

CASE UPDATES

U.S. Supreme Court

No First Amendment Protection for Public Employee's Speech If Pursuant to Job Duties

The plaintiff in this case, Richard Ceballos, was a long-time deputy county district attorney. He worked as the calendar deputy in one of the local offices and had certain supervisory duties. A defense attorney told him that an affidavit used to obtain a warrant in a pending case contained numerous, serious inaccuracies. Mr. Ceballos investigated the location where the warrant had been executed and came to the same conclusion regarding the warrant affidavit. He prepared a disposition memorandum to his supervisors recommending dismissal of the case based on the infirmities with the warrant. His memo was not warmly received and the case went forward anyway. The defense called Mr. Ceballos as a witness. The trial court rejected the defense's challenge to the affidavit. Following this, Mr. Ceballos claimed that his employer retaliated by removing his calendaring deputy duties, transferring him to a less desirable office, and denying him a promotion. He then filed a section 1983 First Amendment claim.

The district court granted the employer's motion for summary judgment. The court ruled the First Amendment did not apply because Ceballos had written the memorandum in question pursuant to his job duties. The Ninth Circuit reversed. The panel held that because Ceballos' memorandum addressed a matter of public concern, it constituted First Amendment activity regardless of whether he had prepared it as part of his official employment responsibilities. The Supreme Court accepted certiorari and heard oral argument while Justice

O'Connor was still on the Court. It did not reach a disposition before she retired. Soon thereafter, the Court announced it was deadlocked 4-4 and ordered re-argument. Unsurprisingly, the Supreme Court reversed the Ninth Circuit by a 5 to 4 margin.

Writing for the majority, Justice Kennedy drew a distinction of constitutional magnitude between when a government employee has engaged in speech as a citizen and when the employee has done so pursuant to his or her official job duties. When speaking as citizens, government employees must endure only those speech restrictions that are necessary for their employers to operate efficiently and effectively. The majority ruled that when the vehicle for a public employee's expression is merely a part of his or her official job duties, the speech enjoys no constitutional protection whatsoever.

Justice Kennedy made clear it was not the fact that Mr. Ceballos had expressed his views internally that deprived his memorandum of constitutional protection. The majority recognized that many citizens do their talking in the workplace. The Court made clear it was not holding that all public employee speech inside the office was without First Amendment protection. The majority further stated that the memorandum did not lack First Amendment protection because its subject matter related to Mr. Ceballos' employment. The controlling factor was that the memorandum was actually written pursuant to his official duties as calendar deputy. Ceballos made disclosures of unlawful activity as a prosecutor fulfilling his responsibility to advise his supervisor about how to best proceed with a pending case. He was not speaking as citizen but rather just doing his job. The memorandum was an official

communication, over which the employer was allowed to exercise complete control. In short, the Court held that the First Amendment does not prohibit managerial discipline based on an employee's expressive conduct undertaken pursuant to official job duties. The majority feared a contrary rule would require judicial oversight of communications among governmental employees and their supervisors.

The four dissenting justices rejected the categorical difference between speaking as an employee and speaking as a citizen. Writing for three Justices, Justice Souter would have held that the First Amendment protects speech concerning official wrong doing, health or safety matters even if the vehicle for that speech was an official part of the employee's job duties. He found it unacceptable for example to deny protection from retaliation to a government personnel officer who protested his supervisor's refusal to hire minority applicants. Justice Souter would have applied a modified *Pickering* balancing test to Ceballos' memorandum. The three-justice dissent also pointed out that Ceballos' other expressive activities, such as testifying in court, might have independent constitutional protection. Justice Breyer's dissent staked out a middle ground between the other opinions. In concluding that Ceballos' memorandum enjoyed First Amendment protection, he found it particularly significant that his speech related to a potential constitutional violation that Ceballos had an arguable ethical and legal duty to raise. *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006)

Title VII Anti-Retaliation Clause Prohibits All Material Adverse Employer Actions

Sheila White was the only woman working at the Maintenance Department in the Burlington Northern & Santa Fe Railway railroad yard. She was assigned to operate a forklift some of the time, which was a plum assignment. A few months later, she complained that her supervisor had said the Maintenance Department was no place for a woman to work. The Company investigated,

substantiated her allegations, and suspended the supervisor for 10 days. At the same time, the Company removed Ms. White from her forklift duties. Ms. White filed a charge of retaliation with the EEOC, which was immediately mailed to the Company. A few days later, the Company suspended Ms. White for 37 days for alleged insubordination. She filed a second EEOC charge regarding the suspension. Ms. White eventually overturned the suspension using her union grievance procedure, and received full back pay for the 37 days. In court, Ms. White continued to pursue her retaliation claims over the job reassignment and the suspension. She won at trial and received \$43,500 in compensatory damages. The Sixth Circuit initially overturned the verdict, but the en banc court reinstated it.

The issue before the Supreme Court was the scope of Title VII's anti-retaliation provision. Specifically, the Court held, per Justice Breyer, that the anti-retaliation provision is broader than the anti-discrimination provision in that the former also forbids harms that are not related to employment or that occur outside the workplace. The majority rejected the employer's argument that the anti-retaliation clause protects an employee only from changes to his or her compensation, terms and conditions or privileges of employment. The Court reasoned that an employer can effectively retaliate against an employee by taking actions not directly related to her employment or by causing her harm outside the workplace. The majority perceived a fundamental difference between the anti-discrimination and anti-retaliation provisions. The former protects people against injuries based upon who they are, their status. The latter protects against injuries based upon what they do, their conduct. In short, the Court ruled that Title VII's discrimination and retaliation provisions are not coterminous and that the latter is broader than the former.

The Court, however, limited the scope of the anti-retaliation clause to those actions that are

materially adverse. This standard excludes those petty slights or mild annoyances that often take place in the workplace and that all employees experience. In the context of activity under Title VII's "participation" clause, this means that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination. The Court emphasized the standard was an objective one, taking into account all of the particular circumstances. "Context matters." In some circumstances, a particular action will qualify as actionable retaliation, in others it won't. The majority held that the nature of the employer conduct that led to the discrimination charge is not relevant.

The Court had no trouble concluding that both the change in job assignment and the suspension qualified as material adverse actions. The evidence showed that Ms. White's original job duties, which included some work as a forklift operator, were more desirable. Removing them was materially adverse to her. Because Ms. White had actually spent 37 days without pay, it made no difference that the suspension was later overturned with full backpay.

In a single concurring opinion, Justice Alito would have read the anti-discrimination and anti-retaliation provisions coextensively. He would have limited the reach of the retaliation provision to changes to the terms and conditions of employment, *i.e.*, an adverse employment action. He claimed that his test would not necessarily lead to narrow protections for the plaintiff. He agreed that Ms. White had established an adverse employment action with respect to both the reassignment and the suspension. *Burlington Northern & Santa Fe Railway Co. v. White* (June 22, 2006)

Court to Resolve Conflict Between Bazemore and Morgan

The Supreme Court has granted certiorari to resolve the tension between two prior U.S.

Supreme Court cases regarding the accrual of the plaintiffs' cause of action for discrimination: *Bazemore v. Friday*, 478 U.S. 385 (1986) and *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002). *Bazemore* unanimously held "each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII." 478 U.S. at 395-396. *Morgan* unanimously held an act of discrimination or retaliation occurs on a single date, so a charge must be filed within 180 or 300 days of that date. In a footnote, the Court said it was leaving the question of "pattern or practice" claims to another day. 536 U.S. at 115 n. 9. By a 5 to 4 margin (per Justice Thomas; Justice O'Connor dissenting), the Court held that hostile work environment claims occur over an extended period of time. In such cases, a charge of discrimination is timely as long as it is filed within 180 or 300 days of the end of that unlawful practice.

The plaintiff in the case the Court will review worked for the defendant for about 20 years. She received annual reviews and salary adjustments. She claimed that she was paid less than her male co-workers, and had been paid less for years. Alabama has no state fair employment practice deferral agency, so the time limit for filing with the EEOC is 180 days. Ms. Ledbetter filed her EEOC charge, received a right to sue letter and filed a case in federal district court. The jury awarded \$225,000 in backpay, \$4,500 in emotional distress, and \$3.3 million in punitive damages. The district court remitted the verdict to \$360,000.

The employer appealed. The employer argued that the Ms. Ledbetter could sue only for decisions regarding pay that occurred within the six months preceding her EEOC charge. The court did not accept that argument. Instead it held that the employee can reach back outside of the limitations period, but only to the most recent decision that affected her compensation within

the limitations period. The Eleventh Circuit concluded that there was no evidence that those salary decisions were biased. It therefore reversed the judgment to the employee. *Ledbetter v. Goodyear Tire Co.* 421 F.3d 1169 (11th Cir. 2005), *cert. granted* (June 27, 2006).

Ninth Circuit

Remedial Pension Programs for Negro League Baseball Players Don't Violate Title VII

For the early years of the 20th century, Blacks were excluded from Major League Baseball. They played in separate Negro Leagues. In 1993, Major League baseball voluntarily created certain pension and medical benefits for former players who had played in the Negro Leagues before the integration of baseball in 1947. Some but not all of these players later played in the Major League. In 2003, White players challenged the program as racially discriminatory. The district court granted summary judgment to the Major Leagues and the Ninth Circuit affirmed. While the court could have affirmed on the basis of statute of limitations, the panel decided to reach the merits, as had the district court. The court ruled that the benefits to Negro League players long after the fact were not terms and conditions of the employment relationship between those players and Major League Baseball. Thus, the White players suffered no adverse employment action. The court ruled that the White players were not similarly situated in all material respects to the Black players because they had never suffered exclusion from baseball on account of their race. Finally, the court ruled that redressing the discrimination against Black players prior to 1947 was a legitimate non-discriminatory reason for any differential treatment. The court reaffirmed prior cases holding that providing a race conscious remedy for past discrimination does not violate Title VII. *Moran v. Selig*, No. 04-55647 (5/9/06; Reinhardt; Rawlinson, Fogel (N.D. Cal.)).

Employer Ban on Employee's Proselytizing Complies with Title VII

The plaintiff in this case, a self-described evangelical Christian, worked for the County Department of Social Services. His duties required him to interview unemployed and underemployed workers in his cubicle. The County refused to allow him to decorate it with religious items. The County also prohibited him from talking religion with his clients. The Department permitted him to hold voluntary prayer meetings with his colleagues during lunch, but not in the Department's conference room. In December, he was reprimanded for putting up a "Happy Birthday Jesus" sign at his desk and instructed to remove the Bible from the view of his clients. He filed suit under the First Amendment and Title VII. The district court granted the County's motion for summary judgment, and the Ninth Circuit affirmed. Applying the *Pickering* test, the Court found the employer's interest in avoiding an Establishment Clause violation outweighed the plaintiff's interest in discussing religion with members of the public whom he serves. The court held that the ban on religious items likewise was a reasonable means of avoiding governmental communication of a religious message to the public. The court held that the County's restrictions on the use of the conference room to secular activities such as birthday parties and baby showers was a reasonable and lawful limitation as the room was not a public forum. The panel further rejected the plaintiff's claim that the County was required to accommodate his religion or had otherwise discriminated against him under Title VII. In the course of doing so, the panel perpetuated the incorrect use of *McDonnell Douglas* for failure to accommodate claims. *Berry v. Department of Social Services of Tehama County*, No. 04-15566 (5/1/06; Callahan; Farris; Tashima).

En Banc Court Upholds Facial Make-Up Requirement for Women

The plaintiff quit her job as a bartender at Harrah's casino after the employer began to enforce its requirement that women wear make-up. A panel had affirmed the district court's grant of summary judgment to the employer. The case went en banc and reached the same result on a 7-4 vote. Writing for the majority, Chief Judge Mary Schroeder concluded that the differential requirements were not more onerous to women. The majority, which included three of the four female judges on the panel, also rejected the plaintiff's sex-stereotyping argument because nothing in the policies would inhibit a woman's ability to do her job. The majority claimed holding for Jespersen would "come perilously close to holding that every grooming or apparel or appearance requirement that an individual finds offensive, or in conflict with his or her self-image, can create a triable image of sex discrimination." The majority disagreed that the case had anything to do with sexuality or stereotyping women as sex objects. Judge Pregerson's dissent on behalf of four judges lambasted the majority's approach to sex stereotyping, pointing out that Ms. Jespersen was terminated because she failed to comply with a make-up requirement that applied only to women. Judge Pregerson found the case to be quite similar to *Price Waterhouse*. Writing for three judges, Judge Kozinski disagreed with the majority (and Judge Pregerson) that Jespersen had failed to make-out an undue burden claim. He concluded that the policy overall was more burdensome to women. Judge Kozinski believed that Ms. Jespersen's reasonable perception that the make-up requirement was demeaning to women furnished additional evidence to support her claim. *Jespersen v. Harrah's Operating Co.*, No. 03-15045 (4/14/06) (en banc).

Newspaper is Granted Access to Sealed Discovery after Employment Case is Settled

A Honolulu police officer sued the City and County for retaliating against him as a

whistleblower who reported police corruption to his superiors and the FBI. Before the case was settled, the trial court sealed the discovery materials pursuant to a stipulated protective order. When a newspaper requested access to the sealed documents under the commonlaw right of access, the magistrate judge performed an *in camera* inspection before ordering the documents unsealed. The City and FBI appealed. The Ninth Circuit held that the magistrate did not abuse her discretion when ordering the documents to be unsealed noting that "Because the parties had simply stipulated to the protective order, a particularized showing of 'good cause' to keep the documents under seal had never been made to the court as required by *Federal Rule of Civil Procedure 26(c)*." Holding that the City "squandered" its opportunity, the court of appeals held that it did not present "compelling reasons" for keeping the documents sealed, offering only conclusory assertions such as production would "hinder CIU's future operations with other agencies, endanger informants' lives, and cast HPD officers in a false light." Similarly, the United States, as an intervenor, could not rely on a blanket rule that "as a non-party to the litigation, it was entitled to rely on the protections of the stipulated protective order," but must go further than merely listing one of four generic categories of privilege (i.e., privacy, law enforcement, confidential source, and ongoing investigation) to establish compelling reasons for preventing public access to the documents. *Kamakan v. City and County of Honolulu*, 447 F.3d 1172 (05/17/06; McKeown).

Washington Court of Appeals

Promissory Estoppel is an Equitable Claim so Plaintiff Had No Right to a Jury

Mr. Kim's employer, the Deans, promised to pay him a portion of the proceeds when they sold their company. Instead, the Deans just fired Kim after selling the company. A jury awarded \$500,000 in damages to Kim on his claim of

promissory estoppel. Division I held that the trial court erred by denying the Dean's motion to strike Kim's jury demand. The appellate court held there is no right to a jury trial under the Washington Constitution based on historical evidence that when the Constitution was adopted promissory estoppel was an equitable rather than legal claim, even when it includes a request for damages. When a case presents a mix of legal and equitable issues, a court has the discretion to try only the legal issues before a jury. *Tae Yon Kim v. Jeffrey Dean*, No. 55406-9-I (06/05/06; Coleman, Baker, Ellington).

Employer Committed Sex Discrimination by Refusing to Hire Pregnant Applicant Based on the Assumption she was Disabled

The employer hired plaintiff as a clerk/order checker, subject to a mandatory physical examination. In response to a medical questionnaire and the exam, the employer learned that plaintiff was pregnant, sent her home, and rescinded the job offer claiming the job included a 60-pound lifting requirement that her doctors had not authorized her to perform so she was unable to do the job. Plaintiff sued for sex and pregnancy discrimination under RCW 49.60.180 and WAC 162-30-020. Instead, analyzing her claims solely as a failure to accommodate a disability, the trial court found for her employer following a bench trial. Division II reversed, holding that pregnancy and pregnancy-related conditions are not disabilities so the court should not have applied a disability analysis. The appeals court then held for the plaintiff on her gender and pregnancy discrimination claim finding that on the record the lifting requirement was a pretext, that the employer refused to hire the plaintiff assuming she could not physically perform the job, that the employer required her to obtain a release from her doctor even though she never claimed a disability nor requested any accommodation, and the court held it was unlawful to ask if she was pregnant. The court held that the employer waived its argument that it acted legally under the "business necessity" exception in WAC 162-30-020(3)(b) by failing to

raise the issue before the trial court. Interestingly, although the appeals court rejected application of the disability accommodation analysis, the court held in support of the sex discrimination claim that the employer failed to engage in an "interactive" process and failed to consider accommodations for the employee's pregnancy concluding: "Thus it is clear that Fibre took no necessary affirmative steps to satisfy its obligation to avoid firing an employee solely based on pregnancy." *Hegwine v. Longview Fibre Company Inc.*, 132 Wn. App. 546 (04/25/06; Van Deren, Houghton, Quinn-Brintnall).

Judge, as Independent Contractor, is Entitled to Attorney Fee Award in Action to Enforce Contract with City

A municipal judge contracted for a four-year term on the bench. Two years later, however, the City eliminated the municipal court and stopped paying the judge. The trial court granted the Judge's motion for summary judgment and awarded her lost wages of \$49,500 and costs but denied her petition for attorney fees. On appeal, the City claimed the contract was illegal, ultra vires, and void. Division III found that: (1) a contract between a municipality and judge is lawful under RCW 3.50.040; (2) the City Council and Mayor who appointed and ratified the Judge's contract did not exceed their authority; (3) a binding contract is based on exchanging promises not performance so the judge was entitled to her future contracted for wages; and (4) the judge was not acting as an attorney for the City so the City could not discharge her at any time. Division III reversed the trial judge's denial of attorney fees, holding that RCW 49.48.030 provides independent contractors a cause of action and "The award of attorney fees is not discretionary" but mandatory. *Wise v. City of Chelan*, No. 23954-3-III (05/30/06; Sweeney, Brown, Kato).

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