WELA *ALERT*

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WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION
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CASE UPDATES

FEDERAL – U.S. Supreme Court

City Can Terminate Police Officer for Off-Duty Selling of Pornography of Himself In Uniform

The San Diego officer involved decided to make a little extra money by selling on the internet a video of himself masturbating while wearing a police uniform. Although the police uniform was not his Department's, his internet user profile identified him as a police officer. When the Department found out, it fired him. The district court granted summary judgment to the City, the Ninth Circuit reversed. It concluded the officer was terminated for constitutionally protected activity outside of work. A unanimous Supreme Court saw it differently and reversed in a per curiam opinion. The Supreme Court found it particularly significant that the officer had linked his activities with police work and were designed to exploit that image. The Supreme Court then ruled that his work-related speech activities were not directed towards an issue of public concern, so they lacked any First Amendment protection. The Court concluded that "this is not a close case." *San Diego v. Roe*, No. 03-1669 (12/06/04).

Contingency Agreement Attorney Fees Paid in Settlement Are Taxable as Gross Income of the Client Regardless of State Law

Employees in two consolidated cases from the Sixth and Ninth Circuits settled discrimination lawsuits for substantial damages and payment of their attorney fees in accordance with contingent fee agreements. The IRS took the position that the attorneys' fees paid were taxable to the clients as "gross income," which because of the alternative minimum tax would be quite significant. Both courts of appeals rejected the IRS argument. A unanimous U.S. Supreme Court reversed (8-0), holding that the fee agreements amount to an anticipatory assignment to the attorney of a portion of the clients' income from any litigation recovery. In litigation recovery, the income-generating asset is the legal claim. The plaintiff retains dominion over this asset throughout the litigation; the relationship with the attorney is quintessential principal-agent so "it is appropriate to treat the full recovery amount as income to the principal." This is true "regardless of whether the attorney-client contract or state law confers any special rights or protections on the attorney, so long as such protections do not alter the relationship's fundamental principal-agent character." The Court declined to address the contention that the anticipatory assignment principle is inconsistent with the purpose of statutory fee-shifting provisions, such as 42 U.S.C. § 1988, because the attorneys' fees were calculated based solely on the contingent-fee contract pursuant to settlement. Importantly, the Court noted that "the American Jobs Creation Act redresses the concern for many, perhaps most, claims governed by fee-shifting statutes." Likewise, the Court did not consider other tax theories raised for the first time on appeal including that the contract establishes a Subchapter K partnership or that the fees are deductible as a capital or

business expense. *Comm'r of IRS v. Banks*, Nos. 03-892 and 03-907 (J. Kennedy; C.J. Rehnquist not participating; 01/24/05).

FEDERAL – Ninth Circuit

Casino Policy Requiring Female Employees to Wear Make-Up, Nail-Polish, and "Styled Hair" is Not Unlawful Sex Discrimination

The plaintiff in this case worked as a bartender at Harrah's Casino in Las Vegas for 20 years. By all accounts, she was a great employee. In 2000, Harrah's instituted a policy requiring its female employees to wear make-up and colored nail polish, and prohibiting male employees from doing the same. The policy also required short hair for men and styled, loose hair for women. After the plaintiff refused to comply with the policy, she was terminated. She sued for sex discrimination. The district court granted summary judgment to the casino and the Ninth Circuit affirmed 2-1. Judge Tashima concluded that the different standards for men and women did not impose an unequal burden on the sexes, and did not amount to unlawful sex stereotyping in violation of *Price-Waterhouse v. Hopkins*. (Apparently the judges in the majority had not noticed that there is a reason that women often take longer to get ready than men.) In a very persuasive dissent, Judge Thomas concluded that Harrah's policy both imposed added daily burden on women and was founded on the outmoded stereotype that women in the workplace should be viewed as sex objects. *Jesperson v. Harrah's Operating Co.*, No. 03-15045 (Tashima, Silverman, Thomas; 12/28/04).

Veterinarians Are Exempt Professionals Under the FLSA

Under the FLSA, certain professionals are exempt from overtime if paid on a salary basis and doctors and lawyers are exempt even if they are not paid on a salary basis. The plaintiffs in this case, licensed veterinarians, often worked shifts of 12 or more hours at a time. They were paid by multiplying the numbers of shifts worked by a set rate, so they were not paid on a salary basis. Generally, this would make an employee non-exempt. Although exemptions from overtime are narrowly construed, the district court and the appellate court had little trouble concluding that veterinarians are exempt doctors under the FLSA. *Clark v. United Emergency Animal Clinic*, No. 03-15267 (Rymer, Canby, Hawkins; 12/07/04).

Circuit City's Arbitration Agreement Unconscionable Under Washington Law

In several prior decisions, the Ninth Circuit had held that Circuit City's arbitration agreement, at least in the form in which it existed in the late 1990s, was unconscionable under California law. Circuit City's arbitration agreement lacked bilaterality, limited statutory remedies, reduced the statute of limitations, required the proceedings to be secret, prohibited class actions and gave Circuit City the right to change the arbitration procedures at any time. In the wake of these decisions, Circuit City had retroactively eliminated most of the unconscionable features. The Ninth Circuit had already ruled that this could not save the agreement under California law. This case raised the question whether Washington's law of unconscionability would lead to the same result. The case had a particularly tortured procedural history. The employee originally filed suit in 1998. Circuit City moved to compel arbitration, which the district court denied on the basis of *Duffeld* and federal law. The Ninth Circuit originally affirmed. The U.S. Supreme Court granted certiorari and remanded to the Ninth Circuit in light of *Adams v. Circuit City*. The Ninth Circuit then heard argument, vacated the district court's decision, and remanded for consideration of state law unconscionability. Judge Pechman ruled the agreement was substantively unconscionable and the Ninth Circuit affirmed in the instant opinion. The majority concluded that the recently decided *Adler* and *Zuver* cases (see below) were essentially consistent with Ninth

Circuit precedent on substantive unconscionability. In dissent, Judge Bea would have certified the issue to the Washington Supreme Court. *Al-Safin v. Circuit City Stores*, No. 035297 (Tashima, Paez, Bea; 01/14/05).

WASHINGTON – Supreme Court

Washington Adopts U.S. Supreme Court's Decision in Morgan for Continuing Violations

The plaintiff in this case began working for King County Corrections in 1983. From 1985-1996, she was repeatedly subjected to sexual harassment. She suffered additional sexual harassment beginning in 1997. In 2000, she filed a lawsuit. The County moved to dismiss all allegations prior to three years before filing. The trial court agreed, but division one reversed, and adopted the U.S. Supreme Court's analysis in *Nat'l RR Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed.2d 106 (2002), which treated hostile work environment as one continuing violation. The Washington Supreme Court accepted review, affirmed, and adopted *Morgan* into Washington law for employment cases. As a result, except in pattern and practice cases, a disparate treatment claim under the WLAD cannot be based on acts occurring more than three years before filing. In hostile work environment cases, as long as one act contributing to the environment occurred within three years of filing, the entire course of conduct will be actionable, regardless of whether the plaintiff knew of her injuries earlier. Writing for a unanimous court, Justice Madsen ruled that the one-year gap in harassment did not necessarily mean there was not a single unlawful employment practice. *Antonius v. King County*, No. 74759-8 (12/23/04).

A Pre-Dispute Employment Arbitration Agreement is a Waiver of the Right to Trial by Jury and Must be Knowing, Intelligent and Voluntary to be Valid; Even if a Waiver is Valid, Harsh Provisions Are Unconscionable But May be Severable

Justice Bridge issued the majority opinions in two companion cases deciding the enforceability of pre-dispute employment arbitration agreements to claims under the WLAD. Plaintiff Zuver alleged disability discrimination and failure to reasonably accommodate. Plaintiff Adler alleged disability, age, and national origin discrimination and other claims including common law torts. Both appealed orders compelling them to arbitrate their discrimination claims against their respective employers. They argued that various provisions in the arbitration agreements were procedurally *and* substantively unconscionable rendering them unenforceable. Adler also argued that the arbitration agreement was not a valid waiver of the state constitutional right to trial by jury

In *Zuver*, a 7-2 ruling, the Court held that provisions of the agreement requiring confidentiality and limiting plaintiff's remedies so as to prohibit punitive or exemplary damages are substantively unconscionable. However, applying a severability clause in the contract, the Court found the remainder of the agreement enforceable, including a true "prevailing party" fee provision so long as the arbitrator follows discrimination law on the issue. It concluded that because there were "only two" unconscionable provisions, that unfairness did not "pervade" the agreement. The Court rejected Zuver=s procedural unconscion-ability arguments based solely on the parties' unequal bargaining power and the adhesionary nature of the agreement. In explanation, the Court stated: "At minimum, an employee who asserts an arbitration agreement is procedurally unsconscionable must show some evidence that the employer refused to respond to her questions or concerns, placed undue pressure on her to sign the agreement without providing her with a reasonable opportunity to consider its terms, and/or that the terms of the agreement were set forth in such a way that an average person could

not understand them." Justice Madsen, joined by Justice Johnson, dissented on the ground that the provision limiting remedies is not invalid because the majority=s analysis is based upon a lack of mutuality which is not a valid basis for finding unconscionability.

In *Adler*, an 8-1 ruling, the Court held substantively unconscionable provisions depriving an employee of prevailing party fee-shifting pursuant to RCW 49.60.030(2) and imposing a 180-day statute of limitations on all claims. The Court remanded for a factual determination of whether arbitration fee-splitting provision is prohibitively expensive as to Adler rendering it substantively unconscionable.

On remand, the trial court is also instructed to determine whether the agreement is procedurally unconscionable and whether Adler knowingly, intelligently and voluntarily waived his right to a jury trial. The Court declined to decide whether procedural unconscionability alone is sufficient to render a contract void. However, the Court explained: "On remand, if the trial court concludes that Fred Lind Manor's representative threatened to fire him if he refused to sign the agreement despite the fact he raised concerns with its terms or indicated a lack of understanding, then the evidence here would not support Fred Lind Manor's claim that Adler knowingly and voluntarily agreed to arbitration, and thus implicitly waived his right to a jury trial." Although the Court did not address the issue, Adler likely bears the burden of proving procedural unconscionability whereas his employer would have the presumably greater burden of establishing valid waiver of his state constitutional right to a jury trial. In a concurrence, Justice Madsen remarked that "an employee's disagreement with the terms of an arbitration agreement entered into upon employment or continued employment will be sufficient to invalidate the agreement." *Zuver v. Airtouch Comms., Inc.*, No. 74156-5 (Bridge; 12/23/04); *Adler v. Fred Lind Manor*, No. 74701-6 (Bridge; 12/23/04).

WASHINGTON – Court of Appeals

Tax Consequences Awarded for Emotional Distress Damages; Denial of Fee Multiplier for Risk Was Abuse of Discretion

Two employees obtained a $550,000 jury verdict for WLAD race/national origin discrimination claims. The trial court then awarded $168,000 for the increased tax liability resulting from the lump sum payment of lost wages. On appeal, Division I remanded for the trial court to award additional supplemental damages for the tax consequences of the emotional damages of $120,000 awarded to the plaintiffs. Holding that "an award [of emotional damages] is not a gain for the plaintiff; it substitutes for the sense of well-being that the plaintiff lost as a result of being discriminated against," the court found no material distinction for tax purposes between emotional damages and lost wages, for which the Washington Supreme Court ordered tax consequences be paid in *Blaney v. Internat'l Ass'n of Machinists and Aerospace Workers*, 151 Wn.2d 203 (2004). After deducting $50,000 in attorney fees for work related to unsuccessful efforts during the litigation (*e.g.*, cross summary judgment motion and request for injunctive relief), the trial court had awarded $297,532.77 in attorney fees. Reversing, the Court of Appeals noted: "the trial court improperly focused on the short term failure of certain components of the litigation, when the focus should have been on the long term success of the litigation as a whole." Similarly, the appeals court reversed the trial court=s denial of a request for a 2.0 multiplier for risk in the litigation on the ground that the risk was due to the plaintiffs' inability to articulate their own claims and the paucity of proof: "The law against discrimination is not intended to protect only the articulate" and "the 'paucity' of evidence known to the plaintiffs at the outset of the case is a common feature of disparate treatment litigation." *Van Pham v. City of Seattle*, No. 52356-2-I (Becker, Coleman, Appelwick; 12/20/04).

Request for Supplemental Award for Tax Consequences Need not be Specifically Pleaded or Filed within Ten Days of Entry of Judgment

Two female plaintiffs prevailed in a sex discrimination and sexual harassment suit against their employer, Outback Steakhouse, obtaining general damages of $75,000 each and back awards of $50,000 and $1,570.80 respectively. In a supplemental judgment, Plaintiffs' counsel was awarded $271,230 in attorney fees and $36,420.28 as the prevailing party under WLAD and Title VII. After permitting relevant discovery and hearing the testimony of Plaintiffs' CPA expert, the trial court awarded a second supplemental judgment of $192,549.82 for the adverse tax consequences to Plaintiffs. Finding that an offset for tax liability resulting from a discrimination award is an equitable remedy, the Court of Appeals held that such relief need not be specifically pleaded under CR 9(g) and did not violate the Defendant's due process or right to a jury trial. Analogizing the request for the supplement award to cover tax liability to a petition for attorney fees, the appellate court ruled that it is not a motion to alter or amend the judgment and need not be filed within ten days of entry of judgment. *Hirata v. Evergreen State Ltd. Partnership*, No. 52481-I (Schindler, Grosse, Cox; 12/13/04).

VICTORIES AND DEFEATS

Please let us know what happens in your cases, good and bad, so we can all benefit.

Andrea Brenneke and Mike Subit wrote an amicus brief on behalf of the plaintiff in *Antonius* urging the adoption of *Morgan* hostile work environment cases brought under the WLAD.

Mike Subit represented the employee in *Al-Safin*.

Jeff Needle and Jessie Wing wrote an amicus brief on behalf of the plaintiffs in *Zuver* and *Adler* urging the Court to adopt strict standards for enforceability of pre-dispute, mandatory arbitration agreements.

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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