issue might have supported holding ECWA, as well as individual defendants, liable for race discrimination under the Equal Protection Clause—a federal claim plaintiff chose not to pursue—I do not think that, as the case was tried, they demonstrate an ECWA policy or custom of interference with intimate association, specifically, with engagement to marry.

1. Racially Discriminatory Termination: The Preclusion Errors Were Not Harmless

As the majority opinion explains, New York law gives preclusive effect to quasi-judicial administrative fact-finding where there has been a full and fair opportunity to litigate the point at issue. Thus, a federal court will do the same. See ante at 26–27 (citing relevant authority). Insofar as Matusick was charged with various acts of workplace misconduct preliminary to being terminated—specifically, sleeping on the job and failing timely to dispatch workers to the site of a water main leak on October 1, 2005; and failing timely to respond to a reported water-pressure problem on October 20, 2005—he plainly had a full and fair opportunity to litigate these accusations at a Section 75 proceeding before an independent hearing officer who found them proved. See ante at 12–15. Thus, the panel agrees that the district court erred both in allowing Matusick to argue to the contrary at trial and in failing to instruct the jury as to the preclusive effect of the Section 75 misconduct findings on its own deliberations. See ante at 37, 40. The panel majority nevertheless dismisses these errors as harmless, concluding that they did “not affect any party’s substantial rights.” Fed. R. Civ. P. 61; see ante at 39–41. I respectfully disagree.

While the law strongly disfavors retrial in civil cases, see Fed. R. Civ. P. 61, such relief is warranted where an appellant shows that complained-of error affected substantial rights, see Tesser v. Bd. of Educ., 370 F.3d 314, 319 (2d Cir. 2004). To carry this burden, an appellant must show that the error likely affected the outcome of the case. See Lore v. City of Syracuse, 670 F.3d 127, 150 (2d Cir. 2012) (holding that “substantial right is not implicated if there is no likelihood that the error or defect affected the outcome of the case”); ante at 40 (quoting Kotteakos v. United States, 328 U.S. 750, 765 (1946)).² That showing is made here by the record of Matusick’s own arguments at trial insisting that he had not engaged in the charged misconduct, leaving racial bias as the likely explanation for his termination.

As to October 1, 2005, Matusick’s counsel specifically told the jury that his client “wasn’t sleeping” at work on that date and had in fact “dispatched the duty man in a timely manner.” J.A. 2924. Both statements are in direct contradiction to

² In Kotteakos, a criminal case, the Supreme Court observed that error is not harmless if “one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error.” Kotteakos v. United States, 328 U.S. at 765. To the extent this appears to resolve ambiguities in favor of a defendant, it is noteworthy that a criminal defendant’s “substantial rights” include the presumption of innocence and the right not to be convicted except upon proof beyond a reasonable doubt, which are not applicable in civil cases.

the hearing officer's findings of fact. The district court did not admit these findings into evidence, much less did it instruct that such findings were binding on the jury's own deliberations. Thus, even though defendant Mendez, who made the final termination decision, was permitted to testify that the hearing officer's Section 75 discharge recommendation was the strongest he had ever seen, Matusick's counsel was allowed to impugn this recommendation and the undisclosed findings on which it was based as the "irrelevant" product of a "kangaroo court." J.A. 2932. Indeed, counsel was allowed to argue at length that the evidence would admit no conclusion other than that Matusick had not engaged in any workplace misconduct on October 1:

The Water Authority concluded that the water was shut down within a reasonable period as reflected in their own claim file denying the claim by the resident. . . . The evidence is clear that the call came in at 5 a.m. Mr. Lisinski and Mr. Jaros admit that there w[ere] no calls prior to 5 a.m. . . .

Mr. Kuryak and Mr. Jaros confirmed that there w[ere] no police or highway records of any calls. After that call came in Mr. Matusick found Mr. Marzec, he then had some problems with his computer, but he was printing the necessary documents by 5:31. Mr. Baudo admitted the computer issues were possible and Mr. Schichtel confirmed the computer problems were far more common during the midnight shift. The computer documents in evidence do not show that there weren't computer problems. In fact, some missing evidence, pages one through nine of Plaintiff's Exhibit 31. We have page 9, but we don't have pages

1 through 8. We don't know what happened prior to 5:47 a.m. That evidence is not available to you.

It is undisputed that Mr. Marzec had difficulties using the laptop, which made it more important that Scott Matusick print out maps for him before he left. But even despite all that, Mr. Marzec was on the scene by 6:30. Mr. Matusick was where he was supposed to be throughout, in his chair, by the phone at all times. Mr. Lisinski admitted that. There's no evidence he was sleeping on October 1st. [T]here's no video of him sleeping, and [Water Authority officials] knew . . . how to preserve videos if that evidence was going to be important to them.

J.A. 2924–25.

As to October 20, 2005 misconduct, Matusick's counsel similarly insisted that his client had not failed timely to respond to a report of a possible water leak. Rather, he "simply made a judgment call" to wait "for a second customer call" before dispatching the duty man. J.A. 2925. This too was in direct contradiction to what should have been binding findings of fact by the hearing officer. The officer specifically found that Matusick had not timely responded to a 1:50 a.m. report of a drop in water pressure indicative of a potentially serious water leak. Indeed, the hearing officer found that Matusick had misrepresented ECWA's policy when he told the caller who first reported a problem, "[W]e don't send a guy out there by himself in the middle of the night looking for a water leak." J.A. 312. The hearing

officer concluded that Matusick's failure either to dispatch a Water Authority employee to the site or to arrange for an over-the-phone assessment of the problem could not have reflected "a judgment call" in light of his discredited account of a purported second call. J.A. 311.

Instead of accepting these findings, as the law required, Matusick's counsel argued to the jury that the soundness of Matusick's "judgment call" in not taking immediate action on October 20 was so plainly supported by the testimony of "nearly all the witnesses" as to be, in effect, indisputable:

Again, the facts are clear. At approximately 2:15 a.m. there was the first call regarding just low pressure, no visible water, no visible leak. This is in a remote area where there are open fields and ditches and there aren't many houses and a caller who lived back from the road.

At 5:10 a.m. a second call came in where a leak was observed and Mr. Matusick promptly dispatched the duty man. A third call came in [at] 5:22 just 12 minutes later, reporting water in the field. But by then Mr. Matusick was already dispatching the duty man. You heard plenty of testimony about other potential causes of low pressure, not just a water main break, it included corroded pipes, blocked screens on intakes, malfunctioning pressure reducing valves, garden hoses being left on, et cetera, et cetera, et cetera.

You heard testimony from dispatchers, active and retired, from engineers, that you don't just dispatch based on one low pressure call in the middle of the night in a remote area. . . .

Plaintiff's Exhibit 53 reinforces the practice of waiting until morning to dispatch in connection with low pressure. Only Mr. Jaros claimed that

you also dispatched the duty man regardless of circumstances. Every other witness disagreed. You consult control, you wait for a second call, you wait until someone sees water, sees an actual leak, then you dispatch the duty man.

J.A. 2926–27.

Plainly, Matusick’s purpose in making these arguments was to show pretext. If he could convince the jury that there was nothing to the misconduct charges, then the defendants’ proffered legitimate reason for terminating him was false, making it more likely than not that the real reason for his termination was race discrimination or retaliation. See Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 149 (2000) (noting probative value of proof that employer’s explanation is false); James v. N.Y. Racing Ass’n, 233 F.3d 149, 155 (2d Cir. 2000) (explaining that “in some circumstances a prima facie case plus falsity of the employer’s explanation can, without more, be enough to support a reasonable finding that prohibited discrimination has occurred”). If, instead, Matusick had been properly foreclosed from disputing the misconduct found at the Section 75 proceeding, he would have been able to prevail only by carrying the heavier burden of showing that, notwithstanding his misconduct, the proscribed reasons played a substantial part in his termination. In these circumstances, I think there is a real likelihood that the preclusion errors affected the outcome of this trial.

In concluding otherwise, the majority states that it is highly unlikely that a jury would have discredited the charged misconduct because (1) Matusick was “thoroughly and effectively cross-examined” on his denials; (2) defendants offered persuasive evidence of the misconduct; (3) Matusick admitted to having blocked a workplace security camera, misconduct that was the subject of an earlier Section 75 proceeding resulting in a 60-day suspension; (4) Matusick’s counsel effectively admitted his client’s misconduct in arguing that other ECWA employees were not terminated for comparable or worse misbehavior; and (5) the jury finding that Mendez was not individually liable for wrongful termination made it “unlikely that the jury credited Matusick’s testimony that he had not committed misconduct justifying termination.” Ante at 41–43. I am not convinced.

Specifically, I cannot agree that the noted preclusion errors were necessarily neutralized by defendants’ opportunity to cross-examine Matusick and to put on evidence supporting the misconduct charges. Indeed, such a conclusion is at odds with our obligation, on the appeal of a judgment following a jury verdict, “to view the facts of the case in the light most favorable to the prevailing party.” Kosmynka v. Polaris Indus., Inc., 462 F.3d 74, 77 (2d Cir. 2006). When the evidence is so viewed, we must assume that the jury credited Matusick’s disavowal of workplace

misconduct and, accordingly, found no misconduct basis for termination. Such findings made it easier for Matusick to carry his trial burden than would have been the case if he had properly been precluded from disputing already-adjudicated misconduct and if the jury had been correctly instructed in this regard.

Nor is a different conclusion warranted because Matusick's counsel argued that other employees were not terminated for misconduct worse than that attributed to his client. I respectfully submit that such an argument does not effectively admit misconduct on its face, much less in context. At most, it tells the jury that defendants' discriminatory intent in terminating him for unwarranted charges of misconduct is further evidenced by the fact that employees actually guilty of comparable or worse misconduct were not terminated. Before referencing any comparators, counsel made Matusick's position plain: he was not sleeping on the job on October 1, and his conduct on October 20 reflected a reasonable exercise of judgment. See J.A. 2924–26. Thereafter, he urged the jury to give no weight to arguments referencing the administrative tribunal, which he dismissed as “a kangaroo court,” though its misconduct findings should have bound him. J.A. 2932.

Finally, I cannot agree that the verdict in favor of Mendez, the supervisor who made the final termination decision, means that the jury rejected Matusick's

disavowal of workplace misconduct. See ante at 42–43. Indeed, such a conclusion is undermined by the majority’s own reasoning in elsewhere reconciling the jury’s decision that ECWA was liable for wrongful termination even though Mendez was not. In this regard, the majority submits that the misconduct charges against Matusick could have been “tainted” by racial animus. Ante at 46. But it would be far easier for Matusick to prove that “taint” if he could persuade the jury that the charges were false than if the jury were required to accept them as proved. See Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. at 149; James v. N.Y. Racing Ass’n, 233 F.3d at 155. Because Matusick’s trial strategy was to argue falsity, consistent with our obligation to view the evidence in the light most favorable to him as the prevailing party, we must assume that the jury made the finding that he urged. Thus, because Matusick was precluded from arguing, and the jury was precluded from finding, that the misconduct charges were false, the preclusion errors here cannot be deemed harmless.

Accordingly, I would vacate the judgment in favor of Matusick on his racially discriminatory termination claims and order a new trial.

2. Matusick's Constitutional Claim of Intimate Association

a. Matusick's Failure To Pursue an Obvious Constitutional Claim for Race Discrimination Under the Equal Protection Clause

At its core, this is a case about race discrimination. As the majority opinion details, Matusick, who is white, was subjected to co-worker abuse because of his relationship with an African-American woman, Anita Starks. Such racial harassment not only supported Matusick's hostile-work-environment claim under New York law, but also would have supported a parallel claim under 42 U.S.C. § 1983 for violation of the Fourteenth Amendment's Equal Protection Clause. See U.S. Const. amend. XIV. Moreover, the harassment would have supported such a constitutional claim without any inquiry into the particulars of the Matusick-Starks relationship. Whether Starks was Matusick's fiancée, his next-door neighbor, or just a casual friend, if defendants took adverse action against Matusick because this white man associated with an African-American woman, the conduct violated equal protection. See Bob Jones Univ. v. United States, 461 U.S. 574, 605 (1983) (observing that precedent "firmly establish[es] that discrimination on the basis of racial affiliation and association is a form of racial discrimination"); see also Holcomb v. Iona College, 521 F.3d 130, 139 (2d Cir. 2008) (holding, under Title VII, that where

employee is subjected to adverse action because “employer disapproves of interracial association, the employee suffers discrimination because of the employee’s own race” (emphasis in original)); DeMatteis v. Eastman Kodak Co., 511 F.2d 306, 312 (2d Cir. 1975) (concluding that white plaintiff had standing under 42 U.S.C. § 1981 to sue employer for taking adverse employment action against him in reprisal for selling house to African-American person); Rosenblatt v. Bivona & Cohen, P.C., 946 F. Supp. 298, 300 (S.D.N.Y. 1996) (concluding that white plaintiff had standing to sue under § 1981 for termination motivated by marriage to African-American woman).

For reasons that the majority aptly describes as “perplexing,” ante at 64, Matusick did not pursue a violation of equal protection at trial. He sought § 1983 relief only for violation of the right to intimate association, even as he relied exclusively on evidence of racial harassment to prove that violation. While the nature of Matusick’s relationship with Starks would have been irrelevant to an equal protection claim based on such harassment, it was critical to his intimate association claim.

b. The Majority's Recognition of an Intimate Association Right in Betrothal

The majority identifies the constitutionally protected right at issue as one of “betrothal.” To the extent Matusick and Starks were engaged, there is precedent suggesting that their choice of each other as marital partners might claim constitutional protection under the Due Process Clause, if not also under a First Amendment right of intimate association. See Roberts v. U.S. Jaycees, 468 U.S. 609, 620 (1984) (“[T]he Constitution undoubtedly imposes constraints on the State’s power to control the selection of one’s spouse.”)³; Loving v. Virginia, 388 U.S. 1 (1967) (holding that state prohibition on interracial marriage violated both equal protection prohibition against race discrimination and due process right to marry); Adler v. Pataki, 185 F.3d 35, 42 (2d Cir. 1999) (observing that whenever Supreme Court has considered impairment of “most fundamental of intimate relationships, marriage, it has not spoken generally of right of intimate association, but has referred specifically to a right to marry and has grounded that right on the liberty protected by the Due Process Clause”).

³ In Roberts, the Supreme Court recognized the “right of association” to have two components, one relating to association with others for expressive purposes protected by the First Amendment, the other relating to intimate association, see 468 U.S. at 617–18. Language in Roberts, and the authorities cited therein, suggest that the right derives from the personal liberty protected by the Due Process Clause. Id.; see Adler v. Pataki, 185 F.3d 35, 42 (2d Cir. 1999).

Whatever the constitutional source of the right of intimate association in betrothal recognized by the majority today, I agree that it was not so clearly established at the time of the events at issue to support the individual defendants' liability for infringing that right through the creation of a hostile work environment. I thus join in the decision to dismiss Matusick's constitutional claim against the individual defendants on the ground of qualified immunity.

Qualified immunity does not extend to Matusick's municipal employer, the ECWA. See Owen v. City of Independence, 445 U.S. 622, 650 (1980); Monell v. N.Y.C. Dep't of Soc. Servs., 436 U.S. 658, 701 (1978). My colleagues in the majority uphold the intimate association judgment against that defendant, concluding that the evidence was sufficient to admit a jury finding that Matusick sustained pervasive verbal and physical harassment "on the basis of his intimate association with Starks [that] rose to the level of a custom, policy, or practice at the ECWA." Ante at 71. While I recognize that we can affirm for any reason that finds support in the record, see 10 Ellicott Square Court Corp. v. Mountain Valley Indem. Co., 634 F.3d 112, 125 (2d Cir. 2011), I cannot join my colleagues in concluding that the record here admits a finding of an ECWA custom or practice to violate employees' intimate association right in betrothal.

c. Betrothal Was Not Here Identified as the Protected Intimate Association

Insofar as the majority recognizes betrothal as the intimate association here at issue, I am not persuaded that this case was presented to the jury on the theory that betrothal was the specific protected relationship violated. To be sure, in his opening statement to the jury, Matusick's counsel stated that his client's "termination was a form of discrimination because of his relationship with his wife who was at that time his fiancée." J.A. 1894 (emphasis added). Even assuming this is enough to identify betrothal as a protected relationship, the jury did not find that Matusick had been terminated based on intimate association. Rather, it found him terminated on the basis of racial bias. With respect to the hostile work environment that informs the jury's intimate association judgment, counsel did not link that injury to the fact of the couple's engagement—as distinct from their relationship generally. In his opening statement, counsel asserted that Matusick was subjected to repeated racial epithets simply because he had "fall[en] in love with an African American woman," making no mention of what intimate association the couple had formed that warranted constitutional protection. J.A. 1892. Indeed, counsel stated that Matusick's co-workers made plain that their harassment was prompted by his client "hanging around" with blacks, that "[w]hite people shouldn't hang around

with [blacks],” and that Matusick “should stay away from the [blacks].” J.A. 1893.⁴ This suggested that Matusick was subjected to a racially hostile work environment because he maintained any relationship with an African American woman, not specifically because that relationship was a betrothal. As I have already noted, the Equal Protection Clause would proscribe a hostile work environment based on race without regard to the couple’s precise relationship, but the same conclusion does not obtain with respect to the right of intimate association.

Nor did counsel’s summation or the court’s charge clarify that betrothal was the intimate association supporting Matusick’s constitutional claim. To the contrary, counsel repeatedly referenced Starks as Matusick’s “girlfriend,” rather than as his “fiancée,” and stated that Matusick was discriminated against “because he was dating and then became engaged to an African American woman,” drawing no constitutional distinction between the two phases of the couple’s relationship. J.A. 2905, 2915, 2934–35.⁵ In discussing infringement, counsel did reference engagement

⁴ In the quoted excerpts, I have substituted the word “blacks” for the racial epithet that counsel ascribed to Matusick’s harassers. See ante 8 n.3.

⁵ This conflation persists in Matusick’s brief on appeal, which maintains that “the right to intimate association extends to all highly intimate family relationships, including a dating/fiancée relationship.” Appellee’s Br. 47; see Webster’s New World Dictionary 1491(3d ed. 1986) (defining “virgule” as “short diagonal line (/) used between two words to show either is applicable (and/or). . . .”).

and marriage: “It is not required that the defendants interfere with the relationship itself. They do not need to have broken up the marriage or caused the engagement to be broken off [] to cause harm.” J.A. 2934. But that negative point hardly made clear to the jury that the couple’s betrothal was the critical fact supporting a constitutional claim of intimate association.

Indeed, the district court did not so charge the jury. It instructed as follows:

Freedom of association includes the right to enter into and maintain certain intimate human relationships, such as a relationship that plaintiff shared with his then-girlfriend Anita Starks. . . This right can be violated if someone is penalized for those — for who the other person is in a relationship.

J.A. 3008–09. The fact that the court referred to Starks as Matusick’s “girlfriend” —not his “fiancée” —can reasonably be understood to signal that the constitutional claim did not depend on the couple’s betrothal. That conclusion is only reinforced by the instruction that the right of intimate association can be violated by penalizing someone “for who the other person is in a relationship,” rather than by penalizing someone “for his choice of whom to marry.”

d. The Record Does Not Admit a Finding of Municipal Liability for Violation of the Intimate Association Right in Betrothal

In any event, the record does not admit a finding that ECWA had a policy, practice, or custom of violating employees’ intimate association right in betrothal.

The law recognizes that, even in the absence of a professed unconstitutional policy, a municipality may be liable for the unconstitutional practices of its subordinates where those practices are “so persistent and widespread” in the workplace “as to practically have the force of law,” Connick v. Thompson, 131 S. Ct. 1350, 1359 (2011), “or if a municipal custom, policy, or usage would be inferred from evidence of deliberate indifference of supervisory officials to such abuses,” Jones v. Town of E. Haven, 691 F.3d 72, 81 (2d Cir. 2012). The majority concludes that the jury could have found an unconstitutional custom or policy here from evidence that Matusick complained to various supervisors about persistent harassment by co-workers, that supervisors failed to take remedial action, and that at least one of those supervisors—Mendez—knew that Matusick and Starks were engaged. See ante at 71–73. I cannot agree. Where municipal liability is based on employer inaction, “rigorous standards of culpability and causation must be applied” to ensure against vicarious liability. Board of the Cnty. Comm’rs v. Brown, 520 U.S. 397, 405 (1997); accord Connick v. Thompson, 131 S. Ct. at 1365; Reynolds v. Giuliani, 506 F.3d 183, 192 (2d Cir. 2007). Matusick did not satisfy these standards.

As the majority itself recognizes, the pervasive harassment that Matusick experienced was racial. See ante at 46. The record does not indicate that Matusick complained or that ECWA would otherwise have known, that such racial

harassment was caused by his engagement to marry Starks.⁶ The latter motivation, and ECWA's knowledge of it, would appear necessary to support a conclusion that ECWA had a custom or practice of violating its employees' rights of intimate association, and not only their rights of equal protection. See City of St. Louis v. Prapotnick, 485 U.S. 112, 127 (1988) (stating that if authorized policymakers approve subordinate's decision "and the basis for it," their ratification is chargeable to municipality); Green v. City of New York, 465 F.3d 65, 80 (2d Cir. 2006) (referencing municipality's practice to engage in "constitutional violation at issue"); Amnesty Am. v. Town of W. Hartford, 361 F.3d 113, 128 (2d Cir. 2004) (Sotomayor, J.) (observing that plaintiff must establish that policymaking official had notice of potentially serious problem of unconstitutional conduct, such that need for corrective action or supervision was obvious). While Starks testified that Mendez knew of the couple's engagement, that knowledge does not by itself equate to knowledge that Matusick was being harassed because the couple planned to marry. Indeed, as already noted, Matusick's counsel argued to the jury that the harassment

⁶ The record does indicate one log entry in which Matusick complained that co-worker Finn was making disparaging comments about him, his father, and his family. While Matusick testified that he considered Starks and her children his "new family," he did not so state in his complaint, much less did he indicate that the couple was engaged and that the disparagement was informed by that relationship.

was prompted by the fact that the couple had any relationship at all, circumstances that would have supported an equal protection claim but not necessarily one based on an intimate association right in betrothal.

Further, insofar as the panel unanimously affords Mendez qualified immunity as an individual because his obligation to stop racial harassment as a violation of the intimate association right of betrothal was not then clearly established, it seems curious to conclude that his failure to stop the harassment is an adequate basis for identifying an ECWA custom or practice of violating its employees' rights of intimate association. See ante at 72–73; see also City of Canton v. Harris, 489 U.S. 378, 388 (1989) (holding that official's inaction must demonstrate "deliberate choice"). Indeed, precedent signals caution in reaching such a municipal liability conclusion. This court has held that where a municipal liability claim is grounded in an employer's deliberate indifference to the unconstitutional actions of its employees, the constitutional right at stake has to be "clearly established." Townes v. City of New York, 176 F.3d 138, 143–44 (2d Cir. 1998); Young v. County of Fulton, 160 F.3d 899, 904 (2d Cir. 1998). The Eighth Circuit recently cited approvingly to Townes and Young in reaching the same conclusion en banc. See Szabla v. City of Brooklyn Park, 486 F.3d 385, 393 (8th Cir. 2007). As that court explained, requiring that a constitutional right be clearly established to support a claim of deliberate

indifference “is not an application of qualified immunity for liability flowing from an unconstitutional policy. Rather, the lack of clarity in the law precludes a finding that the municipality had an unconstitutional policy at all, because its policymakers cannot properly be said to have exhibited a policy of deliberate indifference to constitutional rights that were not clearly established.” Id. at 394 (emphasis in original). While these deliberate indifference cases arise in the context of failures to train or supervise rather than failure to investigate or discipline, what is common to all these circumstances is employer inaction. And as the Eighth Circuit has persuasively explained in Szabla, for inaction of any sort to reflect “deliberate indifference to constitutional rights,” the right must be established. To conclude otherwise is to ignore the rigorous standards of culpability and causation that, as I earlier noted, the Supreme Court has mandated for municipal liability based on deliberate indifference to employees’ constitutional violations. See Board of the Cnty. Comm’rs v. Brown, 520 U.S. at 405; see Reynolds v. Giuliani, 506 F.3d at 192 (holding that rigorous standards apply to “broad range of supervisory liability claims” including failure to supervise and to discipline, as well as to train).

Here, there was a clearly established constitutional right at stake: the right of equal protection. Thus, to the extent Mendez, or other ECWA supervisors, failed to investigate and stop the persistent racial harassment to which they knew Matusick

was being subjected, ECWA might well have been found liable for deliberate indifference had that clearly established federal right been asserted. But I am not convinced simply from the fact that Mendez knew that Matusick and Starks were engaged that his failure to stop the racial harassment supports holding ECWA liable for an employer custom and practice of violating employees' rights of intimate association in betrothal.

e. The Law Does Not Warrant Extension of the Right of Intimate Association to Romantic Relationships Generally

Even if I were convinced that Matusick had demonstrated an ECWA custom or practice of interfering with employees' choices of whom to marry, I would not be able to join in the majority opinion. While my colleagues are careful to identify betrothal as the intimate association at issue, certain language in the opinion could be read to imply that the right reaches more broadly to protect a variety of (unidentified) romantic relationships. See ante at 58–61, 60 n.18. Such a suggestion is at best dictum, but it is dictum in which I cannot join.

In recognizing a right of intimate association, as distinct from a right of expressive association, the Supreme Court explained that the former shields “the formation and preservation of certain kinds of highly personal relationships” from unjustified state interference. Roberts v. U.S. Jaycees, 468 U.S. at 618 (emphasis

added). In short, not every highly personal relationship can claim the constitutional protection of intimate association, only “certain kinds.” While the Supreme Court has declined to identify “every consideration that may underlie this type of constitutional protection,” *id.*, it has stated that the “kinds of highly personal relationships” warranting constitutional protection are those that “have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideas and beliefs,” in the process “foster[ing] diversity and act[ing] as critical buffers between the individual and the power of the State.” *Id.* at 618–19. “[T]he constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others.” *Id.* at 619 (emphasis added) (observing that affording constitutional protection to “these relationships . . . safeguards the ability independently to define one’s identity that is central to any concept of liberty” (emphasis added)). As the highlighted language indicates, while the highly personal relationships warranting intimate-association protection characteristically foster personal identity and provide emotional enrichment, not every personal relationship that does so is constitutionally protected. The considerations underlying extension of intimate-association protection to “such relationships” relate to the “critical role” they play “in the culture and traditions of the Nation,” as described by Roberts. *Id.* at 618–19.

In Roberts, the Supreme Court identified “[t]he personal affiliations that exemplify these considerations, and that therefore suggest some relevant limitations on the relationships that might be entitled to this sort of constitutional protection.” Id. at 619 (emphasis added). These affiliations are “those that attend the creation and sustenance of a family,” specifically, “marriage, childbirth, the raising and education of children, and cohabitation with one’s relatives.” Id. (citations omitted). The Court observed that such “[f]amily relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life.” Id. at 619–20. Such family relationships are also “distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship.” Id. at 620. Insofar as betrothal reflects a proclaimed promise (if no longer an enforceable contract) to marry,⁷ it might be said to attend the formal creation of a family and, thus, to play a critical role in the transmittal of the nation’s culture and traditions.

The majority, however, suggests that intimate association might reach further

⁷ See N.Y. Civ. Rights Law § 80-a (abolishing cause of action for breach of promise to marry); Fearon v. Treanor, 272 N.Y. 268, 5 N.E.2d 815 (1936) (upholding statute as constitutional), appeal dismissed, 301 U.S. 667 (1937).

because Roberts did not specifically cabin the right of intimate association to family relationships, see Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 545 (1987) (noting that Supreme Court has “not held that constitutional protection is restricted to relationships among family members”), and our own court has disclaimed any “categorical approach . . . [to] association-rights cases,” Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y., 502 F.3d 136, 144 (2d Cir. 2007). True enough. But neither the Supreme Court nor this court has thus far recognized the right of intimate association to apply outside the context of families, whether defined by blood or law. See also Poirier v. Mass. Dep't of Corr., 558 F.3d 92, 96 (1st Cir. 2009) (upholding dismissal of intimate association claim by prison guard fired for romantic relationship with former inmate, holding that “unmarried cohabitation of adults does not fall within any of the Supreme Court’s bright-line categories for fundamental rights”); but see Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC, 666 F.3d 1216, 1222 (9th Cir. 2012) (construing anti-discrimination provisions of federal and state fair housing laws not to apply to shared living quarters to avoid possible intrusion on intimate association rights of roommates). At a minimum, this signals caution in expanding the right based simply on analogous descriptive characteristics.

Certainly, Roberts does not suggest that any small, select, and secluded association—a description that might well fit some criminal enterprises—can claim constitutional protection. Rather, Roberts instructs that “[a]s a general matter, only relationships with these sorts of qualities” are “likely to reflect the considerations” warranting constitutional protection for intimate associations. Roberts v. U.S. Jaycees, 468 U.S. at 620. Thus, Roberts’s descriptive characteristics establish a useful objective standard for identifying entities—like the Jaycees—whose size and openness preclude them from claiming intimate-association protection. See also Board of Dirs. of Rotary Int’l v. Rotary Club of Duarte, 481 U.S. at 547 (holding Rotary Club not protected by right of intimate association). Indeed, this court has used Roberts’s descriptive characteristics in this way, to reject intimate association claims in various contexts. See Piscottano v. Murphy, 511 F.3d 247, 278–80 (2d Cir. 2007) (rejecting claim by corrections officers disciplined for gang association); Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y., 502 F.3d at 147 (rejecting intimate association claim by fraternity wishing to continue excluding women without forfeiting university recognition); Sanitation Recycling Indus., Inc. v. City of New York, 107 F.3d 985, 995–96 (2d Cir. 1997) (rejecting intimate association claim by carting companies challenging restrictive licensing scheme).

Neither the Supreme Court nor this court, however, has afforded intimate association protection based solely on a finding of small size, selectivity, and seclusion. Such a preliminary finding might allow the intimate association inquiry to continue, but it does not conclusively resolve it. The inquiry process is necessarily holistic given “the broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the State,” Roberts v. U.S. Jaycees, 468 U.S. at 620 (noting that factors relevant to intimate association inquiry include “size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent”). Moreover, it contemplates a “careful assessment of where the relationship’s objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments.” Id. But the ultimate point of the inquiry is not simply to draw descriptive analogies. Rather, I understand the inquiry’s ultimate purpose to be identifying those highly personal relationships that exemplify the considerations underlying the constitutional protection for intimate association. As thus far identified by the Supreme Court, those considerations relate to the critical role that certain highly personal relationships have played in the “culture and traditions of the Nation.” Id. at 618–19. Betrothal may satisfy this criteria, but I am not inclined

to speculate that other relationships that fail to do so can also claim constitutional protection.

In explaining why I dissent from the majority's decision to uphold ECWA's liability for violating Matusick's right of intimate association, a final point is noteworthy: the practical beneficiary of the court's decision is not Matusick, but only his attorney. Although the jury awarded Matusick \$5,000 in punitive damages from each of the individual defendants found liable on the intimate association claim, the panel today reverses that judgment on the ground of qualified immunity. And while the majority affirms the intimate association judgment against ECWA, the jury awarded Matusick no compensatory (or even nominal) damages against that defendant. Thus, the practical effect of today's decision with respect to the intimate association claim is not to compensate Matusick for infringement of any constitutional right, but only to allow his lawyer to recover attorney's fees for pursuing a dubious constitutional claim of association instead of an obvious one of equal protection. See 42 U.S.C. § 1988.

* * *

To conclude, I concur in the court's decision to affirm the judgment for Matusick on his state law claim of a racially hostile work environment. I also concur in the decision to dismiss Matusick's federal intimate association claim against

individual defendants on the ground of qualified immunity. For the reasons stated in this opinion, however, I respectfully dissent from the majority decision to affirm the judgment for Matusick on his state wrongful termination claim and his federal intimate association claim against ECWA.