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18 WEST MERCER ST. SUITE 400
SEATTLE, WA 98119-3971
www.welaweb.org

ALERT

Editors: Mike Subit / Jeffrey Needle

CASE UPDATES

FEDERAL – U.S. Supreme Court

High Court to Decide Who is a "Supervisor" Under Faragher/Ellerth.

The question in this case is whether a "supervisor" under *Faragher/Ellerth* is limited to those who have the power to hire, fire, promote, transfer or discipline or whether it also includes those employees who have the authority to direct and oversee the employee's daily work. The circuits are split 3-3.

Vance v. Ball State Univ. (cert. granted 6/25/2012) (arg. 11/26/2012)

FEDERAL - Ninth Circuit

Employee Need Not Prove an Intent to Deceive Separate from Showing Company Submitted Knowingly False Estimates in order to State a Claim under the False Claims Act.

The Government awarded to Lockheed a contract the objective of which was to "automate, standardize, and modernize software and hardware used to support our nation's space launch operations . . . at Vandenberg Air Force Base (Western Range) and Cape Kennedy (Eastern Range), while also providing continued support for and transition from legacy systems."

At the original contract competition, the Air Force issued to potential bidders a Request for Proposal ("RFP"). The Air Force concluded that the contract would be a cost-reimbursement contract because "uncertainties inherent in the requirements render attempts to establish a fixed-price unrealistic." One of the significant factors to be considered by the Government was cost. The Air Force "informed the offerors that it may select an offer that is not the lowest priced technically acceptable offer, but may instead select a higher priced offer that represented the 'Best Value' to the Government." Lockheed was awarded the contract even though it did not submit the lowest bid. One of the individuals who worked on the bid estimate testified that the inputs used to compute the final bid were based on "bad, bad guesses" but were not false.

The relator in this case was employed as a Senior Research Operations engineer. He alleges that Lockheed violated the False Claims Act ("FCA") by: (1) knowingly underbidding the contract; (2) including undisclosed freeware in software deliverables that did not convey all intellectual property rights; and (3) failing to perform all required tests or improperly conducting those tests. He also alleged wrongful termination. Hooper filed his *qui tam* suit in the District Court for the District of Maryland, which transferred the suit at Lockheed's request to the Central District of California on *forum non conveniens* grounds. The California district court granted summary judgment in favor of Lockheed on all grounds. The relator appealed, and the Ninth Circuit affirmed in part and reversed in part.

The district court had dismissed the wrongful termination claim because it applied the two year

statute of limitations in California - the jurisdiction to which the case was transferred. The Ninth Circuit ruled that the three year statute of limitations applicable in Maryland should have been used: "a transferee district court must apply the state statute of limitations that the transferor district court would have applied had the case not been transferred on forum non conveniens grounds pursuant to 28 U.S.C. § 1404(a)."

The Ninth Circuit also concluded that false estimates, defined to include fraudulent underbidding in which the bid is not what the defendant actually intends to charge, can be a source of liability under the FCA, assuming that the other elements of an FCA claim are met. Viewing the evidence in a light most favorable to Hooper, the Ninth Circuit ruled that there existed a question of fact about whether there existed sufficient evidence of fraudulent underbidding. The district court erred when it required an "intent to deceive."

The Ninth Circuit affirmed the dismissal of the relator's claim concerning the fraudulent use of freeware and defective testing procedures because the government knew of the testing procedures and that the freeware was being used. The Ninth Circuit acknowledged that "government knowledge is no longer an automatic bar to suit, [and as a result,] courts have had to decide case by case whether a FCA claim based on information in the government's possession can succeed." In this case, however, Lockheed submitted overwhelming evidence that it shared with the Air Force in its Disclosure Letters the use of freeware and also disclosed to the Air Force its testing procedures. Accordingly, Hooper failed to demonstrate the existence of a genuine issue of material fact whether Lockheed "knowingly" submitted a false claim.

Hooper v. Lockheed Martin Corporation, 688 F.3d 1037 (9th Cir. 8/2/2012) (Pregerson, Graber, Berzon)

Complaint Alleging Five Younger Employees Kept Their Jobs While Plaintiff Didn't States "Plausible" Case of Age Discrimination.

The plaintiff filed a complaint for federal age discrimination and wrongful discharge under Oregon law. The complaint alleged the facts forming a prima facie case of age discrimination, including the fact that five younger employees kept their jobs. The district court dismissed the complaint for failing to satisfy the pleading requirements of Fed. R. Civ. P. 8(a)(2) and *Twomby/Iqbal*. The Ninth Circuit reversed. The court adopted the Seventh Circuit's reasoning that "in many straightforward cases" *Iqbal* did not make it any harder for a plaintiff to plead a sufficient claim of discrimination. The Court also found the wrongful discharge allegations sufficient.

Sheppard v. David Evans & Assoc., No. 11-35164 (9th Cir. 9/12/12) (Pregerson, B. Fletcher, D. Walter (W.D. La)).

WASHINGTON - Supreme Court

Single Ambiguous Comment Sufficient for Jury to Find Hostile Work Environment on the Basis of Sexual Orientation.

Debra Loeffelholz worked at the University of Washington. From 2003-2006, her supervisor was James Lukehart. In 2003 he asked her if she was gay. After she replied that she was, he told her not to flaunt it. Over the next three years, Lukehart regularly discussed his hostility

towards other people and talked about getting revenge. He told her he had a gun. Lukehart also denied Loeffelholz training, evaluations and advancement. Soon before his deployment to Iraq in June 2006 he told the work-group he was "going to come back a very angry man." After Lukehart was deployed to Iraq, Loeffelholz learned that Lukehart had told people he disliked her because she was gay and overweight, and had tried to fire her.

Loeffelholz filed suit against UW and Lukehart in May 2009. The Superior Court dismissed her case on the basis that the 2006 amendments to the WLAD that included sexual orientation as a protected category were not retroactive. The Superior Court also found no acts of a hostile work environment based on sexual orientation had occurred in the three years before Loeffelholz filed suit. The Court of Appeals reversed on the basis that a jury could find that Lukehart's "very angry man" comment was based on hostility towards Loeffelholz's sexual orientation.

The Supreme Court unanimously affirmed in an opinion by Justice Owens. The Court held that retroactive application of the 2006 amendment to any pre-amendment conduct would violate due process. The Court held that a jury could consider Lukehart's pre-amendment conduct as background evidence to prove his discriminatory intent for any actionable post-amendment conduct. In contrast to the reasoning of the Court of Appeals, the Supreme Court held that Loeffelhelz could recover damages only for Lukehart's post-amendment conduct. Lukehart's only post-amendment conduct was the "very angry man" comment.

The Supreme Court held that while the relationship between that comment and Lukehart's earlier hostility is "tenuous," a jury could find the "very angry man comment" was specially directed to Loeffelhelz because of her sexual orientation and a natural extension of his prior animus towards her. The Court held that the "standard for linking discriminatory acts together in a hostile work environment is not high." Here that was met because Lukehart had anger management issues and kept a gun in his vehicle. The Court specifically distinguished *Crownover v. Dep't of Transp.*, 165 Wn. App. 131, 265 P.2d 971 (2011), on the grounds that there the only timely conduct was innocuous.

In a puzzling statement, the Court held that "the preamendment conduct establishes that the "angry man" comment could be severe enough, on its own, to alter the conditions of employment and establish a hostile work environment. We recognize that a single act of harassment is rarely enough to establish a prima facie claim, but this case presents a unique set of facts." But the Court then left open the possibility that the defendants might still be entitled to summary judgment on whether there was sufficient post-WLAD amendment conduct to create a hostile work environment on the basis of sexual orientation and whether the "very angry man" comment actually occurred pre- or post-amendment.

Loeffelholz v. University of Washington (9/13/12)

Court Must Award at least $500 per Plaintiff per Violation of Farm Labor Contractors Act.

In *Perez Farias*, the Plaintiff was a representative on behalf of 650 farm workers alleging violations of the Washington's Farm Labor Contractors Act (FLCA), RCW 19.30.110 *et seq*., and the federal Migrant and Seasonal Agricultural Worker Protection Act (AWPA). They brought suit against three growers and Global Horizons, a farm labor contractor. The

farm workers alleged that the growers learned that the contractor, Global, was not registered and are therefore jointly and severally liable for all damages. The trial court certified three subclasses.

The FLCA's civil remedies provision, RCW 19.30.170(2), states in pertinent part: "[I]f the court finds that the respondent has violated this chapter ... it may award damages up to and including an amount equal to the amount of actual damages, or statutory damages of five hundred dollars per plaintiff per violation, whichever is greater, or other equitable relief." The District Court found joint and several liability and originally awarded statutory damages of $500 per violation, which equaled $1,875,000.

In a motion to reconsider, the Defendants argued that the amount of damages, if any, was totally discretionary with the Court, and that the Court had discretion to award statutory damages from $0 "up to" $500 per violation. They argued that in this case the statutory damages of $500 per violation were wholly disproportionate to the harm that was done. In the alternative, the growers argued that $500 per statutory violation was a violation of due process of law. The Plaintiffs, who claimed no actual damages, argued that $500 was the statutory minimum and that the trial court has no discretion to reduce the amount awarded per violation.

The trial court agreed with the Growers and vacated that portion of the award imposing automatic statutory damages. The Court distinguished between what it considered "technical" and substantive violations and awarded statutory damages of $228,150. The workers appealed to the Ninth Circuit.

The Ninth Circuit certified three questions to the Washington State Supreme Court: (1) Does FLCA, and in particular RCW 19.30.170(2), provide that a court choosing to award statutory damages: (a) must award statutory damages of $500 per plaintiff per violation; or (b) has discretion to determine the appropriate amount to award in damages from among a range of amounts, up to and including statutory damages of $500 per plaintiff per violation? (2) If FLCA provides that a court, choosing to award statutory damages, must award statutory damages of $500 per plaintiff per violation, does that violate Washington's public policy or its constitutional guarantees of due process? (3) Does FLCA provide for awarding statutory damages to persons who have not been shown to have been "aggrieved" by a particular violation?

In response to the first question, the Court distinguished the Ninth Circuit's interpretation of the former federal Farm Labor Contractor Registration Act of 1963, 7 U.S.C. Sections 2041-2055, on the basis that the federal statute omits the critical language - "whichever is greater." In addition, the federal replacement statute differed from the state statute because the federal statute required an intentional violation, limits damages of multiple infractions of a single provision to only one violation for purposes of determining the amount of statutory damages, and because class action damages are capped under federal law.

The Supreme Court ruled that the workers' interpretation best reflected the statute's remedial purposes, and that the $500 of statutory damages was a floor and not a ceiling; "once the existence has been established, courts should review the quantity rather than the quality of violations to effectuate enforcement of the FLCA's requirements and deter future violations."

The Court declined to reach the federal constitutional issues concerning the due process standard for excessive statutory damages, and the standing of "aggrieved" persons within the meaning of the state statute.

Perez-Farias v. Global Horizons (9/27/2012)

WASHINGTON – Court of Appeals

Employee Manual Containing General Statements and Allowing Employer Complete Discretion in Discipline Does Not Constitute Promise of Specific Treatment

Plaintiff was demoted from management, and alleged wrongful demotion in violation of an implied contract and the violation of specific promises concerning investigations and the discipline of employees. The trial court granted summary judgment, and the Plaintiff appealed. The Court of Appeals affirmed.

Prior to his demotion, Plaintiff had not been subject to any disciplinary action. He came under suspicion of improperly using his influence to get his second cousin and his nephew hired at Boeing in violation of company rules. The lead investigator interviewed seven employees involved in the hiring or placement of the two relatives. The investigator also interviewed Quedado. The investigator reported that Quedado had improperly used his influence to obtain positions for his relatives, and when questioned he was not forthcoming about his family relationships.

The Court of Appeals reaffirmed the familiar employee at will doctrine, subject to an exception that an employer's employment policies and procedures can alter the employment at-will relationship and form either a binding implied employment contract or create enforceable promises regarding terms of employment.

The Court acknowledged that an employer can create an implied contract with an offer of new or different terms of employment; acceptance; and consideration. An implied contract can be created from a policy manual which was explained to the employee, who signed the policy, agreed to be bound, and continued to work for the employer. A so called handbook claim (equitable reliance) can be established by proof that (1) that a statement (or statements) in an employee manual or handbook or similar document amounts to a promise of specific treatment in specific situations, (2) that the employee justifiably relied on the promise, and (3) that the promise was breached. General statements of company policy are insufficient for either claim. A conspicuous disclaimer in the manual defeats either claim.

In this case, the Court found that the Boeing code relied upon by the Plaintiff made no "offer" of new employment terms or entitlements. Nor does it extend any specific promises as to how employees will be treated in specific situations. Language which merely states that it will conduct its business fairly, impartially, and in full compliance with all rules and regulations is only a general and unenforceable promise. Statements promising progressive discipline are likewise unenforceable where they are qualified with language allowing management to take disciplinary action without prior warning for conduct which it considers extreme and serious: "Where an employment manual gives the employer discretion in applying the discipline procedures, 'courts have held as a matter of law that the manual does not provide a promise of specific treatment in a specific circumstance.'"

The same rule applied to Boeing's statements concerning how investigations would be conducted.

The Court acknowledged that disclaimers in a handbook or manual may be negated by later, inconsistent representations by the employer, but found no such result in this case. "Examples . . . of subsequent representations by an employer that could negate a disclaimer included employment manuals that provided 'exclusive lists of reasons for discharge'; a 'listing of detailed procedures and specific grounds for discharge'; and 'detailed disciplinary policies, including descriptions of certain conduct for which termination would be immediate and other circumstances in which warnings would be provided before discharge.'"

Quedado v. The Boeing Company, 168 Wn. App. 363, 276 P.3d 365 (5/14/2012). (Div. I Becker, Spearman, Lau).

Employee Who Conducts Individual Sales Is Not Exempt; Fluctuating Workweek Unavailable to Employer Where Employee was Paid Salary as Exempt Employee

Plaintiff Fiore was employed by PPG as a Territory Manager, where he was responsible for servicing 11 of Loewe's home improvement retail stores. PPG required him to visit two stores a day, for four hours a day, and to visit each store at least three times per month. He spent many hours driving to and from his 11 stores but was not paid for his driving time. He was also required to review and respond to e-mail messages and voice mails from management, but was not paid for his time. He was compensated on a salary basis.

Following Fiore's termination he filed a filed a complaint in Superior Court seeking less than $50,000. PPG removed the case to federal court on the basis that attorneys' fees could be over $400,000. Fiore responded by arguing that the total award including attorneys' fees in typical small wage cases are less than $75,000. The district court remanded the case.

After remand PPG transferred the case to arbitration. PPG prevailed and Fiore sought trial de novo. Both sides filed motions for summary judgment. The Superior Court granted summary judgment to Fiore holding he was not an administratively exempt employee. It also held the fluctuating workweek doctrine did not apply. The Superior Court initially denied summary judgment on the willfulness of the withholding on the basis of factual disputes. The parties stipulated that the Superior Court should resolve the willfulness issue, which it did in Fiore's favor. The total damages awarded, after doubling, was $24,406.20. The Superior Court awarded Fiore's counsel $600,000 in attorneys' fees including a .25 multiplier. PPG appealed.

The Court of Appeals affirmed on all issues except for attorneys' fees. The court agreed that PPG could not show that Fiore's primary duty was administrative. Fiore spent the majority of time performing manual labor and making individual sales to customers at the Lowe's stores to which he was assigned. PPG considered him a member of the National Field Sales Team. The duties of a Territory Manager were largely selling. He had no involvement in PPG's advertising or promotional campaigns. Territory managers could not change prices, sign documents or formulate procedures.

The Court of Appeals rejected the argument that Fiore promoted sales within the meaning of the administrative exemption. Fiore's job wasn't to promote sales generally but rather to make particular sales transactions to individual customers. He didn't perform work requiring the

exercise of discretion and independent judgment. It wasn't enough that Fiore's interactions with customers or Loewe's employees weren't scripted for him. He couldn't vary the set promotional materials. Therefore, he did not perform non-manual field work directly related to the operations or management policies of the business.

Relying on Judge Leighton's decision in *Monahan v. Emerald Performance Materials LLC,* 705 F. Supp. 2d 1206 (W.D. Wash. 2010), the Court of Appeals held that the fluctuating workweek doctrine is not available to the employer where, as here, the employer didn't pay overtime contemporaneously with the work performed and there was no clear mutual understanding in advance that overtime would be paid.

The Court of Appeals rejected PPG's argument that an employee must show that the employer did not have a genuine belief it had properly classified him as exempt in order to obtain double damages. PPG management had participated in meetings where the propriety of Fiore's classification was discussed. The Company refused to introduce the facts it had provided to legal counsel for an opinion whether Fiore was exempt. The court noted that the "Territory Managers" position used to be called "Retail Sales Representative, and indicated an intentional effort to evade the duty to pay overtime.

PPG argued that Fiore should be estopped from claiming more than $75,000 based on his represented to the federal district court. The Court of Appeals disagreed. PPG had turned the case from a typical low-wage case to a "test case" for PPG territory managers throughout the country. These changed circumstances were enough to avoid judicial estoppel.

The Court of Appeals upheld the Superior Court's calculation of the lodestar. The court also rejected PPG's argument that the amount the attorneys' fees were disproportionate to the amount recovered. The Court of Appeals held that the Superior Court properly included the hours Fiore spent in a losing effort in arbitration and litigating the protective order and motion to remand. The Court of Appeals agreed it was proper for the Superior Court to make an adverse inference from PPG's refusal to provide information on how much time its attorneys had spent litigating the case, even as PPG claimed the time Fiore spent was excessive.

The Court of Appeals held that the Superior Court had erred in awarding a .25 multiplier. The Court of Appeals held that the case was not high-risk and did not require novel theories. It was at bottom a straightforward wage claim. The lodestar award properly compensation Fiore's attorneys for the amount of time PPG required them to spend on it.

The Court of Appeals held it was legal error for the Superior Court to have awarded a multiplier based on the risk created by the RCW requiring a party that does not improve at trial its position from arbitration to pay the other party's fees and costs. The court held that the risk resulted from a legislative policy preference of discouraging appeals from arbitration decisions so awarding a multiplier in this circumstance incentivized something the legislature has sought to discourage.

Fiore v. PPG Indus. Inc., 169 Wn. App. 325, 279 P.2d 972 (Div. I 7/2/2012) (Dwyer, Appelwick, Lau).

Whether Audit Associates are Professionally Exempt Must Include Consideration of Education, Experience, and Actual Worked Performed.

KPMG employs entry-level audit associates. A person must have a college degree with an accounting concentration to qualify for this position. KPMG paid its audit associates on a salary basis with no overtime. The plaintiff filed a class-action lawsuit asserting that unlicensed accountants were entitled not exempt professional employees and were entitled to overtime. The Superior Court certified a class of 200. The Superior Court (Judge Gonzalez) ruled that whether audit associates were exempt professionals depended on whether they had a bachelor's degree with a minimum number of accounting hours and 2,000 hours of work experience, what is required for certification under the regulations interpreting the Public Accountancy Act ("PAA").

The parties stipulated to certification of issues to the Supreme Court. The Supreme Court transferred the case to Division One, which affirmed in part and reversed in part. The court of appeals looked to the Department of Labor & Industries Professional Exemption Policy for guidance on whether the employees were exempt. The policy allows accountants who do not hold a public accountancy license to qualify as exempt if they perform work that requires the consistent exercise of discretion and judgment and otherwise meet the test for professional employee.

Division I held that the trial court erred by ruling that KPMG must pay overtime to audit employees who do not meet the education and experience requirements of the PAA because that bright line rule was inconsistent with the Professional Exemption Policy. The court of appeals held that the PAA was not intended as a guide to the definition of "professional employee" under the MWA. The court of appeals held that the PAA lists the requirements to be a "licensed accountant" not a "professional accountant." Therefore, employees who do not meet the PAA requirements may or may not be entitled to overtime, depending on what duties they actually perform.

Litchfield v. KPMG, No. 65372-5 (Div. I 9/4/12) (Leach, Lau, Schindler)

Washington Does Not Recognize Claim for Failure to Accommodate Religious Belief; Plaintiff Must Prove Constructive Discharge Under the WLAD?

The Plaintiff had strongly held religious beliefs. She overheard the Superintendent of the school district, to whom she reported, make disparaging comments about an independent contractor with whom she worked. In response to his direct questions, she relayed that information to the contractor. The Superintendent confronted the Plaintiff about the information she relayed to the contractor, and insisted that Plaintiff divulge what she told him. The Superintendent insisted that Plaintiff tell the contractor that the information she had previously told was untrue. The Plaintiff refused because that would require her to tell a lie which would be a violation of her religious beliefs.

Thereafter the Superintendent held a meeting with Plaintiff and another employee concerning an upcoming school project. She explicitly instructed the Plaintiff not to discuss the substance of the meeting with the independent contractor or whether that the meeting even had occurred. According to Plaintiff, the

Superintendent did not merely tell her to maintain a confidence, instead she expressly and repeatedly directed her to lie.

Thereafter, the working environment because extremely difficult and allegedly hostile. The Plaintiff took a leave of absence because of the hostile environment created by the Superintendent. She never returned from the leave and resigned.

The Plaintiff brought suit alleging religious discrimination, failure to accommodate her religious beliefs, and retaliation under the WLAD. The School District's motion for summary judgment was granted for failure to state a prima facie case under all theories. The Plaintiff appealed.

The Court of Appeals affirmed. The Court ruled that Washington State has not yet recognized a claim for failure to accommodate based upon religious beliefs. The Court distinguished *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 837 P.2d 618 (1992), relied upon by the Plaintiff. The Court explained that *Hiatt* addressed a religious discrimination claim based upon failure to accommodate, and not separate claims of religious discrimination and failure to accommodate, as argued by the Plaintiff. The Court further explained that "the *Hiatt* opinion recognized such claims *only* under federal law." Emphasis original. The Court declined to interpret the WLAD to include a failure to accommodate claim based upon religious beliefs.

In reference to the retaliation claim, the Plaintiff argued that she was constructively discharged. The Court rejected this argument. The Court applied the *McDonnell Douglas* shifting burden model. The Court assumed, without deciding, that the Plaintiff was engaged in protected activity. It ruled, however, that Plaintiff failed to establish a prima facie case because she failed to prove constructive discharge. "To establish constructive discharge an employee must show 1) a deliberate act by the employer that made her working conditions so intolerable that a reasonable person in her shoes would have felt compelled to resign and 2) that she resigned because of her working conditions and not for some other reason." Viewing the facts in a light most favorable to Plaintiff, the Court concluded that Plaintiff failed to meet this standard.

Plaintiff did not argue that the WLAD only requires "proximate cause" and not constructive discharge. *See Martini v. Boeing Co.*, 137 Wn.2d 357, 971 P. 2d 45 (1999) ("Prohibiting an award of back or front pay for wrongful discrimination absent a successful constructive discharge claim would not further the policy behind Washington's law against discrimination").

Short v. Battle Ground School District., 169 Wn. App. 188, 279 P.3d 902 (Div. II 6/26/2012) (Hunt, Worswick, Quinn-Brintnall).

Victories & Defeats

Jeff Needle and Joe Shaeffer authored WELA's amicus brief in *Perez-Farias.*

Steve Strong represents the class in *Litchfield.*

Patrick Leo McGuigan represents the employee in *Fiore.*

Judith Lonnquist represents the employee in *Short.*

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WELA *ALERT* EDITORS

Michael C. Subit (206) 682-6711
msubit@frankfreed.com

Jeffrey Needle (206) 447-1560
jneedlel@wolfenet.com

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Programs & Social Events Co-Chair

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CLE Co-Chair tavlaw@qwest.net

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Communications Chair djohnson@bjtlegal.com

Hardeep S. Rekhi (206) 388-5887
hsrekhi@rekhilawfirm.com