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ALERT

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CASE UPDATES

Ninth Circuit

Prevailing Market Rate, Not Individual Contact, Provides the Standard for Loadstar Calculation of Attorney Fees

After the plaintiff prevailed on a sex discrimination claim against the Billings, Montana, Police Department in administrative proceedings, she filed a related section 1983 claim which the parties settled except for attorney fees. The trial court denied plaintiff's request for fees on the ground that she was not a "prevailing party," but the Ninth Circuit reversed. On remand, the trial court awarded $85,992 out the $122,857 in fees requested. The plaintiff appealed. The Ninth Circuit affirmed holding that while the plaintiff's counsel submitted his own affidavit and affidavits of five colleagues establishing his rate and that he was deserving of his rate, he "submitted no evidence of what the 'prevailing market rate' in Montana was." Since the defense submitted uncontradicted affidavits of the "prevailing" rate in the community, the trial court did not abuse its discretion in accepting such evidence. The dissent argued that the trial court did not explain why the plaintiff's counsel's evidence was insufficient to establish that his rate was prevailing given his skill and expertise. *Carson v. Billings Police Dep't*, No. 04-35438 (12/7/06, Kleinfeld, Graber, Rafeedie of C.D. Cal. Sitting by designation).

State Administrative Audit is a Source of Public Disclosure Precluding *Qui Tam*

Charlotte Bly-Magree filed a *qui tam* action under the False Claims Act, 31 U.S.C. § 3729, against the California Department of Rehabilitation (CDR) for defrauding the federal government. The trial court dismissed her action on the ground that she was not the original source of the allegations, which is a jurisdictional requirement, but that instead they were publicly disclosed by a state agency in a published audit report. In a case of first impression, the court agreed, holding that "an administrative report, audit, or investigation prepared by a state entity (as opposed to the federal government) qualifies as a source of public disclosure" precluding a private party from subsequently filing a *qui tam* action as the original source. *Bly-Magee v. Premo*, No. 05-55556 (12/13/06, Canby, Noonan, Berzon).

ADA Does Not Permit Individual Liability

Falling in line with every circuit to have addressed the issue, the Ninth Circuit has ruled the ADA does not provide for individual liability. The Ninth Circuit had previously ruled that there is no individual liability under Title VII. The employee at issue in this case could not sue her former employer directly under the ADA because it was a state agency. State agencies have 11th Amendment immunity for suits for monetary damages under the ADA. An employee can plead for injunctive relief but in this case the employee did not have standing to request the injunctive relief since she was no longer a current employee. *Walsh v. Nevada Dept. of Human Resources*, No. 04-17440 (12/18/06; Noonan; Cox (11th Cir); Paez).

Where Crux of Complaint is that Party Seeks Invalidation Only of Arbitration Clause in Franchise Agreement, Court Rather than Arbitrator Must Decide Issue

In this non-employment case, the Ninth Circuit en banc reversed a prior panel ruling that the validity of the arbitration agreement at issue was for the arbitrator. Applying California law, the en banc court held that because the plaintiff

essentially sought to enforce rather than invalidate the franchise agreement she had signed containing an arbitration clause, her claim was that only the arbitration provision was unconscionable, rather than the contract as whole. The underlying claim had a tortured procedural history. The plaintiff sued the company for breach of her franchise agreement. The company filed for AAA arbitration claiming that she owned it money instead. After a time, the plaintiff refused to participate and filed suit in state court claiming, among other things, that the arbitration clause was invalid. The company removed on the basis of diversity and moved to compel arbitration. The district court granted the motion and the plaintiff appealed. The court en banc reversed by an 8-3 vote. The court ruled that it made no difference that state law required consideration of the making of the entire contract as part of a ruling on the validity of the arbitration clause or that the plaintiff included alternative claims attacking the contract as a whole. The majority also ruled that the plaintiff's limited participation in the arbitration proceedings under protest did not amount to a waiver of her right to challenge the arbitration provision in court. On the merits, the en banc court ruled 7-4 that the arbitration agreement was both procedurally and substantively unconscionable. The majority looked to differences in bargaining positions between the parties, the fact that the clause was in a contract of adhesion, was unilateral with respect to provisional injunctive remedies, and had a burdensome forum selection clause. The majority refused to sever the unconscionable provisions and invalidated the arbitration clause in its entirety. *Nagrampa v. Mail Corps, Inc.*, No. 03-15955 (12/4/06).

Washington Supreme Court

Tribal Immunity Extends to All Tribal Corporations Absent Waiver and Abrogation

The Confederated Tribes of the Colville Reservation is a sovereign tribe recognized by the U.S. government. The tribe created some business entities which hired plaintiff Christopher Wright, a non-Indian, as a pipe layer and equipment operator. Wright, who worked off-reservation on a project for the U.S. Navy, alleged race discrimination and state common law torts against his employers and supervisor. The trial court dismissed for lack of subject matter jurisdiction. The Court of Appeals reversed and held that sovereign immunity does not protect the tribal employer. Reversing, the Supreme Court held that the entities created by the tribe under its own law and which distribute funds to the tribe are entitled to immunity because the tribe has not explicitly waived immunity and Congress has not abrogated it. Likewise, the immunity extends to Wright's supervisor in his official but not individual capacity. The concurrence contended that the plurality ignored relevant factors to determine that the tribal entities act as entities of the tribe, such as the purpose the entity was created, and argued that the plurality did not have the authority to establish its bright-line rule, a matter of federal law. The dissent asserted that numerous factual disputes made it inappropriate to decide on a motion to dismiss whether the tribal entities were entitled to immunity. *Wright v. Colville Tribal Enter. Corp.*, No. 03-2-00850-2 (12/7/06, Sanders for the plurality; Madsen concurring joined by Fairhurst; C. Johnson for the dissent joined by Chambers and J. Johnson).

Washington Court of Appeals

City May Have Payroll System that Delays Payment for Some Wages Earned Less than 14 Days Before Current Semi-Monthly Paycheck Until Next Pay Period

In this class action, Kent police officers challenged the City's payroll system for overtime and irregular pay. The City paid normal wages to the employees in the next paycheck with a maximum delay of 5 days. Overtime and other irregular pay earned 14 days or less before the employee's next pay check was not paid until the following pay period. The employees claimed the City's practices violated WAC 128-035. The Superior Court granted summary judgment to the employees, but Division 1 reversed. The

regulation appears to allow only the deferral to the following pay period of wages earned 7 days or less before the employee's next paycheck. Division 1 read the authorization for an employer to defer wages up to 7 days before the next paycheck as something other than a prohibition on deferring wages earned more than 7 days before the next pay check. The court read the limitation as applying to only monthly rather than semi-monthly pay systems. *Clark v. Kent,* No. 57359-4 (1/16/07; Cox, Ellington, Grosse).

Coffee Delivery Drivers are Not Exempt Outside Salespersons; Not Abuse of Discretion to Award Attorneys' Fees at Historical Rather than Current Rates in Unpaid Wage Cases

Farmer Brothers manufactures, sells and delivers coffee products to customers. Route sales representatives deliver the coffee to regular customers. The representatives are also told to try to increase their customers' purchase needs and find new customers, but spend no more than 20% of their time on these activities. The route sales representatives receive no overtime. They filed a class action for overtime under the Washington Minimum Wage Act. The superior court granted summary judgment to the employees and Division 1 affirmed. The court agreed that the route sales representatives were more appropriately viewed as non-exempt coffee delivery drivers rather than as exempt outside salespersons. The court rejected the employer's argument "making a sale" included restocking the customer's pre-ordered supply of products. The court ruled that almost all deliveries would be treated as sales under this theory. The court ruled that "making a sale" requires persuading a customer to buy a product he has not already consented to buy. The appellate court also rejected the employer's claim that it should have to classify its employees by the amount of time they spent respectively on sales and deliveries. The court also considered the fact that the route sales representatives do not function like the traditional outside salespersons in that they do not choose when and to whom to make sales calls. Even though no other Washington case dealt with the outside sale exemption under the WMA, the court held that it was not an abuse of discretion for the court to use historical rates rather than current ones. The court contrasted claims for unpaid wages under the Washington Minimum Wage Act with civil rights cases. *Miller v. Farmer Bros. Co.,* No. 56816-7 (1/16/07; Baker, Dwyer, Becker).

Regulation Prohibiting Employee Use of Public Resources for Political Purposes is Constitutional

Ed Herbert and Dennis Nusbaum are public school teachers fined by the Public Disclosure Commission (PDC) for using school facilities for political purposes in violation of RCW 42.17.130. The teachers alleged that as applied the statute violated their First Amendment free speech rights and is arbitrary, capricious, and overbroad. As union representatives, they placed blank petitions for ballot measures in teachers' school mailboxes and sent an e-mail to school staff about collecting the petitions. The court affirmed concluding that the school internal mail and computer system are nonpublic forums and the regulation prohibiting their use for political purposes is reasonable in light of their purpose – efficient communication among teachers -- and is viewpoint-neutral in that it prohibits use for all political purposes. That teachers can exchange their political views in other forums in the school (like the cafeteria) does not make the regulation arbitrary because it prohibits only the using of school resources to do so. Likewise, the regulation is not overbroad just because it prevents using the forum to communicate non-political speech accompanying political speech. *Herbert v. WA State Public Disclosure Comm'n*, (12/18/06, Coleman, Agid, Baker).

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.

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