WELA *ALERT*

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WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION
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CASE UPDATES

FEDERAL - Ninth Circuit

9th Circuit Upholds Protective Order Barring Employer Inquiry into Immigration Status During Discovery in Title VII Case

The plaintiffs in this case were a group of 23 female immigrant factory workers. After they had worked for the employer for several years, the employer decided to give them an English proficiency test. The plaintiffs failed and were terminated. They sued under California state and federal law. In discovery, the employer sought discovery of the plaintiffs' immigration statuses. Each of the plaintiffs had verified immigration status at her time of hire. The magistrate judge granted the plaintiffs' motion for protective order, but allowed the employer to conduct its own investigation into the plaintiffs' statuses. The court allowed an interlocutory appeal, and the Ninth Circuit affirmed. The panel agreed that requiring the plaintiffs to answer questions about their status would likely deter them and others from bringing meritorious claims. In dicta, the panel majority expressed its doubts that *Hoffman Plastics Compound Inc. v. NLRB*, 535 U.S. 137 (2002), which held the NLRB could not award back-pay to unlawful immigrants, applied to Title VII cases. Judge Reinhardt has several pages explaining why *Hoffman* should not apply to Title VII cases, but the court ultimately does not reach the issue. The court also suggested that the proper way for a court to handle the impact of a plaintiff's unlawful immigration status would be to bifurcate between liability and damages. The panel majority stated that the "after-acquired evidence rule" does not direct district courts to authorize fishing expeditions into the plaintiff's backgrounds, and, consistent with *McKinnon*, encourages trial courts to issue protective orders such as the one in the present case. Judge Siler would have simply upheld the protective order as within the district court's discretion. *Rivera v. NIBCO, Inc.*, No. 02-16532 (04/13/04; Reinhardt, Hawkins, Siler (6th Cir.)).

Plaintiff's Harassment of Lesbian Subordinate in Violation of Company Policy Legitimate Non-Discriminatory Reason for Termination

The plaintiff was an evangelical Christian who worked as a long-time Quality Assurance Manager for a cable television company. A lesbian employee was moved under her supervision. During a "coaching session" following the lesbian employee's break-up with her significant other, the plaintiff told the employee that "God's design" was for her to have heterosexual relationships and that homosexuality was a sin. According to the plaintiff, the lesbian employee was "born again" by their conversation and agreed to attend an evangelical conference with her. Three months later the employee quit and gave the plaintiff's treatment of her sexuality as the reason. The employer investigated and fired the plaintiff because her comments to the employee violated the Company's anti-harassment policy. The plaintiff sued for religious discrimination. The trial court granted the employer's motion for summary judgment, and the Ninth Circuit affirmed. The court rejected the argument that a discipline free employment record prevents an employer from firing an employee for workplace harassment. The court left open the possibility that where the employer does not follow its usual steps in

terminating an employee, that could be evidence of pretext. Here, the evidence did not support such a claim. Despite *Costa* and prior Ninth Circuit law, the panel continued to draw an incorrect distinction between direct and circumstantial evidence cases. The panel also rejected the plaintiff's claim of intentional infliction of emotional distress based on allegedly false statements in the Company's response to her EEOC charge. *Bodett v. CoxCom, Inc.*, No. 03-15112 (04/26/04; Hawkins, Fernandez & Thomas).

"Direct Evidence" Not Required in Title VII Retaliation Cases

The case at issue arose under the federal Surface Transportation Assistance Act ("STAA"), which prohibits retaliation against employees for making covered safety complaints. The employee filed a complaint with the Department of Labor. He prevailed before the Administrative Law Judge and the Administrative Review Board affirmed. The Ninth Circuit then rejected the employer's petition for review. The panel reaffirmed that Title VII retaliation law applied to claims of retaliation under the STAA. The panel stated that *Costa* had eliminated any direct evidence requirement in retaliation cases. This represents a (correct) extension of *Costa*. The decision in this case, however, does not reach the issue whether a plaintiff prevails in a Title VII retaliation case by showing retaliation was "a motivating factor." The decision also holds that a decision adverse to the employee in a union-grievance arbitration will not necessarily bar a subsequent action based on statutory rights. In this case, the Ninth Circuit agreed with the Agency that its policy of deferring its proceedings until the conclusion of grievance arbitrations did not prevent further proceedings because the union did not arbitrate any of the employee's statutory claims. *CalMet Co. v. U.S. Dep't of Labor*, No. 02-73199 (04/19/04; B. Fletcher, Pregerson, Ferguson).

State Medical Board is Absolutely Immune for Licensing Decisions

A physician assistant sued the Idaho State Board of Medicine, its Board of Professional Discipline, the individual members, and its Executive Director for failing to reinstate her license based on her religion (Mormon). After the plaintiff overdosed on prescription drugs, her supervising physician had withdrawn her sponsorship automatically canceling the plaintiff's license. Disciplinary charges were filed against her, which were settled stipulating that her license could be reinstated. Then, the Board denied reinstatement citing procedural and timing flaws with her request. She appealed to state court but then dismissed her appeal and instead brought section 1983 and 1985 actions alleging discrimination, conspiracy, and lack of due process, and violations of Idaho law. The Ninth Circuit affirmed dismissal of her claims applying the factors of *Butz v. Economou*, 438 U.S. 478 (1978), to find that the defendants functioned comparably to judges and prosecutors so they are entitled to absolute immunity for their quasi-judicial and quasi-prosecutorial acts. The Court noted that plaintiff's decision to sue rather than pursue her appeal of the Board's decision was "in direct contravention of the policy behind absolute immunity," which "aids in the 'discouragement of collateral attacks, thereby helping to establish appellate procedures as the standard system for correcting judicial error.'" The Court held that other alleged misconduct -- deemed ministerial acts -- were either barred by the statute of limitations or insufficient on their own to allege violations of the law. *Olsen v. Idaho State Bd. of Medicine*, No. 02-35796 (04/07/04; Trott, Fisher, Gould).

$952,000 First Amendment Jury Verdict Upheld; Sanctions Against Plaintiff's Counsel for Trial Misconduct Overturned

After her teaching contract was not renewed, Plaintiff Settlegoode sued her employer, the Portland Public Schools, and her superiors, alleging violations of section 504 of the Rehab Act, 29 U.S.C. § 794, the First Amendment, and

Oregon's Whistleblower Act. Plaintiff alleged that she was retaliated against for writing complaints to her superiors that the school's resources for teaching disabled students were inadequate. Finding for the plaintiff on all claims, a jury awarded her $402,000 in economic damages, $500,000 in non-economic damages, and $50,000 in punitive damages against two individual defendants under section 1983. However, the trial judge granted defendants' motion for judgment as a matter of law on all claims, found the individual defendants were entitled to qualified immunity, and granted a new trial because plaintiff's counsel engaged in misconduct. In an opinion by Judge Kozinski, the Ninth Circuit reversed and reinstated the jury verdict. The Court held that Settlegood established at trial the non-renewal of her contract resulted from bad evaluations she received only after her complaints were submitted and that the trial judge wrongly required plaintiff to bear the burden of persuasion to overcome the same action defense (the burden is "on the defendants to show that they 'would have taken the same action even in the absence of the protected conduct.'"). The Court noted that even if plaintiff's work performance established that the school *could* have legitimately taken action against her, the school must establish that it *would* have done so -- a result the jury rejected. Likewise, given that the jury was properly instructed, the trial court erred in rejecting the jury's verdict which necessarily reflected a finding "that any disruption her comments might have aroused was outweighed by Settlegoode's interest in free expression." That finding sufficed to deny qualified immunity. Similarly, the Ninth Circuit reversed the order of a new trial as a sanction finding that plaintiff's counsel did not act improperly. The trial court limited plaintiff to presenting evidence that her complaints were made in "good faith" and precluded evidence about whether the school's programs actually were in violation of the law – a distinction the Ninth Circuit held to be vague and very difficult to follow. The trial court also wrongly sanctioned plaintiff's counsel for closing argument comments designed to evoke sympathy, for mischaracterizing the argument of defense counsel, and for urging the jury to "send a message" with a punitive damages verdict. The appellate court disagreed with the trial court's interpretations entirely. *Settlegoode v. Portland Public Schools*, No. 02-35260 (04/05/04; Nelson, Kozinski, McKeown).

WASHINGTON - State Supreme Court

Defendants Must Pay Adverse Tax Consequences In RCW 49.60 Cases

In a decision that will have far reaching consequences for all civil rights cases without physical injuries, the Washington Supreme Court unanimously held that under RCW 49.60 a judge has the power to award a prevailing plaintiff the "adverse tax consequences" resulting from the court victory. These tax consequences include the increase in the tax rate from a receipt of economic damages in a lump-sum; the taxation of compensatory damages awards; and any taxes paid by the client on the attorneys' fees awarded by the court. While the Supreme Court reached the same result as Division One, the Justices agreed with WELA's amicus brief that the "adverse tax consequences" were not a form of "actual damages" but rather a type of equitable relief. By adopting WELA's suggested rationale, the Court not only avoided the need for a second jury trial in every case to assess the adverse tax consequences, but allowed the decision to be expanded to other state statutes and to federal law. By an 8 to 1 margin, the Justices held an instruction that required the jury to award front pay until retirement was harmless error on the facts of this case. Justice Sanders thought the error was not harmless. The Court did not address the potential tension between its decision that the given instruction was erroneous and its prior statement in *Xieng* that absent evidence to the contrary, the jury should presume a plaintiff will work until retirement. *Blaney v. Int'l Ass'n of Machinists & Aerospace Workers*, No. 73306-6 (04/01/04).

WASHINGTON - Court of Appeals

No Technical Quit Required for Constructive Wrongful Discharge; Handbook Claims Viable for Current Union Employees

Three plaintiffs, employed by a Hanford defense contractor challenged retaliatory conduct, including transfers and demotions, after reporting safety violations and other work-place problems. The plaintiffs alleged wrongful termination in violation of public policy and handbook claims. The appellate court affirmed dismissal of two plaintiffs' wrongful discharge claims on the ground that one is still employed by the company and the other is on long term disability, for which only "active"employees are eligible. Likewise, the court held that "Although the plaintiffs and amicus curiae argue convincingly for recognition of a tort of wrongful retaliation in violation of public policy, the court is constrained by" *White v. State*, 131 Wn.2d 1 (1997). The third plaintiff, however, went on unpaid medical leave and then received unemployment for quitting with good cause. Reversing the trial court's grant of summary judgment as to that plaintiff, the court found that a "technical quit" is not necessary; rather, a constructive discharge can result where "an employer deliberately rendered working conditions intolerable and thus forced the employee to permanently 'leave' the employment." The court also held that removal as lead engineer – with no loss of pay, becoming the target of an investigation, and being accused of misconduct and threatened with termination could amount to "aggravated circumstances or a continuous pattern of treatment" establishing intolerable working conditions. Similarly, the court held that the clarity element is satisfied by the federal Energy Reorganization Act ("ERA"), 42 U.S.C. § 5851(a)(1)(A), which serves as a general public policy although its anti-retaliation provisions apply only to federal employees. Of note, the court also concluded that because defendants failed to satisfy *their* burden of raising a justification for discharge, the plaintiff had no burden to prove absence of justification. Additionally, the court reversed dismissal of the handbook claims, finding them not limited to discharged employees and available to union members. Holding that the "Employee Concerns Program" requires reporting ethical misconduct and promises the employer "will" take corrective action against retaliation, the court concluded the employer could be liable for breaching such promises even where one plaintiff signed an employment application acknowledging employment at will. The court was not persuaded that the company could also be held liable for breach of promised progressive discipline where the policy afforded discretion to the company. Finally, the court affirmed dismissal of the plaintiffs' request that Virginia law (where one of the defendant's parent companies resides) applies allowing for punitive damages, holding that under the "most significant relationship" test, Washington law applies. *Korslund v. Dyncorp Tri-Cities, Inc.*, No. 21603-9-III (04/22/04; Kato, Sweeney, Schultheis).

ANNOUNCEMENTS

OFFICE SPACE: Frank Freed Subit & Thomas LLP have an office to rent. Call Cliff Freed if you are interested. (206) 682-6711.

VICTORIES AND DEFEATS

Please let us know what happens in your cases, good and bad, so we can all benefit.

DON'T FORGET ABOUT AMICUS HELP

Please remember that the WELA Amicus Committee, chaired by Jeff Needle, is available to consider submission of amicus briefs. The committee tries to keep informed about important issues on appeal, but needs members to help spot those cases in which WELA may want to have a say.

JOIN THE WELA LISTSERVE

WELA members are entitled to participate in an Internet-based electronic discussion group, or "listserve," that provides almost instant feed-back to questions and thoughts related to employment law. This is a terrific way to keep on top of the

latest developments in the law, new defense tactics, judges, and recent jury attitudes. To become a part of this group, contact our moderator, Jesse Wing, at jessew@mhb.com. Jesse will verify your WELA membership, and sign you up.

PROGRAM COMMITTEE SOLICITS IDEAS

Jill Hawkins and Susan Mindenbergs co-chair the programs committee. The committee plans the short programs WELA now regularly sponsors. Jill and Susan welcome your suggestions for topics of interest.

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