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ALERT

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CASE UPDATES

FEDERAL – U.S. Supreme Court

Court to Decide Whether Failure to Meet Title VII 15 Employee Threshold is Jurisdictional

A district court in the Fifth Circuit Ruled that a federal court lacks subject matter jurisdiction over a defendant-employer who does not have 15 employees. The Fifth Circuit affirmed. The Court has granted review. *Arbaugh v. Y&H Corp,* No. 04-944 (05/16/05).

FEDERAL – Ninth Circuit

Jespersen to be Reheard En Banc

The Ninth Circuit had voted to rehear en banc the case of *Jespersen v. Harrah's Operating Co.* In that case the court held 2-1 that a casino's requirements that women wear make-up and style their hair was not sex discrimination. No. 03-15045 (05/13/05).

Circuit City Sanctioned for Frivolous Appeal of Order Denying Motion to Compel Arbitration

In a prior opinion, the Ninth Circuit had ruled that Circuit City's arbitration agreement was unconscionable under California law. *Ingle v. Circuit City*, 328 F.3d 1165 (9th Cir. 2003). Undeterred, Circuit City filed a renewed motion to compel arbitration arguing that *EEOC v. Luce Forward Hamilton & Scripps,* 324 F.3d. 742 (9th Cir. 2003) (en banc) had undermined the opinion in *Ingle*. The district court disagreed and denied the motion to compel arbitration. Circuit City appealed and the Ninth Circuit affirmed. The panel further ruled that Circuit City's appeal was frivolous and awarded double costs and attorneys' fees to the plaintiff. *Ingle v. Circuit City,* No. 04-55927 (05/18/05; Pregerson, Thompson, Wardlaw).

Court Lacks Subject Matter Jurisdiction over Federal Employee's Defamation and Intentional Interference Claims

The plaintiff, a federal employee, applied for a promotion as a Treasury Auditor. He was offered the position subject to a background check, which he failed. The plaintiff sued a co-worker interviewed for the check for defamation and the department manager for intentional interference with employment. The district court dismissed on the grounds that the employee's claims were barred by exclusive remedy provisions of the Civil Service Reform Act. The Ninth Circuit agreed, holding that the CSRA covered claims against both federal employees who sought recommendations regarding employment and those who provided them. *Mathesian v. Lee*, No. 04-15093 (05/10/05; Noonan, Thompson, Rymer).

Finance and Insurance Managers of Retail Automobile Dealers are Not Entitled to Overtime

These cases involved FLSA suits by Washington and Oregon Finance and Insurance Managers for unpaid overtime. In all three cases the district courts ruled in favor of the employees, holding that the managers did not derive commissions from the dealership's retail activity. The Ninth Circuit reversed and granted judgment for the dealerships. The FLSA exempts (1) employees of retail or service establishments (2) who earn more than 150% of the minimum wage (3) if more than 50% of the employees' compensation

is in the form of commissions on the sales of goods or services. The cases involved application of the last factor. Despite the law that FLSA exemptions are to be narrowly construed, the Ninth Circuit ruled that managers who handle the insurance and finance aspects of automobile sales are engaged in the automobile dealership's retail activity. Essentially the Court ruled that the exemption applied to all-commission based employees of retail establishments, and not just those who earn commissions on the sales of retail goods and services. The employees argued that their commissions were not derived from the sale of the vehicles themselves, so that they did not fall within the exemption. The panel's decision appears contrary to the plain-language of the statute. The panel rejected the employees' analogy to funeral home employees who sell burial insurance, who have been held to be non-exempt and entitled to overtime. *Grieg v. DRR, Inc.*, No. 03-35619 (05/18/05; Pollak (6th Cir.), Trott, Keinfeld).

The Pickering Balancing Test Governs Hybrid Free Speech and Association Claim Under the First Amendment

Clark College adjunct economics instructor Barbara Hudson sued a faculty member, Dr. Craven, and administrators who allegedly retaliated against her for attending WTO protests with her students. Out of concern for the students, faculty members objected to Hudson's initial plan for a school-sponsored trip to the protests. "Although Hudson attempted to circumvent the clear directive that she could not sponsor a field trip on behalf of the College, it was, in effect, a de facto class field trip." After the trip, Craven recommended non-renewal of Hudson's contract. Noting that although the instructor's right to associate with her students is the predominant issue, the Ninth Circuit added that "The very purpose of the rally was to speak out against the WTO, an exercise that implicates core speech rights." In a case of first impression, the Court nevertheless applied the balancing test set forth in *Pickering v. Board of Education*, 391 U.S. 563 (1968), noting that "The speech and associational rights at issue here are so intertwined that we see no reason to distinguish this hybrid circumstance from a case involving only speech rights." Although the Court had no difficulty concluding that her speech and associational activities were a matter of public concern, it held that "her associational interests in this context are strongly outweighed by the legitimate administrative interests of Clark College." The Ninth Circuit held the college met its burden by demonstrating that its legitimate interests outweighed Hudson's interest in attending the anti-WTO rally with her students. The curtailment of her speech was minimal because she was free to attend the rally herself and she could discuss her views with anyone, including in the classroom with her students. The government's interests in the "safety of students and pedagogical oversight" outweighed Hudson's rights to attend with her students "protests of such novelty and scale in the face of warnings about rioting." Moreover, the Court explained, Clark College has a strong and recognized interest in maintaining its political neutrality as an educational institution which was compromised by Hudson's inclusion of the rally on her class's final exam, which gave the students who accompanied her to the rally an advantage. *Hudson v. Craven*, No. 03-35408 (04/06/05; Hawkins, Thomas, McKeown).

Back Pay is an Equitable Remedy Awarded at the Discretion of the Court, Not the Jury

Lutz, a longtime teacher and assistant principal sued her school district in Arizona state court under the ADA for firing her. The district removed the case to federal court where, over her employer's objection that she waived her right to a jury, a jury found in her favor. Finding that she failed to timely request a jury, the Ninth Circuit reversed and remanded for a bench trial or, in the trial court's discretion, a ruling on the record of the first trial. Prior to the Civil Rights Act of 1991 (CRA), Title VII (and therefore the ADA, which expressly incorporates Title VII's

remedies), only afforded equitable remedies. Holding that in the CRA "Congress did not alter the remedial scheme it had established for back pay," 42 U.S.C. § 2000e-5(g), the Court noted that "Congress *excluded* back pay for the types of damages for which it authorized a jury trial. 42 U.S.C. § 1981a(b)(2)." Accordingly, the Court of Appeals concluded that if the trial court finds liability in favor of Lutz on remand, it cannot reinstate the jury's verdict as to the appropriate amount of back pay but instead must exercise its discretion to determine an amount of any back pay. Nevertheless, the Court remarked that the trial court could if it chose accept the jury's verdict as to the appropriate measure of pain and suffering damages because it was properly a jury issue. *Lutz v. Glendale Union High School*, No. 03-15745 (04/08/05; Kozinski, Fletcher, Bybee).

$5,000,000 Punitive Damages Award for Race Harassment Reduced on Due Process Grounds

Plaintiff, Bains LLC, is a company owned by three American citizen Sikh brothers born in India which was hired by ARCO to haul gasoline fuel. ARCO repeatedly abused the owners and their drivers delaying their deliveries by ignoring their arrival, requiring them to stand in the rain while others sat in their trucks, falsely accusing them of safety violations, forcing them to clean up the spills of other drivers, mocking their religiously observant clothes, and using racial epithets against them. ARCO initially ignored the Plaintiffs'complaints and then terminated their contract. A jury awarded $50,000 in compensatory damages for a Washington state law breach of contract claim, $1 nominal (actual) damages for race discrimination in violation of 42 U.S.C. § 1981, $5,000,000 in punitive damages, and $442,065 in attorneys' fees, plus costs exceeding $10,000. The Ninth Circuit rejected several challenges to the verdict holding that: (1) a corporation has standing to bring a section 1981 claim; (2) the jury's award of nominal damages was not irreconcilable with a finding that the ethnic discrimination caused economic harm to the corporation (the only kind of harm a company can suffer); (3) the Court need not address whether ARCO had a mixed motive or would have terminated its contract with Bains absent its discriminatory motive because the jury verdict established that ARCO harassed Bain employees and interfered with the company's trucking business for racial reasons; and (4) an ARCO supervisor witnessed the racial harassment so ARCO is vicariously liable for its failure to remedy and prevent the misconduct. Despite finding that it was a "case of highly reprehensible conduct…that caused economic harm to a corporation," the Court reduced the five million dollar punitive damages award on due process grounds relying on *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003), which found that except in rare cases punitive damages should not exceed nine times the compensatory damages. The Ninth Circuit held that: "The jury found $50,000 of actual harm, and as this is not the 'rare case' for which *State Farm* leaves room, the ratio approach suggests that punitive damages could not, consistent with due process exceed $450,000." Remanding for a new trial or a remittitur "to a figure somewhere between $300,000 and $450,000" the Court explained that it came to the higher number because it is nine times the $50,000 in compensatory damages awarded by the jury and the lower number because "the civil penalty authorized in Title VII for comparable harm suggests that Congress regards $300,000 as the highest appropriate amount in somewhat comparable cases." This case is currently pending on a request for *en banc* review. *Bains LLC v. Arco Products Co.*, No. 02-35906 (04/19/05; Kleinfeld, Gould, Tallman).

WASHINGTON – Supreme Court

Notice of Claim Provision Not Pending for One Day Until Day After it is Filed

The issue in this case was how to count the 60 day notice of claim period under Washington

law. Reduced to its essence, the issue is whether the "first" day of the period is the day the notice is filed or the day after it is filed, as CR 6 would suggest. Reversing the court of appeals, the Supreme Court ruled 5 to 4 in favor of the latter construction. Because under this interpretation of the law, the plaintiff filed her legal action one day too early, she lost her claims. *Troxell v. Rainier Public School District No. 307* No. 74986-8 (05/26/05).

WASHINGTON – Court of Appeals

Ordinary Agency Principles Apply to RCW 49.52; Factual Issues Remain on Piercing Corporate Veil

In this unpaid wages case, complicated questions arose whether one of the defendants was an "agent" of the employees' employer for the purpose of liability for wrongfully withheld wages. Both parties moved for summary judgment but the district court denied both motions. The district court certified four legal questions for discretionary review by the court of appeals. The court refused to answer the legal questions but affirmed the denial of both motions for summary judgment. The employees' actual employer was an LLC. One of the two members of that LLC was also an LLC. The court had little difficulty concluding that both LLCs were liable under RCW 49.52. But the court held that in order to hold an individual manager of the LLC which was in turn a "manager" of the employees' employer individually liable under RCW 49.52, the employees had met the test for piercing the corporate veil. The court ruled that ordinary agency principles applied but that factual issues remained as to whether the corporate veil could be pierced. *Dickend v. Alliance Analytical Labs.*, No. 23038-4-III (05/20/05; Brown, Schultheis, Allen).

Broker Agreement Arbitration Provision Does Not Cover Employment Disputes

The plaintiff was a former employee of a yacht dealer who claimed unpaid commissions. Both the employer and the employee were members of the Northwest Yacht Brokers' Association ("NYBA"). The membership application of the NYBA contained a provision that members would abide by the bylaws, which contained an arbitration provision for disputes between members. The superior court denied the employer's motion for arbitration and the court of appeals affirmed. The court ruled that an arbitration agreement is enforceable if an employment agreement incorporates it by reference, but there was no such incorporation here. The court distinguished this case from those that have arisen in the securities industry on the grounds that membership in the NYBA was not a condition of employment in the industry and the NYBA does not regulate employment relationships. *Todd v. Venwest Yachts, Inc.*, No. 54215-O-I (05/02/05); Agid, Ellington, Baker).

Washington Overtime Law Does Not Apply to Out of State Work Done by Washington Employees

The issue in this case is whether the Washington Minimum Wage Act ("MWA") applies to out-of-state work done by Washington employees. The plaintiff was a truck driver who worked in Washington for a California-based company. His runs always began and ended in Vancouver, WA. The employer did not comply with the overtime provisions of the ("MWA"). The superior court granted summary judgment to the employee but the court of appeals reversed. The appellate court claimed plain-meaning of RCW 49.46.130 limited the statute to hours worked in Washington, although no such words of limitation appear in the statute. More persuasive was the court's reliance on L&I regulation that limited the MWA overtime pay of interstate

truck drivers to hours worked in Washington. But that regulation is a consequence of the Federal Motor Carrier Act which regulates interstate trucking. The blanket holding that the MWA does not apply to hours worked by Washington employees outside of Washington is both unnecessary and unjustified. *Bostain v. Food Express Inc.*, No. 31641-4-II (05/17/05; Bridgewater, Quinn-Brintnall, Morgan).

Disparity in Pay Among State Workers Doing Same Jobs Violates Equal Protection

State employees working in general government and higher education performing essentially the same jobs as each other sued the state alleging that wage disparities between the groups violates the state civil service laws and the state and federal guarantees of equal protection. The employees contended that the Personnel Resources Board was required by state law to adopt a single state salary schedule for all the employees. Finding it unnecessary to resolve the issue, the Court held that the Plaintiffs could not establish what single salary schedule the Board would have adopted, when the Board would have adopted it, and that the director of financial management, the Governor, and the legislature would have approved it. However, reversing summary judgment for the State, the Court of Appeals held that the state's rate classifications distinctions bear "no rational relationship to the purposes of Washington's Civil Service Laws"and therefore deny the Plaintiffs federal "equal protection by failing to provide equal pay for essentially equal work." *Washington Public Employees Assoc. v. State of Washington*, No. 31824-5-II (04/26/05; Armstrong, Van Deren, Morgan).

Teachers are Entitled to Loudermill Hearing When Certificates Lapse

The Court of Appeals affirmed summary judgment in favor of two teachers who were terminated without being afforded the due process of *Loudermill* hearings. Both teachers were fired for inadvertently allowing their teaching certificates to lapse. Their termination notices stated the decision was final and without recourse. The teachers requested a hearing pursuant to RCW 28A.405.300 and .310, which prohibits termination of school officials in the absence of "probable cause." The school rejected their request. The Court held that the RCW created a property right in continued public employment for the teachers and so the teachers were entitled to a genuine pre-termination hearing allowing them to explain what the Court described as seemingly valid justifications for the lapses of their certificates. Quoting the U.S. Supreme Court's decision in *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985), the Court of Appeals noted that the teachers had a "significant private interest in retaining their public employment. 'While a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job.'" The pre-termination hearing is "an initial check against mistaken decisions." The Court also rejected the district's argument that it was entitled to have the teachers repay the wages they earned while working without their certificates noting that it "received valuable services" and the teachers were entitled to quantum meruit. The matter was remanded for the school to hold the due process hearings. *Giedra v. Mt. Adams School Dist. No. 209*, No. 23349-9-III (04/14/05; Brown, Sweeney, Kato).

Double Damages Awarded Against Commercial Hauler Claiming Exemption from Minimum Wage Act as Farm Employer

In some circumstances, the Washington Minimum Wage Act (MWA) exempts farm employers from paying overtime compensation. *See* RCW 49.46.130(2)(g). Affirming summary judgment in favor of employee drivers suing for overtime, the Court held that the employer, a commercial carrier fulfilling contracts with processors to haul agricultural products from farms to the processors, is not a farm employer

within the meaning of the MWA. In so holding, the Court deferred to the WA DOL=s interpretation of the MWA and explained that "The MWA plainly differentiates between persons working for farmers by hauling farm commodities and persons who drive for carriers that work for non-farmers." The employees were awarded their overtime compensation plus interest and double damages against the company and its owners. *Cerrillo v. Cipriano Esparza*, No. 22739-1-III (04/05/05; Brown, Kato, Sweeney).

Undiagnosed Multiple Sclerosis Can be a Disability under RCW 49.60

Administrative assistant Debra Callahan was fired after taking a cluster of absences to address various health problems and extensive evaluations for an undiagnosed illness. Reversing summary judgment for the employer, the Court of Appeals held that she is entitled to a trial on whether her undiagnosed multiple sclerosis (MS) constitutes a disability under the Washington Law Against Discrimination and whether it was a substantial factor in her termination for allegedly excessive absenteeism. The definition of a disability refers to "a medically cognizable or diagnosable condition." MS is susceptible to recognition and diagnosis, held the Court. Further, nothing that the Washington Human Rights Commission's finding of reasonable cause to conclude discrimination had occurred "strongly supports her assertion that reasonable minds might differ" on whether "her disease disabled her by causing a cluster of unavoidable absences." Likewise, the matter was remanded for trial because there was sufficient disputed evidence that her supervisor may have learned of the MS diagnosis prior to terminating her and an inference of discrimination could be drawn from evidence that unlike other employees' absences, Callahan was subjected to sudden strict adherence to its policy manual for reporting absences. *Callahan v. Walla Walla Housing Authority*, No. 22587-9-III (04/12/05; Schultheis, Brown, Sweeney).

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

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

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