WELA
WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION
A NELA AFFILIATE

ALERT

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

Editors: Mike Subit / Jesse Wing

CASE UPDATES

FEDERAL – Ninth Circuit

Plaintiff Entitled to New Trial Because Jury Instructions Did Not State Conduct Caused By a Disability is Legally the Same as the Disability Itself.

Stephanie Gambini worked as a contracts clerk for several years. During her employment, she was diagnosed with bipolar disorder and informed her supervisors. She told them, and her co-workers, the types of symptoms she might experience as a result of her disability. She also revealed she was seeing a therapist. Her symptoms grew worse and her therapist made a medication change. Soon after, she was called into a meeting with her supervisor who handed her a performance improvement plan that began with the sentence that her "attitude and general disposition are no longer acceptable." Ms. Gambini became extremely agitated, tossed the performance improvement plan across the desk, and stormed out of the meeting. She called her therapist about suicidal ideations and was committed to a mental hospital for three days. The company granted her FMLA leave. Several employees, who knew she had been in the hospital, sent e-mails demanding Ms. Gambini not be allowed to return to work. The company terminated her FMLA leave and fired her. Three days later Gambini wrote a letter asking the company to reconsider because her outburst was caused by her bipolar disorder. The company refused. The case went to trial on claims of disability discrimination and FMLA interference. Plaintiff's counsel objected to the giving and omitting of several jury instructions. The jury found for the defendant and the plaintiff appealed, asking for either judgment as a matter of law in her favor or a new trial. The Ninth Circuit ruled that a new trial was warranted, because the trial court had refused to give a jury instruction stating "conduct resulting from a disability is part of a disability and not a separate basis for termination." The court held that "where an employee demonstrates a causal link between disability produced conduct and the termination, a jury must be instructed that the employee was terminated on the basis of disability." The Ninth Circuit recognized that under Washington law the correct causation standard is "a substantial factor" not "the determining factor" holding that "a decision motivated even in part by disability is tainted and entitles the jury to find discrimination". The court rejected the employer's contention that misconduct caused by a disability should be treated like misconduct by other non-disabled employees. The panel agreed that the district court had arguably erred by placing the burden of persuasion on the plaintiff to show a discharge during FMLA was motivated by the leave. The court ruled any error was harmless because the employer did not terminate Ms. Gambini because she had taken leave, but for her workplace conduct. The court rejected the plaintiff's claim that under the WLAD a jury must be instructed that she only needs to prove that a proposed accommodation would "plausibly" have succeeded. The court refused to decide whether the WLAD recognized the "direct threat" doctrine, reasoning that the employer litigated the case as one involving "misconduct" rather than "workplace safety." *Gambini v. Total Renal Care*, 480 F.3d 950 (9th Cir. 2007)

Ninth Circuit Upholds Class Certification in Wal-Mart

In a case that essentially presents the question whether there is a "very, very large employer" exception for Title VII class actions, the Ninth Circuit upheld 2-1 the district court's

certification of the largest employment class action in history. Women who work for Wal-Mart claim they are paid less than their male counterparts and promoted less frequently. The plaintiffs claim that Wal-Mart's centralized structure facilitates uniform decision making based on gender stereotypes. The class includes 1.5 million members. The Ninth Circuit majority made several important rulings: (1) The methodology of plaintiff's stereotyping expert, sociologist William Bielby, was sound and Wal-Mart's criticisms went to the weight only. It did not matter that his testimony about the company's general structure did not deal in exact or quantifiable conclusions; (2) *Daubert* does not apply with the same force on a class certification motion; (3) statistical evidence showing discrimination can be gleaned at the regional level and need not be done store by store; (4) anecdotal discrimination evidence from 120 class members was probative; (5) a company wide policy of subjective decision making can raise an inference of discrimination when coupled with statistical evidence; (6) Rule 23(b)(2) certification is appropriate even though many of the plaintiffs are former employees; (7) the large size of the plaintiffs' requests for back-pay and punitive damages does not defeat the claim that the injunctive relief predominates so that certification under Rule 23(b)(2) is permissible; (8) neither due process nor Title VII requires an individualized hearing for each plaintiff on damages, and statistical methods may be used to determine back-pay and punitive damages relief for individual members; (9) it is up to the plaintiff to choose whether to proceed under a single motive/a determining factor standard or a mixed motive/a motivating factor standard and if the plaintiff chooses the former there is no same action defense; and (10) the district court properly limited promotion as a remedy to only those plaintiffs who had showed an interest in and qualifications for open positions. *Dukes v. Wal-Mart*, 474 F.3d 1214 (9th Cir. 2007)

Reduction in Attorney Fees Hourly Rate Reversed but Block Billing Entries Warranted Some Reduction.

Plaintiff filed a petition for $39,112 in reasonable attorney fees at hourly rates of $375 and $400 after prevailing on her ERISA claim for long-term disability benefits. The trial court awarded only $10,762, finding that $250 was the reasonable hourly rate, because the plaintiff's counsel did not collect the requested rate from her paying clients, and reduced the fees across-the-board by 20 percent for block billing entries and another 20 percent for billing in quarter-hour increments. The trial court also reduced hours spent on unnecessary activities, including meetings between firm lawyers and excessive billing for boilerplate motions. The Ninth Circuit affirmed the reductions for unnecessary activities and excessive billing in deference to the district court's familiarity with the litigation. Likewise, the Court of Appeals affirmed the across-the-board reduction for charging in quarter-hour increments. However, applying the loadstar calculation precedent, the Court of Appeals reversed the reduction in plaintiff's counsel's rate, finding that she established that $375 and $400 were prevailing rates in the community by presenting supporting affidavits from other lawyers and court awards to that effect. The Ninth Circuit found that the district court had erred by concluding otherwise because "We have repeatedly held that the determination of a reasonable hourly rate 'is not made by reference to the rates actually charged the prevailing party.'" On remand, the trial court may reduce the rate to the extent it concludes that the plaintiff's counsel performed below the level of expertise for the rate requested, or finds that the rate was enhanced to adjust for contingent risk, but not where the rate compensates for delay in payment which is a proper consideration. The Court of Appeals also remanded because although across-the-board reductions for block billing would have been acceptable, the trial court improperly applied the reduction to non-block billing entries as well.

***Welch v. Metropolitan Life Ins. Co.*, 480 F.3d 942 (9th Cir. 2007)**

Plaintiff Unable to Establish that Employer Regarded Her as Disabled Under the ADA.

Naomi Walton was a court security officer (CSO) employed by Akal Security, a private contractor with the U.S. Marshall Service (USMS), in federal courts of the Ninth Circuit. Among the 29 essential functions of a CSO, according to the USMS, is the ability to determine the location and source of sound. An annual physical exam revealed that Walton's ability to localize the direction of sound was compromised purportedly disqualifying her from working for the USMS, so Akal terminated her employment. Walton sued under the Rehabilitation Act of 1973 alleging that she was "regarded as" disabled, *see* 29 C.F.R. § 1630.2(*l*), in the major life activities of hearing and working, but the trial court disagreed granting summary judgment for the defendant. The Ninth Circuit affirmed, holding that Walton did not show that the USMS regarded the impairment it imputed to her as substantially limiting or that the impairment was objectively substantially limiting. The Court of Appeals held that her expert's opinion was insufficient to preclude summary judgment on the major life activity of hearing because the opinion did not state a factual basis. Finally, the court held that she failed to "present specific evidence about relevant labor markets", so she did not create a genuine issue of material fact in dispute about whether she was regarded as disabled in the major life activity of working. *Walton v. U.S. Marshals Service*, 476 F.3d 723 (9th Cir. 2007)

Class-of-one Equal Protection Claim is Not Viable in Employment Context but Substantive Due Process Right to Pursue Chosen Profession is Cognizable.

A jury awarded Engquist $175,000 in compensatory damages and $250,000 in punitive damages against her former public employer and individual defendants for violating her constitutional equal protection and substantive due process rights and for interference with contract; she did not prevail on federal anti-discrimination laws. Engquist was told that her job was being eliminated due to a re-organization and that she was unqualified for the only position at her level. She applied for, but was not offered, about 200 jobs. Defendants' vocational expert testified that there are very few opportunities in the state for work in Engquist's fields. Defendants were held liable for violation of equal protection because they intentionally treated Engquist, as a class-of-one, different than other similarly situated employees "without any rational basis and solely for arbitrary, vindictive, or malicious reasons."

In contrast to all seven federal circuits that have considered the matter, the Ninth Circuit declined to extend the class-of-one theory from its application in the regulatory and legislative arenas to public employment decisions. The court explained that "the government as employer has broader powers than the government as regulator." In support, the court noted that the rights of public employees are limited, as compared to ordinary citizens, in the First and Fourth Amendment contexts, and to hold otherwise would upset long-standing personnel practices and "generate a flood of new cases." On a matter of first impression in this Circuit, however, the court did extend its substantive due process rulings from the regulatory and legislative area to the employment context, holding that an employee has a constitutional right to pursue a particular profession. The court limited the claim to "extreme cases, such as a 'government blacklist, which when circulated or otherwise publicized to prospective employers effectively excludes the blacklisted individual from his occupation, much as if the government had yanked the license of an individual in an occupation that requires licensure.'" But the court reversed the jury verdict on this claim anyway, holding that Engquist failed to prove causation. Engquist's

damages and attorneys fees were remanded for re-determination under his successful state law claim. Judge Reinhardt dissented explaining that the majority's class-of-one analysis was flawed and that at-will employment is preserved by the rational basis test to which government decisions in regulatory and legislative areas are subject, and that the seven circuits who have so ruled have not suffered a flood of resulting litigation. *Engquist v. Oregon Dep't of Agriculture*, 478 F.3d 985 (9th Cir. 2007)

WASHINGTON – Supreme Court

Blaney Does Not Extend to Non-Economic Damages; Contingency Multipliers Restricted

In *Blaney* the Washington Supreme Court ruled that prevailing plaintiffs were entitled to a gross-up to compensate for the tax consequences of economic damages and attorneys' fees award. Ms. Blaney did not request a gross-up for non-economic damages, so the issue was not directly addressed. Following *Blaney*, the courts of appeals had four times held that the same rule applies to non-economic damages. In *Pham*, the Supreme Court disagreed 6-3. Justice Bridge's opinion gave little more than "we think not" as its reason for rejecting the equivalence of economic and non-economic damages for the purpose of a tax gross-up. The Court said that because non-economic damages don't compensate for financial loss they shouldn't be grossed-up, a non-sequitur at best. The Court held that the trial court had not abused its discretion in reducing the plaintiff's lodestar attorneys' fees by eliminating time spent on certain tasks. The majority largely leaves fee awards un-reviewable on appeal. It came closer to adopting federal law prohibiting contingency multipliers in individual cases, but did not go that far. It said such multipliers would be justified only "occasionally." The majority agreed that the trial court had relied on an improper factor in denying a multiplier, the plaintiffs' difficulty in articulating their claims. The majority remanded for reconsideration the appropriateness of a multiplier. Justice Sanders' dissent, joined by Owens and Chambers, feared the majority opinion would be "devastating for civil rights plaintiffs". The dissent claimed that the trial court's specific fee reductions to the lodestar were contrary to law. The dissent agreed *Blaney* should apply to non-economic damages as well. *Pham v. City of Seattle*, 159 Wn.2d 527, 151 P.3d 976 (2007)

Hours Worked Out-of-State by Washington Employees Count Toward Overtime Calculation.

Larie Bostain sued his employer, Food Express, Inc., for failing to pay him for overtime that he worked as an interstate trucker, driving to and from a terminal in Vancouver, Washington. Although he worked in excess of 40 hours per week, he did not work more than 40 hours per week within the state of Washington. The trial court granted summary judgment to Bostain awarding him $9,846 in unpaid overtime wages plus prejudgment interest and attorney fees. Food Express appealed, and Bostain cross-appealed alleging that he should have been awarded more in attorney fees and double damages under RCW 49.52.070. Relying in part on two WACs, which state that overtime is based on the hours worked in Washington, the Court of Appeals reversed, holding that Bostain was not entitled to overtime pay. In turn, the Washington Supreme Court reversed the appellate court, holding that "RCW 48.46.130(1) requires overtime compensation for interstate truckers. It makes no distinction between the hours spent driving in state and those spent driving outside Washington." The Supreme Court noted that "the purposes of the MWA would be contravened if [its statement of purpose in] RCW 49.46.005 is construed to exempt Washington-based employees who work out of state."

The Supreme Court held that the two WACs conflicted with the plain language of the statute,

so were invalid and not entitled to any deference. Similarly, the Court rejected a constitutional challenge alleging that the Commerce Clause precluded Washington from burdening interstate commerce by requiring a Washington employer to pay overtime to its interstate truckers. The Court also reversed the trial court's reduction of about $7,000 in attorney fees based on "its determination that there was a bona fide dispute as to whether Food Express was liable for overtime wages, the issues presented in this case are unsettled and are a matter of first impression, and the size of the award for overtime wages." None of these factors were proper to consider. The trial court was instructed that on remand it should determine whether a multiplier is appropriate. However, the Court affirmed the trial court's denial of double damages because the dispute was bona fide. Finally, the claim was properly deemed liquidated so the award of prejudgment interest was affirmed. The dissent contended that the MWA is ambiguous so the court should defer to the WACs, which the dissent claimed are consistent with the Act's purpose "to establish minimum standards of employment within the state of Washington." RCW 48.46.005. *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 153 P.3d 846 (2007)

WASHINGTON – Court of Appeals

Restrictive "Good Cause to Quit" Legislation Violated Subject in Title Rule

As part of the giveaways to try to keep Boeing from relocating in 2003, the Legislature passed a bill placing drastic limitations on the grounds for "good cause" to quit, for the purposes of receiving unemployment. An unemployment applicant challenged that part of the law on the basis that the subject wasn't included in the title of the legislation, as required by Article ii, Section 19 of the Constitution. ESD agreed that the subject of "good cause" was not included in the title of the 2003 legislation, but claimed that it was included in the title of a 2006 bill that re-enacted the limitations. The title of the latter legislation said the 2006 bill made "adjustments in the unemployment insurance system to enhance benefits and tax equity." The employee said the "good cause" limitations still did not fall within the title. Division I agreed and said claims of "good cause" must be evaluated under the pre-2003 standard. *Batey v. Employment Security Dep't*, 154 P.3d 266 (2007)

Pizza Store General Manager Class Certification Reversed

A Superior Court granted class certification to pizza store general managers who claimed they were denied overtime. They argued that, despite their titles, their work was no different from those of production employees, who took orders, made pizzas, worked the register, etc. The company argued the managers were exempt as executives. Division II reversed the grant of class certification. The basic problem was that although there was evidence that the named plaintiff did mostly non-exempt work, there was no evidence that managers at other stores also performed mostly non-exempt work. *Weston v. Emerald City Pizza LLC*, 137 Wn. App. 164, 151 P.3d 1090 (2007)

Victories & Defeats

Sean Phelan and Mike Subit are counsel for the plaintiff in *Gambini v. Total Renal Care*, 480 F.3d 950 (9th Cir. 2007), summarized in this issue.

Mike Subit and Jeff Needle authored a WELA Amicus brief in *Pham v. Seattle* that argued unsuccessfully that non-economic damages should be subject to a *Blaney* gross-up.

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.

WELA *ALERT* EDITORS

Michael C. Subit	(206) 682-6711 msubit@frankfreed.com
Jesse Wing	(206) 622-1604 jessew@mhb.com

2007 WELA BOARD OF DIRECTORS

Jesse Wing Chair	(206) 622-1604 jessew@mhb.com
Victoria L. Vreeland Vice Chair	(206) 676-7528 vvreeland@gth-law.com
Mitchell A. Riese Treasurer	(206) 545-8561 mariese@nwlink.com
Ken Isserlis Secretary	(509) 326-1800 kisserlis@leeisserlis.com
Jeffrey Needle Amicus Chair	(206) 447-1560 jneedlel@wolfenet.com
Kathryn Olson CLE Co-Chair	(206) 220-6895 kathryn.olson@eeoc.gov
Kevin Peck CLE Co-Chair	(206) 382-2900 kpeck@thepecklawfirm.com
Victoria L. Vreeland Programs Co-Chair	(206) 676-7528 vvreeland@gth-law.com
Susan Mindenbergs Programs Co-Chair	(206) 447-1560 susanmm@msn.com
Kathleen Phair Barnard Membership Chair	(206) 285-2828 barnard@workerlaw.com
Judith A. Lonnquist Immediate Past Chair	(206) 622-2086 lojal@aol.com