WELA *ALERT*

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WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION
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CASE UPDATES

FEDERAL - U.S. Supreme Court

On March 29 the U.S. Supreme Court granted certiorari in *Banaitis v. CIR*, 340 F.3d 1074 (9th Cir. 2003). *Banaitis* had held that the attorneys' fees an Oregon attorney receives under a contingency fee settlement agreement is not income to the client given Oregon's attorney lien law. While the Washington Supreme Court's April 1 decision in *Blaney* (to be reported next month) protects RCW 49.60 plaintiffs to some extent from the consequences of a reversal in *Banaitis*, the grant of certiorari calls in the question the effectiveness of the new Washington attorneys' lien law which was designed to prevent the taxation of attorneys' fees to the client.

FEDERAL - Ninth Circuit

Plaintiff Cannot Take Advantage of State's Eleventh Amendment Immunity to Deprive Court of Jurisdiction After Losing at Trial

This month's Chutzpah Award goes to the plaintiff in this case, who just happened to be a California Superior Court court reporter. She was sexually harassed by her supervisor, who was fired for his behavior. She then sued the court and her supervisor under Title VII and California law. The state raised 11th Amendment immunity, but did not move to dismiss. The plaintiff then dismissed all of her federal claims. She lost at trial, appealed, got a new trial, and lost again. On her second appeal, she asserted that the district court "lacked jurisdiction" over her case due to the 11th Amendment. The Ninth Circuit rejected what it described as a "brazen" argument. It reaffirmed that 11th Amendment immunity does not deprive a federal court of subject matter jurisdiction, so the plaintiff may not raise the issue. *Tritchler v. County of Lake***,** No. 02-15687 (2/18/04; Cudahy (7th Cir.), Goodwin and Kleinfeld).

Washington Public Employee's Right to Name Clearing Hearing Triggered by Placing Stigmatizing Termination Documents in Employee's Personnel File

The plaintiff worked for Spokane County Road Department as a Safety/Loss Manager. In 1998, there was a serious accident on a county road, resulting in numerous claims. The plaintiff was criticized for the handling of the claims by county officials in a written report and discharged. The plaintiff sued under section 1983 for deprivation of liberty and property without due process, and under Washington law for wrongful termination. The district court granted summary judgment to the defendants on all claims but the liberty interest claim. The defendants filed an interlocutory appeal based on qualified immunity. The Ninth Circuit affirmed the denial of summary judgment. Case law dating back more than 30 years entitles a public employee to a name clearing hearing when stigmatizing information regarding the reasons for the termination is disclosed to the public. The court held that "publication" occurs when the information is placed in the employee's personnel file, if the information becomes subject to disclosure under a state Public Records Act at that point. The court held 2-1 that the prior Ninth Circuit precedent, when coupled with the Washington Public Records Act, made the law clearly established, even though there was no case

directly on point. Judge Hall dissented on the qualified immunity question. *Cox v. Farnell*, No. 00-35887 (2/20/04; Rawlinson; Hall, Tashima).

Resident Electrical Utility Workers Entitled to Pay for On-Call Time

The plaintiffs in this case were workers at an Oregon hydroelectric plant who resided on-site. They claimed (overtime) pay for being on-call. The employer claimed the time was non-compensable, and the district court agreed. The Ninth Circuit reversed. In an opinion by Judge O'Scannlain (!), the court held that the on-call time constituted "working time" under the FLSA. The court found most of the relevant factors were almost evenly balanced but ultimately relied on the requirement that the employees be near their home phones at all times and report to work immediately to find the on-duty time to be compensable. The court also found that even though the employees knew the employer did not pay for on-call time, the district court had erred in finding that the employees' had acquiesced to not being paid. Based on the implicit agreements and understandings between the parties, the employees were entitled to only four hours' pay for a 14 hour on-call duty shift. Because the employees resided on site, the court rejected application of the more employee-favorable FLSA regulation concerning shifts in excess of 24 hours. *Brigham v. Eugene Water & Electric Bd.*, No. 01-35932 (2/3/04; O'Scannlain, Fernandez, Fisher).

Racial Harassment Should be Viewed from Perspective of Reasonable Victim of Same Race

The plaintiff in this case was an African-American who worked for GTE (Verizon) for 23 years. He alleged a pattern of both discriminatory employment actions and workplace racial harassment, including name-calling and racist graffiti. He also alleged retaliation. The district court granted the employer's motion for summary judgment as to all claims. The Ninth Circuit reversed except as to the retaliation claim. On the hostile work environment claim, the court held that whether an environment is objectively racially hostile must be determined from the perspective of a reasonable person of the same race as the plaintiff. The court concluded that references to the plaintiff as a "drug-dealer" had racial overtones. The fact that the supervisor used racist language to people of all races was no defense. His harassment of a white co-worker for associating with black employees was also probative evidence of unlawful motivation. The opinion reviews much of the law in the Ninth Circuit on harassment in a comprehensive fashion**.** It reiterates that an employer must take some form of disciplinary action against a harasser. It required the employer to take affirmative action to ensure that the harassment was not reoccurring. On the failure to promote claim, the court recognized that after *Costa*, an employee need prove only a genuine issue whether the employer's action was due in whole or in part to discriminatory intent. The employee may use any combination of direct and circumstantial evidence, including, if the plaintiff so chooses, pretext evidence generated by the *McDonnell-Douglas Burdine* framework. The opinion contains useful language on proving pretext. Judge O'Scannlain dissented as to the reversal of summary judgment on the failure to promote claim and the reasoning of the majority in reversing the sexually hostile work environment claim. The dissent drew an incorrect distinction between disparate treatment and hostile environment cases regarding the admission of untimely background evidence. Judge O'Scannlain found the evidence of pretext insufficient. *McGinest v. GTE Serv. Corp.*, No. 01-57065 (3/11/04; Paez, Reinhardt; O'Scannlain).

City Law Enforcement Officer Must Be Paid Overtime for Caring for K-9 Partner

Deputy Leever's partner was a police dog named Scout. She had to care for and train Scout during her off-duty hours at home. The City knew about this work but paid her only a flat fee rather than overtime. Subsequently, Deputy Leever's union and the City incorporated a $30.00 per week flat

fee into the applicable collective bargaining agreement. Officer Leever sued for unpaid overtime. The district court granted the employer's motion for summary judgment, but the Ninth Circuit reversed. An FLSA regulation creates an overtime exception for work done at home where the employer proves the parties have made a reasonable agreement for pay in lieu of overtime. The court held that the agreement between the Union and the employer in this case was not necessarily reasonable because they made no effort to approximate the number of hours Officer Leever actually worked taking care of Scout. The court rejected the employer's reliance on a supposed "study" by other jurisdictions because the study at issue was methodologically flawed and there was no evidence that the plaintiff performed duties similar to those of the study participants. The court held the employer was required to make a reasonable investigation of the approximate number of hours worked before entering into any agreement for pay in lieu of overtime. The court remanded for a re-evaluation of whether the agreement was reasonable. *Leever v. City of Carson*, No. 02-16525 (3/4/04; Tashima; B. Fletcher, Pollack (ED Pa.).

WASHINGTON-State Supreme Court

U.S. Supreme Court

ADEA Does Not Prohibit Favoring Older Workers

A UAW collective bargaining agreement eliminated the employer's obligation to provide health benefits to subsequently retired employees, except to then-current employees age 50 and older. Employees age 40-49 alleged violations of the ADEA. The ADEA prohibits "discrimina[tion] because of [an] individual's age, " 29 U.S.C. §623(a)(1), and protects all employees age 40 or over. Reversing the Sixth Circuit, the Supreme Court held that the ADEA's text, structure, purpose, history, and relationship to other statutes established that the ADEA does not protect employees over age 40 from discrimination that favors even older employees. Summing up Congressional intent behind the ADEA, the Court pithily remarked: "The enemy of 40 is 30, not 50." The Court found that Congress's failure to act in response to 30 years of judicial interpretation consistent with this approach supported the Court's conclusion and held that the EEOC's contrary interpretation deserved no deference because it was clearly wrong. Thomas's dissent comments that the same factors should have caused the Supreme Court to hold that Title VII does not protect Caucasians. Title VII prohibits the discharge of "any individual" because of "such individual's race" and its legislative history, social context, and intent was clearly to protect the rights of racial minorities and there was an absence of complaints of reverse discrimination supporting the legislation. *General Dynamics Land Systems, Inc. v. Cline*, No. 02-1080 (Souter majority opinion joined by Rehnquist, Stevens, O'Connor, Ginsburg, Breyer; Scalia, Thomas, and Kennedy dissenting)**.**

On Supreme Court Remand, Summary Judgment Reversed Again in <u>Hernandez</u>, Due to

Ninth Circuit

Removal to Federal Court Waived 11th Amendment Immunity as to Both State and Federal Claims

A professor sued his employer, a state university, in California superior court alleging federal and state claims. California removed the action to federal court but sought dismissal of all claims based on 11th Amendment immunity. The Ninth Circuit rejected this argument as to all claims on the ground that once the state availed itself of federal jurisdiction, California waived 11th Amendment immunity entirely. Noting that a defendant removes the entire case to federal court, not just certain claims, the Court held that the state could not then cherry pick certain claims over which it retains a claim for immunity. *Embury v. King*, No. 02-15030 (3/16/04; Canby, Kleinfeld, Rawlinson).

Factual Disputes

This case was heard on remand after the U.S. Supreme Court held that the Ninth Circuit improperly found disparate impact liability where the Plaintiff only alleged disparate treatment. Hernandez quit in lieu of being fired when he failed a drug test. After participating in a rehabilitation program, he applied for his old job back. His employer refused to hire him. The Court found that there was a genuine dispute over whether the employer fired Hernandez for having a record of drug and alcohol abuse – which violates the ADA, 42 U.S.C. §§ 12102(2)(B)-(C); 29 C.F.R. § 1630.2(g)(2)-(3) – or because the employer has a company policy against rehiring employees who violate company rules. The alleged no-rehire policy was not in writing and the employer's EEOC response did not mention the policy, instead it focused on Hernandez's record of substance abuse. The Court found a jury could conclude that no company policy existed and was pretext for discriminating against Hernandez based on his disability. Interestingly, the Ninth Circuit took the unusual step of withdrawing a footnote in its initial decision, stating that the footnote had "overstated" the record by assuming that the employer had a policy that was uniformly applied, a statement that was "inconsistent with our basic holding in that initial decision." *Hernandez v. Hughes Missile Systems Co.*, No. 01-15512 (3/23/04; Reinhardt, Magill from 8th Cir. sitting by designation, Fisher).

Qualified Immunity Reversed Where Prosecutor Alleges Employment Retaliation for Disclosing Exculpatory Evidence

Cebellos, an Ass't DA, sued L.A. County and his supervisors at the L.A. County DA's office and under 42 U.S.C. § 1983 for retaliating against him for engaging in speech protected by the First Amendment. Cebellos informed his superiors and notified the criminal defense attorney that he believed a police officer grossly misrepresented facts to obtain a search warrant. The defense attorney called Cebellos to testify at a hearing on a motion to suppress evidence which the court denied. Afterwards, Cebellos alleges he was demoted, harassed, isolated, and denied a promotion. The trial court dismissed the action holding that his supervisors were entitled to qualified immunity and the County was entitled to sovereign immunity under the Eleventh Amendment. The Ninth Circuit reversed summary judgment holding that: (1) it was clearly established that Cebello's speech addressed a matter of public concern and outweighed the public employer's interest in avoiding inefficiency and disruption; and (2) a political subdivision -- such as a county -- is not ordinarily protected by the Eleventh Amendment and the DA, acting in his official capacity, is alleged to violate Cebellos's rights through personnel decisions (a county function) as opposed to prosecutorial decisions (a state function in California), for which the DA and the County would be absolutely immune. The Ninth Circuit noted that while the truth of Cebellos's speech was a factor in the balancing test -- especially given the denial of the suppression motion -- the evidence showed that "at most" his statements were erroneous, not reckless or in bad faith. *Cebellos v. Garcetti*, No. 02-55418 (3/22/04; Reinhardt, O'Scannlain, Fisher).

Washington Court of Appeals

Voluntary Resignation Undermines Wrongful Discharge Claim

Travis was a second-year provisional public school teacher suffering from various mental and physical health problems. Travis notified his supervisor that he had a disability, including Attention Deficit Disorder and depression for which he was receiving treatment through the EAP. He declined to discuss the matter any further, however, and did not respond to requests for additional information. Travis resigned after receiving two unsatisfactory evaluations and notice that the District was not renewing his contract for that reason. Although Travis later attempted to rescind his resignation, Division II held that Travis waived his claims – which the opinion does not identify – by voluntarily resigning and held he could not rescind his

resignation once it was accepted by the District. The court held that Travis's resignation was not coerced simply because he resigned to avoid being terminated for cause. Although his attempt to rescind his resignation "may vitiate the element of voluntariness," the Court held that "objectively he had the choice to remain in his current position," and ask his boss to reconsider terminating him. The Court then noted that "because of his second year of unsatisfactory evaluations, the District had valid reasons to nonrenew his contract," so it affirmed the dismissal of Travis's claims. *Travis v. Tacoma Public School*, No. 30198-9-II (3/9/04; Armstrong, Bridgewater, Houghton).

Pre-dispute Employment Arbitration Agreement Upheld

Walters sued his employer for unpaid overtime. His case was dismissed because his employment agreement contained an arbitration clause governed by the Federal Arbitration Act (FAA), which requires evidence that the employer is engaged in interstate commerce. Employees can overcome such clauses and sue in court where the clauses are procedurally or substantively unconscionable under Washington law. Walter's agreement contained a covenant not to compete and a confidentiality provision, both of which could be litigated in court. All other claims had to be handled through arbitration. In a harmful opinion for employees that ignored all positive Ninth Circuit holdings on the issue, Division I affirmed the trial court, stating that where the contract as a whole is supported by consideration, "most courts have not ruled the arbitration clause invalid for lack of mutuality, even when the clause compelled one party to submit all disputes to arbitration but allowed the other party the choice of pursuing arbitration or litigation in the courts." The court found Walter's arrangement sufficiently mutual because "A.A.A. does not have complete choice and Walters is not forced into arbitration exclusively," and noted that although the employer is more likely to seek relief under those provisions, the clause allows either party to do so. The court also ruled that "Walters has not shown that the costs of arbitrating his claims are prohibitive," commenting that *Mendez v. Palm Harbor Homes*, 111 Wn. App. 446 (2002) -- which held prohibitively high costs unconscionable -- was in the context of RCW 7.04 so, "It is not clear that a similar analysis would apply" under the FAA. Finally, Division I held that "mere inequality of bargaining power," and the use of an adhesion contract, were insufficient to establish unconscionability. *Walters v. AAA Waterproofing, Inc.*, No. 52294-9-I (3/1/04; Baker, Schindler, Coleman).

WASHINGTON-Court of Appeals

Arbitration Agreement Upheld Even Though It Allows Employer to Go to Court for the Claims it Would Likely Bring Against the Employee

Division I has upheld an arbitration agreement that essentially requires an employee to arbitrate the claims he would likely bring against the employer but allow the employer to litigate the claims it would bring against the employee. The panel ruled that since both parties would have to arbitrate employment related claims and neither side would have to arbitrate intellectual property and breach of non-competition claims, the agreement was mutual on its face. The court found the terms of the arbitration clause were sufficiently clear. The plaintiff appears not to have raised any arguments about the constitutionality of the waiver of the right to a jury trial. On the bright side, the case does require the party compelling arbitration to show the arbitration contract at issue involves interstate commerce. That may or may not prove to be more than a minimal burden. *Walters v. AAA Waterproofing*, No. 52294-9-I (3/1/04; Baker, Schindler, Coleman).

Teacher Could Not Unresign From Position

The plaintiff was a Tacoma teacher with serious health problems. After receiving two unsatisfactory evaluations, he resigned on May 22, effective August 31. The School accepted his resignation on June 13, effective June 20 (the last day of school). On July 12, he attempted to

rescind his resignation. The Superior Court refused to reinstate him and Division II affirmed. The court held (erroneously) that the School Board's change in the effective date of the plaintiff's resignation was an "immaterial change," so there was an effective offer and acceptance of a contract to resign. The court held (again erroneously) that a "voluntary" resignation waives any claims for wrongful termination. Washington law is clear that a constructive termination is sufficient to support a wrongful discharge claim. A "voluntary" resignation does not preclude a constructive discharge claim. *Travis v. Tacoma Public School District*, 85 P.3d 959 (03/9/04; Armstrong; Houghton; Bridgewater).

Employer May Claim Earlier Receiving "No Match Letter" from Social Security Administration is Legitimate Non-Discriminatory Reason for Terminating Employee

A Wal-Mart employee was terminated a few days after she returned to work from her second workers' comp. injury. Wal-mart claimed it terminated her because it had received a "no-match" letter regarding her social security number five months before that had not been resolved. The employee brought claims for disability discrimination, failure to accommodate, retaliation for filing a workers' claim, and wrongful discharge. The Superior Court granted summary judgment and Division I affirmed in what was originally an unpublished opinion. The panel misstated the elements the *prima facie* case for disability discrimination and erroneously required evidence showing "inference of discrimination" at the first stage of the *McDonnell Douglas Burdine* test. There is little doubt the court would have found insufficient evidence of pretext anyway given Wal-Mart's assertion with respect to the retaliation claim that it terminated the plaintiff because it had received a no-match letter. The court ruled as a matter of law that Wal-Mart's delay in firing the employee was due to its effort to give her time to fix the no match problem rather than being evidence retaliation for going out on workers' compensation. The court rejected the failure to accommodate claim for lack of notice of disability. The court rejected the employee's argument that her discharge for failing to produce citizenship documentation violated public policy under the Immigration Reform and Control Act. The court ruled that even if such a policy existed, the plaintiff could not take advantage of it because she was undocumented. *Anica v. Wal-Mart Stores*, No. 51359-1-I (1/5/04).

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

In February, Bendich, Stobaugh and Strong settled another major class action. The settlement provided that the State will pay part-time community college instructors an additional $11 million for failing to provide summer health insurance, in addition to the $1.5 million it paid after a Washington Supreme Court decision favorable to the class.

On March 22, Governor Locke signed ESSB 6270, which was designed to prevent clients in attorneys fees' contingency cases from being treated as taxable income to the client by modifying Washington's lien law to mirror Oregon's. The bill is explicitly retroactive. Several WELA members were major participants in drafting and lobbying for the legislation. However, the U.S. Supreme Court's grant of certiorari in *Banaitis v. CIR* on March 29 (see above) calls into question whether ESSB 6270 will have its intended effect.

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

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

Jill Hawkins and Susan Mindenbergs co-chair the programs committee. The committee plans the short programs WELA now regularly sponsors. Jill and Susan welcome your suggestions for topics of interest.

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