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ALERT

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CASE UPDATES

U.S. Supreme Court

Calling Employee "Boy" Can be Evidence of Racial Animus; Superior Qualifications Can be Proof of Discrimination in Promotion Even if They "Don't Slap You in the Face"

In a *per curiam* opinion alleging failure to promote based on race, the Court held that calling an employee the word "boy" standing alone may be evidence of racial discrimination even when not modified by a racial classification. "The speaker's meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage." The court further held that pretext could be established by evidence of superior qualifications even if "the disparity in qualifications is [not] so apparent as virtually to jump off the page and slap you in the face." The Court declined to decide the proper standard holding only that the Eleventh's Circuit's standard is too imprecise to yield "consistent results." *Ash v. Tyson Foods, Inc.*, No. 05-379 (Feb. 21, 2006, *per curiam*).

Shareholder/President Has No Personal §1981 Claim for Breach of Company Contracts Based on Racial Animus Towards Him

Plaintiff MacDonald was African-American and the sole shareholder and president of JWM. After a contractual dispute between JWM and Defendant Domino's, JWM filed bankruptcy. The bankruptcy trustee settled a breach of contract claim against Domino's. MacDonald filed a section 1981 claim against Domino's in his personal capacity alleging that Domino's broke its contracts with JWM because of racial animus towards MacDonald. He sought economic, emotional, and punitive damages. The trial court dismissed holding that MacDonald had no claim because he was not a party to the contracts. The Ninth Circuit reversed holding that a nonparty suffering injuries distinct from the corporation may bring suit. Reversing the Ninth Circuit, the Supreme Court declared "Any claim brought under §1981, therefore, must initially identify an impaired 'contractual relationship,' §1981(b) under which the plaintiff has rights." The Court noted that corporations and third-party intended beneficiaries *may* have rights under section 1981 but did not take this occasion to decide either issue. Rejecting the argument that MacDonald had a claim because he was the "actual target" of discrimination, the Court concluded: "Section 1981 plaintiffs must identify injuries flowing from a racially motivated breach of their own contractual relationship, not of someone elses." *Dominos's Pizza, Inc. v. McDonald*, No. 04-593 (Feb. 22, 2006, Scalia for all justices, except Alito who did not participate).

15 Employee Threshold Is Not Jurisdictional Under Title VII

To its great credit, the U.S. Supreme Court has become increasingly precise in recent years about its use of the term "jurisdictional." Previously neither it nor other courts had been so careful. The question in this case was whether the 15-employee threshold for coverage under Title VII is jurisdictional or rather just a necessary element of the plaintiff's claim of relief. If an issue is "jurisdictional" , *i.e.*, goes to the federal court's subject matter jurisdiction, then it can be raised at any time and cannot be waived. In this case, after the plaintiff won at trial, the employer asserted for the first time that it did not have 15 employees. The Fifth Circuit said the 15 employee threshold was jurisdictional

and overturned the verdict. The Supreme Court unanimously reversed in an opinion written by Justice Ginsburg. More generally, the Court adopted a rule that a threshold limits on a statute's scope will be treated as jurisdictional only where Congress expressly says so. *Arbaugh v. Y&K Corp.*, No. 04-944 (Feb. 22, 2006).

Ninth Circuit

Circumstantial Evidence of Discrimination Need Not Be More or Better Than Direct Evidence

Plaintiff Cornwell (African-American) sued his employer, a credit union, for race discrimination and retaliation. He alleged a new CEO (Caucasian) demoted him from VP/COO to his old job as Director of Lending giving his other responsibilities to a less experienced Caucasian employee, and subsequently terminating him for complaining. The trial court dismissed Cornwell's case on summary judgment despite evidence that Cornwell was a valued employee who knew the most about lending at the company, was the only African-American executive, was the only executive demoted, and was excluded from meetings where the reorganization to facilitate the new sales approach was discussed even though it would affect his responsibilities and opportunities. The trial court denied Cornwell's request to reopen discovery to depose an employee who was not willing to give a declaration but purportedly would testify the CEO called her a "nigger bitch" because Cornwell's attorney did not depose preferring "not to disclose his strongest evidence before trial." Finding Cornwell's attorney did not act with diligence, the Court of Appeals held it within the trial court's discretion to deny the request to reopen discovery. In contrast, the Ninth Circuit reversed on the merits of Cornwell's claim of discriminatory demotion holding that based on the plaintiff's evidence a reasonable jury could find that the CEO "had an aim to force Cornwell out" and "did not want to work with an African-American" COO. Citing the U.S. Supreme Court's decision in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), the Ninth Circuit remarked "that Title VII does not require a disparate treatment plaintiff relying on circumstantial evidence to produce more, or better, evidence than a plaintiff who relies on direct evidence." The appeal upheld the dismissal of Cornwell's claim of retaliation because he did not establish the CEO knew of his complaints to the Board of Directors before demoting him and seven months elapsed between his complaints and his termination. Likewise, the Court found that his termination was not based on race because he failed to rebut the credit union's explanation that he was fired "because he would not cooperate with the Board's request for information" about his complaints. *Cornwell v. Electra Central Credit Union*, No. 04-35408 (March 1, 2006, Fisher, Gould, Bea).

Pregnancy Discrimination Act Does Not Require Pension Increases for Women Denied Credit for Pre-Act Pregnancy Leave Where Credit was Given for Non-pregnancy Leave

Four individual female Plaintiffs took pregnancy leave from their employer AT&T before 1979 when the Pregnancy Discrimination Act ("PDA") too effect. Prior to the PDA, T&T employees on pregnancy leave were given service credit for only a portion of their leave whereas employees on other temporary disability leaves were given credit for their entire leave. The individual Plaintiffs and the Communication Workers of America sued AT&T for a present violation of their rights by failing to give the women full credit for their pre-PDA leaves in determining their current eligibility for and computation of their retirement benefits. On cross motions for summary judgment, the district court ruled in the plaintiff's favor concluding that *Pallas v. Pacific Bell*, 940 F.2d 1324 (9th Cir. 1991), was controlling. On similar facts, the *Pallas* Court ruled that pre-PDA calculations using the very same system as AT&T to deny a woman who took pregnancy-related leave full service credit for that leave violated the PDA retroactively. The Ninth Circuit reversed. It held that *Pallas* did not survive *Landsraf v. USI Film Prods.*, 511

U.S. 244 (1994), which ruled that there is a presumption against statutory retroactivity in the absence of clear contrary congressional intent in the statute being considered. The Court found no such intent in the PDA. Unpersuaded by the Plaintiffs' contention that they were not seeking retroactive application but rather relief from AT&T's current discriminatory determinations of eligibility and computation of benefits, the Court explained: "The proper focus is upon the time of the *discriminatory* acts, not upon the time at which *consequences* of the acts become most painful." Plaintiffs argued that AT&T's policy remains facially discriminatory so "each application of the system to calculate benefits is a new act of discrimination…." But the Court rejected this argument too, holding that the plaintiffs are not similarly situated to male and female employees who took non-pregnancy disability leaves because prior to the enactment of the PDA it was legal to distinguish between the two groups. Based on its analysis of the timing of the violations, the Court held that any violations occurred with the initial accountings of Plaintiffs' pregnancy leaves or at the latest when Congress passed the PDA – both in the 1970s. Accordingly, the Court ruled, the statute of limitations barred the Plaintiffs' claims. A detailed dissent by Judge Rymer explained that *Pallas* survived *Landsraf* and should have controlled the outcome of the case. *Hulteen v. AT&T Corp.*, No. 04-16087 (March 8, 2006, Trott, Rymer, and Pager sitting by designation from Fed. Cir.).

Single Publication Rule Applies to Privacy Act claims Relating to Internet Posting

The plaintiff in this case was a chief with the US Army Corp of Engineers. He made numerous whistleblowing disclosures and was stripped of his duties in 1997. In 1999, he and the government entered into a settlement converting his removal to a leave of absence due to illness. *The Washington Post* mentioned the plaintiff's whistleblower allegations in an article. The government responded by posting on its website an entry stating that the plaintiff had abandoned his job and later was removed due to illness. The government removed the posting two months later, but the same information was then posted on the Public Affairs website. The plaintiff filed suit under the Privacy Act. The government moved to dismiss on the basis that he filed the suit more than two years after the first publication of the information. The statute of limitations for the Privacy Act is two years. The district court granted the motion and the Ninth Circuit affirmed. The Court ruled that the two years ran from the time of first publication of the information on the first website, as it would for publication in any print medium. The court rejected the plaintiff's argument that the continuing tort doctrine applied. The court agreed that a republication occurred when the information was posted to a different website, but that too was untimely. *Oja v. US Army Corps of Engineers*, No. 03-35877 (3/6/06; Bybee, Hug, Berzon).

Washington Court of Appeals

Washington Has a Clear Mandate of Public Policy in Favor of Aiding Law Enforcement

Plaintiff Gaspar was a general manager who sued his employer for wrongful discharge in violation of public policy. He alleged he was fired for assisting a police investigation into an employee's purchase of postage stamps at discount prices from a defective post office machine resulting in the employee admitting the improper purchase and paying back the post office "by altering a pretyped check." Gaspar informed the Board of Directors of the incidents and discussed terminating the employee. After placing the employee on administrative leave the Board fired Gaspar. The trial court dismissed the Complaint finding no clear mandate of public policy for "helping law enforcement." On appeal, Gaspar identified four sources of public policy: (1) RCW 7.69.010 (Witnesses and crime victims have civic and moral duty to cooperate with law enforcement and prosecutors); (2) RCW 9.01.055 (citizens who aid police have same civil

and criminal immunity as police); (3) RCW 9A.76.020 (crime to willfully obstruct police); and (4) RCW 9A.76.030 (crime to unreasonably refuse to comply with officer's request to summon aid for officer). Noting "The same statutes were offered in *Gardner*, 128 Wn.2d at 938-39, as proof that there is a clear public policy encouraging citizens to assist law enforcement in the apprehension and prosecution of criminals" the Court reversed and remanded for trial. Without parsing among the particular statutes cited, the Court explained: "[R]ecognition of a public policy to assist law enforcement is fundamental" and "There is no public policy more important or more fundamental than the one favoring the effective protection of the lives and property of citizens." *Gaspar v. Peshastin Hi-Up Growers*, No. 24225-1-III (Feb. 14, 2006, Schultheis, Sweeney, Thompson)

Severance Pay is Wages Under 49.48.030*; *No Attorneys Fees for Pre-Filing Negotiations

The employee in this case worked for the City of Montesano under a written employment contract. The contract provided him with severance if the City terminated him without cause. The City terminated him without cause and refused to provide him with severance. The court granted the employee's motion for summary judgment but denied him double damages and attorneys' fees incurred before filing. The court of appeals affirmed the judgment in favor of the employee, granted double damages and permitted attorneys' fees for pre-filing case investigation, but not negotiations. The court ruled that because the contract unambiguously provided for severance, double damages were mandatory. On the attorneys' fees issue, the court held that the plaintiff was entitled to fees because the severance payments constituted wages under RCW 49.48.030. *Relying on Int'l Fire Fighters v. Everett*, 146 Wn.2d 29 (2002), the court held that fees could be awarded for pre-filing attorney time that was judicial in nature. The court held that case evaluation was sufficiently judicial to be compensable; negotiations were not. *Dice v. Montesano*, No. 32407-5-II (Feb. 22, 2006; Van Deren; Penoyar; Bridgewater).

Summary Judgment Appropriate Where Evidence of Pretext is Conclusory and Speculative

The plaintiff in this worked for her employer for 17 years, at which point her position was eliminated. It demoted her and promoted a male co-worker. The plaintiff served a sex discrimination suit on March 11, 2002. Four days earlier, the Company had begun investigating leaks of confidential information. The investigator apparently did not know about the lawsuit once it was filed, but her managers did. On March 21, 2002, she was terminated allegedly as a result of the investigation. In fact, the employee had not committed the misconduct. The trial court granted summary judgment to the Company on the claim of sex discrimination. After a bench trial, the judge found for the Company on the retaliation claim. The court of appeals affirmed. The court incorrectly stated that it was bound to follow McDonnell Douglas Burdine in analyzing the sex discrimination case. The court found there was insufficient evidence of pretext regarding the company's reasons for promoting the male co-worker, who was at least as qualified. The court unfortunately relied on the same-actor inference because the decisionmaker had previously promoted the plaintiff. There was no evidence that the prior promotions involved competition against a male employee. On the retaliation claim, the court of appeals deferred to the trial judge's determination that the plaintiff's manager sincerely believed she had leaked confidential information when they terminated and that they were not motivated in any respect by retaliation. The court of appeals correctly held that retaliation is a pure question of fact. In troubling language, the court held that an employee must overcome a strong inference that her supervisor's conduct and attitude had not changed over the previous year to prove a retaliation case. Apparently this is another reference to the same

actor inference. Filing a discrimination lawsuit would seem a pretty easy way to change your supervisor's conduct and attitude and should eviscerate any application of the same-actor inference. *Baker v. Advanced Silicon Materials Inc.*, No. 23746-0-III (Feb. 14, 2006; Sweeney; Kato; Thompson).

Prejudgment Interest Must be Calculated in Determining Value of Judgment Under CR 68*; *"Costs" Award to Prevailing Plaintiffs Under RCW 49.46 Should be Read Expansively

The plaintiffs in this case sued for unpaid wages under RCW 49.46. During litigation, the defendant made a CR 68 offer of $125,000 plus costs and reasonable attorneys fees. The plaintiffs rejected the offer. At trial, plaintiffs won a $106,000 verdict plus $33,053.68 in prejudgment interest, for a total of $139,053.68. The court ruled that the judgment was more favorable to plaintiffs than the CR 68 offer, so that they were the prevailing parties under Rule 68. The court also held that costs under RCW 49.46 included not just statutory costs but also expert witness fees; depositions and transcripts not used at trial; the mediation fee, postage, phone, fax and copying. The court distinguished *Hume v. American Disposal*, 124 Wn.2d 656 (1994), which allowed only statutory costs in a common law wrongful discharge case. The court ruled that a claim for unpaid wages is by definition liquidated so that prejudgment interest is appropriate, regardless of whether there is a dispute about the number of hours the employee worked. *McConnell v. Mothers Work Inc.*,No. 23139-9-III (Feb. 7, 2006; Sweeney, Brown, Baker).

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