

CASE UPDATES

FEDERAL – U.S. Supreme Court

Title VII Compensation Discrimination Suits Must be Filed within 180 or 300 Days of the Initial Act of Discrimination.

Lily Ledbetter worked as a manager for Goodyear in Alabama for 19 years. In 1998, she learned that she had been paid less than her male co-workers for many years, based on long past discriminatory evaluations. She filed suit and won a multi-million dollar verdict at trial. The 11th Circuit reversed and entered judgment for the employer on the basis that no act of discrimination had occurred within the Title VII limitations period. The Supreme Court affirmed 5-4. Justice Alito reasoned that the low paychecks Ledbetter received within the limitations period were only the continuing effects of a discriminatory decision made outside the limitations period, and therefore non-actionable. The decision adopts a very favorable view of statutes of limitations. The majority opinion does contain some helpful language stating that disparate treatment discrimination requires proof of an act coupled with discriminatory intent and that most proof of discriminatory intent will be circumstantial. The majority distinguished *Bazemore* as involving a continuing discriminatory pay structure, of which there was no evidence in this case. Relying on *Morgan*, the majority held that pay discrimination was a discrete act of discrimination rather than a cumulative one like hostile work environment. Justice Ginsburg's dissent reasoned to the opposite principle. The dissent viewed the receipt of a discriminatory paycheck to be more than just the consequence of past discrimination. The dissent focused on the fact that Ledbetter was unaware of the pay disparities for many years. The dissent also cited the Title VII provision allowing backpay for up to

two years prior to the filing of a charge of discrimination. The majority made clear that its decision applied only to Title VII and not claims under the Equal Pay Act. Cases construing the Equal Pay Act have allowed the plaintiff to reach pay discrimination that started outside the limitations period. The majority also declined to rule whether Title VII has a discovery rule that would delay the accrual of a claim where the plaintiff did not know of her injury. *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S. Ct. 2162 (2007)

Court Eliminates “No Set of Facts” Test for 12(b)(6) Motions

In this antitrust case, the Supreme Court jettisoned (7-2) its long-standing test for evaluating the sufficiency of a complaint on a 12(b)(6) motion. In *Conley v. Gibson*, 355 U.S. 41 (1957) (a race discrimination case against a union under the NLRA), the Supreme Court had held that a complaint should not be dismissed on a 12(b)(6) motion “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim for relief.” Justice Souter's majority opinion decided this “famous observation has earned its retirement.” The seven Justices were less than clear about what the proper standard was. The opinion holds that the complaint must allege facts “suggestive of illegal conduct” but need not contain “detailed factual allegations.” Neither labels and conclusions nor a “formulaic recitation of the elements of a cause of action” are enough. The complaint must state “enough facts to state a claim for relief that is plausible on its face.” The Court said that factual allegations must be specific enough to raise a right to relief above a speculative level, assuming such facts are true. A plaintiff needs to make allegations “plausibly

suggesting ([and] not merely consistent with)” unlawful conduct. The primary problem with the complaint in this case was that its factual allegations were as equally consistent with lawful conduct as with unlawful conduct. Justices Ginsburg and Stevens dissented. (Justice Stevens did us no favor by asserting that in a discrimination case the plaintiff must use *McDonnell Douglas* at summary judgment if she lacks “direct evidence of discrimination”). What this all means outside the antitrust context is unclear at this point. The majority emphasized it was not overruling *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002), which rejected a heightened pleading requirement for discrimination cases. *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007)

FEDERAL - Ninth Circuit

Court Reverses Summary Judgment Finding Pretext of Religious Discrimination.

Lynn Noyes alleges that she was not promoted to Software Development Manager (SDM) by her employer, Kelly Services, because she was not a member of a small religious group, the Fellowship of Friends, which owns a compound nearby. Fellowship members are required to donate ten percent of their gross monthly income to the Fellowship. William Heinz, who made the decision not to promote Noyes, was a member of the Fellowship. He relied on input from other employees, two of whom he told—inaccurately, Noyes asserted—that Noyes was not interested in the position. Heinz offered the promotion to Donna Walker, who was not a Fellowship member but she declined because she already held a similar position. Heinz then promoted Joep Jilesen, a Fellowship member, and the only other employee under consideration. The trial court granted summary judgment to Kelly Services. Reversing, the Ninth Circuit found sufficient evidence of pretext to survive summary judgment: (1) Heinz told others that Noyes was not interested in the promotion, which was not true; (2) Heinz claimed

that Jilesen was chosen based on a consensus reached with two other managers, but at least one of them said the decision was made by Heinz; (3) Heinz had pressured Noyes to support promoting Jilesen by saying that otherwise Jilesen would have to leave the country; (4) Jilesen was paid \$4,800 more than Noyes in the same position although Noyes had an MBA and six years more seniority; (5) Heinz said he wanted to promote Jilesen in at a higher salary to support his “lifestyle.” Noyes also presented statistical evidence of the number of Fellowship members hired and promoted. *Noyes v. Kelly Services*, No. 04-17050 (May 29, 2007)

State Discrimination Claims Not Preempted by Labor Management Relations Act.

Lorraine Detabali, a 57-year-old Filipina woman, sued her employer in state court for breach of contract, breach of the covenant of good faith and fair dealing, and for discrimination and retaliation in violation of the California Fair Employment and Housing Act (FEHA). Her employer removed the action to federal court under 28 U.S.C. § 1441(b) on the grounds that the claims were preempted by § 301 of the Labor Management Relations Act (LMRA). The trial court dismissed, holding that Plaintiff’s claims were preempted and that the Plaintiff had failed to exhaust the LMRA grievance procedures. The Ninth Circuit reversed and remanded to state court. It explained: Section 301 of the LMRA preempts a state-law claim “if resolution of [that] claim depends upon the meaning of a collective-bargaining agreement” (CBA) but “Causes of action that only tangentially involv[e] a provision of the collective-bargaining agreement are not preempted by section 301. Nor are causes of action which assert nonnegotiable state-law rights.” (citations omitted). The court found that determining whether Detabali was legitimately terminated for refusing to work outside of her cluster in violation of the FEHA requires referring to the CBA but “there is no dispute over the meaning of any terms within the agreement”

so “resolution of the central issue—whether St. Luke’s discriminated against Detabali in applying the agreement—does not depend interpretation of the collective bargaining agreement.” *Detabali v. St. Luke’s Hospital*, 482 F.3d 1199 (9th Cir. 2007)

Law Firm’s Arbitration Agreement is Unconscionable

O’Melveny & Myers implemented a binding arbitration program for all current and new employees. An employee later sued for wage and hour violations. The district court upheld the arbitration agreement but the Ninth Circuit reversed. The appellate court held the arbitration agreement was both procedurally and substantively unconscionable under California law. The court held that it is per se unconscionable to give a current employee the choice of signing an arbitration agreement or being terminated. The court ruled that the following provisions were substantively unconscionable: (1) a one-year statute of limitations period for all statutory employment claims; (2) a broad confidentiality clause; (3) an exemption for any claimed breaches of confidential client information by the employee; and (4) a prohibition on administrative filing. The court ruled the violations were pervasive and struck the arbitration agreement in its entirety. *Davis. v. O’Melveny & Myers*, 485 F.3d 1066 (9th Cir. 2007)

WASHINGTON - Court of Appeals

Ministerial Exception Bars Claims under RCW 49.60.

Robert Fontana sued his former employer, the Catholic Diocese of Yakima and his supervisor, Bishop Carlos Sevilla, for constructive discharge. The Diocese hired Fontana as director of evangelization to develop and implement programs of “Christian disciplinship, Scripture, the Catholic Faith as summarized in the Creed, Sacraments...” Fontana complained that his supervisor did not properly handle a priest who had attempted to

commit suicide after pictures of naked boys were found on his computer. Sevilla began to lose trust in Fontana after Fontana exceeded his delegated authority and there were complaints about his programs. Fontana’s duties were diminished but his salary was not. Then, Fontana resigned and sued alleging retaliatory constructive discharge. The function of Fontana’s position was “directly related to faith teaching and doctrine” so the Court of Appeals affirmed dismissal of Fontana’s claim applying the ministerial exception, which prevents unconstitutional interference with the religious freedom of his employer to select its employees. *Fontana v. Diocese of Yakima*, 157 P.3d 443 (2007)

College Professor Wrongfully Denied Wages During Termination Process.

Tenured college professor Tony Mega sued his former employer, Whitworth College, for terminating his employment--allegedly for behavior complaints--without following college procedures. He alleged wrongful discharge, breach of contract, and wrongful withholding of wages during his termination process. A jury held against Professor Mega but the trial court granted Mega’s CR 50(b) motion holding that, as a matter of law, Whitworth breached the parties’ contract by discharging him without pay prior to the formal dismissal hearing, and ordered Whitworth to pay back wages and prejudgment interest. Mega’s CR 59 motion for a new trial was granted by the trial court on all jury issues because the court held that it gave a faulty jury instruction allowing the jury to decide matters of law. The Court of Appeals affirmed in all respects, and awarded Mega his attorneys’ fees under RCW 49.48.030 for recovering wages. *Mega v. Whitworth College*, 158 P.3d 1211 (2007)

Resident Family Home Care Workers also Exempt as Administrative Employees

The plaintiffs, husband and wife, worked for an adult care home. One of them remained on the premises at all times during their 10 day work period each two weeks. Their job duties included record keeping, planning and preparing meals, and ensuring the residents took their medicines. They were frequently awakened during the night by emergencies. Together, they received a total salary of \$35,000. They sued for overtime under the FLSA. The trial court ruled for the employer after a bench trial and Division III affirmed. It agreed the plaintiffs were “resident employees.” Resident employees are not entitled to overtime as long as their contracts are otherwise reasonable. The court also held that the primary duty of the plaintiffs was administrative because they exercised significant freedom and discretion in managing the daily affairs of the home. *Schryvers v. Coulee Community Hospital*, 158 P.3d 113 (2007)

State Ferry Workers Not Entitled to Bring Court Action for Unpaid Watch Time

This case was a class action by Washington State Ferry workers. They argued that the State had willfully failed to pay them for “watch changes” that extended beyond their regular assigned work day. The Superior Court granted summary judgment to the workers. Division II reversed and granted summary judgment to the State on the basis that the workers were required to exhaust their collective bargaining agreement remedies or administrative remedies before the Maritime Employee’s Commission. RCW 47.62.280 authorizes a binding grievance arbitration mechanism for interpretation and application of ferry worker collective bargaining agreements or a mandatory proceeding before the Maritime Employee’s Commission. The court held this trumped the employees’ right to proceed under RCW 49.52. The appellate court agreed that the State should have paid the workers for the unpaid time. The time was not de minimis but rather was

an essential and regular activity. *Davis v. Washington*, 159 P.3d 427 (2007)

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