WELA *ALERT*

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WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION
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CASE UPDATES

FEDERAL - Ninth Circuit

Appeals Court Lacks Jurisdiction to Review Orders Granting Amendment of Complaint that Destroys Diversity and Remanding to State Court

The plaintiffs filed a unpaid wages class action in Washington state court. The defendant removed to federal court. The plaintiffs then moved to amend the complaint by adding two individual defendants whose presence would destroy diversity. Judge Zilly granted the motion to amend and remanded to state court (as he was required to do once the amendment was granted). The defendants appealed, but the Ninth Circuit dismissed for lack of jurisdiction. Remand orders are not subject to appellate review (except in civil rights cases). The panel held that regardless of whether the grant of the amendment was a separable order, it was not reviewable as a final order nor so important as to justify appellate review under any exception to finality. *Stevens v. Brink's Home Security, Inc.*, No. 03-35217 (08/04/04; Thompson, Pregerson, Callahan).

Federal Court Lacks Jurisdiction Over Federal Employee's Employment Claims Subject to Union Negotiated Grievance Process

The employees in this case worked for the Federal Aviation Administration. They were represented by a union. Government regulations permit non-discriminatory drug testing of air traffic controllers. The plaintiff claimed he was singled out for unfair repeated testing and filed a charge with the Federal Labor Relations Authority (FLRA). The FLRA dismissed and told the employee to file a union grievance, which he failed to do. Instead, the employee sued in federal district court alleging violations of his federal constitutional and statutory rights. The district court dismissed for lack of jurisdiction and the Ninth Circuit affirmed. The court held that the FAA's own equivalent to the Civil Service Reform Act precluded a suit on these claims in federal court because they were subject to a negotiated union grievance and did not fall into the exception for discrimination actions. The decision creates a split in the circuits. The Federal and Eleventh Circuits have held that 1994 amendments to the Civil Service Reform Act eliminated the bar on federal court actions in these circumstances. *Whitman v. Dept. of Transp.*, No. 03-35303 (08/30/04; Wardlaw, Hall, Kleinfeld).

Employee Should be Permitted to Claim Multiyear Sexual Harassment Was One Unlawful Practice; Quid Pro Quo Harassment Not Limited to Formal Supervisors

The plaintiff in this case worked as a California corrections officer. Beginning in 1995, a superior officer repeatedly asked her out. She declined. When he persisted, she reported him. He began retaliating against her. After she reported the officer to her Guild, the Guild representative started sexually harassing her too. The Guild representative subsequently was

promoted to her superior. He then retaliated against her too. She later experienced additional sexual harassment. She eventually filed an internal harassment complaint and went to the EEOC in 1999. The district court dismissed her harassment claim on the basis that the harassment was not one single unlawful practice and the retaliation claim on the basis that too much time had elapsed between the protected activity and the retaliation. The Ninth Circuit reversed. Although the court took an overly broad approach to what acts are discrete and therefore not actionable under the continuing violation doctrine set forth in *Morgan*, it still concluded that a jury could find the plaintiff was subjected to one hostile work environment over several years. The court also ruled that the officer could state a *quid pro quo* claim against the Guild representative even though he was not in a position to retaliate at the time of the unlawful sexual proposition. Judge Tallman dissented from this portion of the opinion, and the majority's reasoning that it is enough that the Guild representative later became her supervisor is questionable. It would have been more accurate to view the "*quid pro quo*" conduct as supervisor retaliation for a prior refusal to submit. The entire panel agreed that an employer's deviation from its regular procedures is sufficient evidence of pretext to survive summary judgment. As for retaliation, all three judges agreed that a causal link between protected activity and an adverse action cannot be ruled out as a matter of law based on the passage of time alone. *Porter v. California Dep't of Corrections*, No. 02-16537 (09/10/04; Callahan, Schroeder, Tallman).

School District Liable for Actions of Superintendent of Schools Found to be Final Policymaker

The plaintiff, a kindergarten teacher in Nevada, won a First Amendment claim under section 1983 against her employer, a school district, for denying her access to the courts because it fired her in retaliation for a previous lawsuit she won against the district. The district's liability was based on misconduct and ratification of misconduct by its superintendent and ass't superintendent, who the district court found were final policy-makers for the purpose of municipal liability under *Monell v. Dep't of Soc. Servs. of New York*, 436 U.S. 658 (1978). The Ninth Circuit affirmed, finding that the school district had delegated its responsibility for "employment-related decisions, particularly employee discipline" to the superintendent and his delegee, so under Nevada law he was a final policy-maker even though the district's board of trustees could review his disciplinary decisions. The Court also approved the jury instruction given for ratification, requiring the plaintiff to prove that the policy makers approved "a subordinate's decision and the basis for it." The appellate court also affirmed the district court's reduction in attorney fees because the plaintiff, who was awarded $75,000 in damages, had not achieved an "excellent result" because she did not prevail on the majority of her claims and her attorneys failed to produce evidence of the prevailing market rate. *Lytle v. Carl*, No. 02-16244 (09/01/04; Alarcon, Beezer, Wm. Fletcher).

Academic Success Undermines Claim for Reasonable Accommodation for Reading Disability

The district court granted summary judgment against the plaintiff, who alleged that the University violated the ADA and the Rehab. Act by denying his request for learning disability (difficulty reading) accommodations and dismissing him for failure to meet the academic requirements of the medical school. The Ninth Circuit affirmed, holding that as "a person who has achieved considerable academic success [without special accommodations], beyond the attainment of most people or of the average person" the plaintiff could not, as a matter of law, demonstrate that he is "disabled" in his ability to learn under the Acts (i.e, show he is

substantially limited in major life activities). The dissent aptly noted the majority's ruling is a Catch 22 because to be admitted to school the student must meet minimum requirements that the court uses to establish that the student is not disabled. *Wong v. Regents of Univ. of Calif.*, No. 01-17432 (08/18/04; Beezer, Thomas, Clifton).

Summary Judgment Reversed Because First Amendment and Title VII Protects Public Employee's Refusal to Facilitate Unlawful Hiring Decision

Plaintiff, Annette Thomas, was a municipal court administrator who was placed on extended probation and then fired for refusing her supervisor's instruction to pass over an African-American subordinate employee for a promotion. The subordinate had successfully sued the city for retaliating against her when she complained that she had not been promoted to the same position because of her race. Thomas alleged that her supervisor told her not to promote the subordinate because of her prior lawsuit even though she was the best candidate. The court of appeals reversed summary judgment against the plaintiff on her First Amendment and Title VII retaliation claims finding that she raised genuine issues of material fact about whether her refusal to facilitate her supervisor's unlawful retaliatory conduct constituted expressive conduct on a matter of public concern and for engaging in protected activity. The Court affirmed dismissal of the plaintiff's Fourteenth Amendment and state law claims. *Thomas v. City of Beaverton*, No. 03-35120 (08/16/04; Goodwin, McKeown, Fisher).

WASHINGTON - Supreme Court

Collateral Estoppel Applies to PERC Hearings

The plaintiff's union filed an unfair labor practice with the Public Employment Relations Committee (PERC) alleging discrimination for union activities. PERC held a hearing and dismissed the union's complaint. The employee later filed a suit for wrongful termination in violation of public policy based on union activities. The Superior Court dismissed on the basis of collateral estoppel. The court of appeals reversed and the Supreme Court granted review. Writing for a majority of six, Justice Madsen found that collateral estoppel applied to the PERC's determination of the union's complaint. Justice Sanders' dissent is most notable for its paean to the right of trial by jury in Washington. Let's hope he gets two more votes in the arbitration cases. *Christensen v. Grant County Hosp. District No. 1.*, (No. 73772-0; 08/26/04).

WASHINGTON - Court of Appeals

Pilot Record Improvement Act Does Not Establish Policy Protecting Pilot From Termination for Failing to Reveal Overturned Discipline

The federal Pilot Records Improvement Act of 1996 requires an airline planning to hire a pilot to request and receive the pilot's work history. In this case, the pilot was terminated from Mesa Airlines for insubordination. He filed a grievance, and prevailed in an arbitration that overturned his dismissal. Mesa rescinded the termination and gave him full backpay. In applying for a new job at Alaska Airlines, the pilot said he had never been disciplined**.** The records Alaska received from Mesa did not show any disciplinary action. After the employee was hired by Alaska, Alaska heard through the grapevine about the prior incident at Mesa. Alaska then terminated him for knowingly withholding information related to his employment. Citing the Pilot Records Improvement Act, the pilot claimed he was wrongfully terminated for exercising his privilege under the Act not to disclose discipline that was overturned. The Superior Court granted Alaska's motion for summary judgment, and Division I affirmed. The court found that the Act did not create a privilege not to reveal discipline that had already been overturned in

response to a direct question about whether the pilot had ever been disciplined. The decision seems to be an unduly narrow interpretation of the policies animating the Act. *Boring v. Alaska Airlines Inc.*, No. 52687-0-I (09/12/04; Kennedy, Grosse, Appelwick).

Service Animals Must Be Specially Trained

A landlord refused the application of a prospective tenant, Candida Campbell (living with a current tenant) of a mobile home park. The tenant filed a Human Rights Commission complaint alleging the landlord denied her application because she had a "service animal," a dog named Spicey. Spicey received only typical pet owner on-the-job training from her, but she claimed that it "alerted" others to help her when she suffered disabling migraine headaches. Her neurologist submitted a letter stating that it was reasonable for dog to serve this purpose. A HRC ALJ ruled in the tenant's favor. Division II reversed, holding that under RCW 49.60.040(23), a service animal must be trained for the purpose of "assisting or accommodating" a disabled person and that "the ALJ's reasoning that Spicey's training consisted of getting what she wanted [-] attention from Candida [-] would make any family pet into a service animal." *Timberland Mobile Home Park v. Jacobsen*, No. 30913 (08/26/04; Armstrong, Bridgewater, Houghton).

Court Cannot Adjudicate Minister's Claims Against Church

This case involved a Presbyterian minister who alleged sex discrimination against her church and two ministers. She complained internally, but the Church did nothing. The minister originally filed her claims in federal district court, some of which were dismissed on First Amendment entanglement grounds. The plaintiff appealed the dismissal of those claims and the dismissal was subsequently reversed by the Ninth Circuit. The plaintiff had filed a second action in state court. The Superior Court granted summary judgment and Division I affirmed. The court held that an adjudication of the minister's claims would require it to re-examine decisions made by ecclesiastical bodies regarding the minister's complaints. This would violate the so called "ministerial exception" which insulates a church's freedom to choose its ministers or practice its beliefs." The Court of Appeals distinguished the Ninth Circuit's decision because the former was decided on a motion for judgment on the pleadings, while at summary judgment more evidence of entanglement with church doctrine was presented. The decision would seem to leave ministers without remedy for sexual harassment if they file an internal complaint against their supervisors (as at least federal law requires) but the Church hierarchy either ratifies the harassment or fails to take adequate remedial action. *Elvig v. Ackels*, No. 53764-4-I (09/27/04; Agid, Baker, Ellington).

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.

Congratulations to Marty Garfinkel for his procedural victory in *Stevens*.

Kathy Barnard and Jeff Needle wrote an amicus brief on behalf of the plaintiff in *Christensen.*

Judith Lonnquist represented the minister in the *Elvig* case

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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