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ALERT

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CASE UPDATES

FEDERAL – U.S. Supreme Court

Opposition Clause Prohibits Retaliation for Involvement in Internal EEO Investigation

The plaintiff in this case, Ms. Crawford, was contacted and interviewed by her employer as part of an investigation into sexual harassment based on a complaint by a co-employee. Ms. Crawford made statements supportive of the co-employee's case. She claimed she was terminated for her statements. The district court granted summary judgment to the employer on the basis that Ms. Crawford had not herself "instigated or initiated" a complaint of discrimination. The Sixth Circuit affirmed on the basis that Title VII's opposition clause "demands active, consistent 'opposing' to warrant protection" from retaliation. The Supreme Court unanimously reversed. Justice Souter reasoned that Ms. Crawford's answers to her employer's interview questions were covered by Title VII's "opposition clause," which makes it unlawful for an employer to retaliate because a person has opposed an unlawful employment practice. The Court described the district court's holding as "freakish" and concluded the Sixth Circuit's approach would undermine the goals of *Faragher/Ellerth.* The Court declined to address whether Title VII's "participation clause" (which protects participation in any "proceeding" under the statute) would also apply. Justices Alito and Thomas concurred only in the judgment. Justice Alito's concurring opinion sought to limit protection from retaliation to employees who communicate their opposition to their employers through purposive conduct, as opposed to silent opposition or conversations with co-workers, or events outside the workplace. *Crawford v. Metropolitan Govt. of Nashville & Davidson County, TN*, 129 S. Ct. 846 (2009).

FEDERAL - Ninth Circuit

Railway Labor Act Does Not Completely Pre-empt State Law Wage & Hour Claims

This case was a class action for unpaid wages under Oregon law against Alaska Airlines. The case was brought in Oregon state court alleging state law claims. Alaska removed to federal court on the basis that the plaintiff's claims were completely pre-empted by the Railway Labor Act (RLA) which also covers airlines. (For unknown reasons, Alaska did not claim diversity jurisdiction, which clearly existed). Once in federal court, Alaska moved to dismiss the case on the grounds of pre-emption. The district court granted Alaska's motion, but the Ninth Circuit reversed. The court ruled that the RLA was subject to "ordinary" rather than "complete" pre-emption, so the court could not rewrite the state law claims as federal ones. The panel held that prior Ninth Circuit precedent suggested that complete RLA pre-emption had been overruled by intervening Supreme Court precedent. *Moore-Thomas v. Alaska Airlines,* 553 F.3d 1241 (9th Cir. 2009) (M. Smith, Tashima, Wu (C.D. Cal.)).

ADA Pre-empts Award of Fees to Prevailing Defendant Under State Discrimination Disability Law with Lower Standard

The plaintiffs in this non-employment disability access case unsuccessfully argued that the defendant's restaurant did not comply with access requirements of the ADA and California law. The trial court ruled for the defendant and awarded attorneys' fees against the plaintiff. The

Ninth Circuit ruled that the ADA pre-empted the fee award under state law. Under the ADA, fees may be awarded to a defendant only if the plaintiff's action was frivolous. An award of fees to the prevailing party was mandatory under California law. An ADA violation also constituted a violation of the state statute. The fee award under state law therefore amounted to an award against a plaintiff for bringing a non-frivolous federal ADA claim, and was impermissible. *Hubbard v. SoBreck LLC*, 554 F.3d 742 (9th Cir. 2009) (Schroeder, Silverman, Berzon).

Postal Inspectors are Covered by the Fair Labor Standards Act

The issue in this case concerned the relationship between the FLSA and several subsequent federal statutes concerning the pay of postal inspectors. The government claimed that the FLSA did not apply to the pay of postal inspectors. The Ninth Circuit disagreed. It held that the later federal statutes did not implicitly repeal the FLSA. The appellate court remanded the case to the district court for a determination whether the postal inspectors' duties rendered them administratively exempt under the FLSA. *Nigg v. USPS*, 555 F.3d 781 (9th Cir. 2009) (McKeown, B. Fletcher and Whyte (N.D. Cal.)).

ADEA Pre-empts Section 1983 Claim for State Employee Even Though ADEA Claim is Barred by 11th Amendment

The plaintiff in this case was a Nevada state employee. She sued for age discrimination under Section 1983. Congress enacted Section 1983 in 1871 to provide a means of bringing federal constitutional claims, including violations of the Equal Protection Clause, against state actors. In 1967, Congress enacted the ADEA which provided an express cause of action against state governments for age discrimination. In 2000, the U.S. Supreme Court ruled that the 11th Amendment barred ADEA claims against state governments. In this case, the Ninth Circuit ruled that Congress' enactment of the ADEA in 1967 barred state employees from bringing claims of age discrimination under Section 1983, even though Congress was unaware that its attempt to provide an express remedy for age discrimination against state governments was unconstitutional. The court ruled that Congress intended the ADEA to be the exclusive remedy for age discrimination claims against state governments. The court weakly distinguished Title VII, which has long been held not to be an exclusive remedy, because Title VII provides for broader relief than the ADEA. If anything, this should have cut the other way. The panel held that employees can still file ADEA claims in state court, which is not at all clear under recent U.S. Supreme Court sovereign immunity jurisprudence. *Ahlmeyer v. Nevada Sys. of Higher Ed.*, 555 F.3d 1051 (9th Cir. 2009) (Bea, Noonan, W. Fletcher).

District Court Properly Dismissed Assistant Attorney General's 1st Amendment Claims But Erred in Awarding Fees to Defendant

The plaintiffs in this matter were a lawyer and a paralegal in the Office of the Attorney General of California. The lawyer represented the paralegal in a private legal malpractice case against another lawyer without permission in violation of office policy. The lawyer was told she would be fired if she continued to do so. She filed a 1st Amendment claim instead, and a breach contract claim. The district court dismissed the claim under Rule 12(b)(6) and awarded the State fees. On appeal, the Ninth Circuit affirmed the dismissal of the 1st Amendment claim on the ground that the assistant attorney general did not engage in any constitutionally protected speech activity. It ruled that the legal malpractice action she was pursuing on behalf of the paralegal did not involve any issues of public concern. The

court further ruled that the policy against outside litigation without prior approval was not an improper prior restraint. The court noted that the policy did not prohibit all outside legal activities and provided for a mechanism by which permission could be granted. The majority reversed the award of fees because the plaintiffs' prior restraint argument was not frivolous. Judge Clifton dissented on that issue. *Gibson v. Office of the Attorney General, State of California*, 561 F.3d 920 (9th Cir. 2009) (Graber, Clifton, Reed (D. Nev.)).

Subordinate Liability Turns on the "Intensely Factual" Determination of Whether the Superior Never Would have Made an Adverse Decision "But for the Subordinate's Retaliatory Conduct"

The plaintiff-appellee, Lea Lakeside-Scott ("Scott"), was fired from her position as an information systems specialist at Multnomah County's Department of Community Justice ("DCJ"), ostensibly for her improper use of DCJ's computers and email system. She filed suit alleging her employer retaliated against her because of her 1st Amendment speech and her complaints that her supervisor, Brown, favored gay and lesbians in promotions.

Brown's supervisor, Fuller, asked her to do an investigation concerning a *different* employee, which Brown delegated to a subordinate. The subordinate found a relevant email which revealed racially discriminatory remarks made by the plaintiff contained in a journal attached to the email. The subordinate (Brown) sent it to HR, and also read the relevant email, including the journal, and immediately reported it to Fuller. Thereafter, the plaintiff, Scott, was informed that she was placed on administrative leave. Fuller then directed a different employee, Turner, to conduct an investigation concerning plaintiff. Brown's role in the investigation was limited to answering Turner's questions; she did not provide him with any written materials.

At the conclusion of his investigation, Turner produced a report to Fuller detailing his findings and recommending that all of the charges against Scott be sustained. Based upon this investigation, Fuller made the decision to terminate Scott. Fuller testified that although Scott's journal was the reason she decided to initiate the investigation, she based her decision to fire Scott on all of the evidence that Turner procured during his investigation. Throughout her trial testimony, Fuller reiterated that Brown played no role in her decision to fire Scott. Scott did not produce any evidence to the contrary.

After a trial, a jury found in Scott's favor, awarding her $150,000 in compensatory damages and $500,000 in punitive damages against Brown.

The Ninth Circuit framed the issues as follows: (1) whether a final decision maker's independent investigation and termination decision, responding to a biased subordinate's initial report of misconduct, can negate any causal link between the subordinate's retaliatory motive and an employee's termination; and, if so, (2) whether the record here compels the conclusion that Fuller conducted an independent investigation and made a wholly independent decision to terminate Scott such that Brown cannot be held liable for causing her to be fired.

The Ninth Circuit held that the "wholly independent, legitimate decision to discharge [Scott], uninfluenced by the retaliatory motives of a subordinate" prohibited the jury from finding Brown liable for Scott's termination. "[A] superior's nonretaliatory employment decision 'does not *automatically* immunize a subordinate against liability for her retaliatory acts;' subordinate liability instead turns on the 'intensely factual' determination of whether the superior never would have made this decision 'but for the subordinate's retaliatory conduct.'" *Lakeside-Scott v. Multnomah County*, 556 F.3d 797 (9th Cir. 2009) (Risher, Berzon, Barzilay (U.S. Ct. Int'l Trade)).

Employee with Insulin-Dependent Type 2 Diabetes is a "Qualified Individual" with a "Disability" Within the Meaning of the ADA

The plaintiff was employed as a welding metallurgy specialist. As a metallurgy specialist, plaintiff was primarily responsible for overseeing all aspects of Salt River's welding procedures, maintaining Salt River's welding manual, training all welding personnel, reviewing and auditing the work of subcontractors, ensuring that all welding procedures complied with applicable codes and specifications, advising Salt River on the purchase of new welding equipment, and counseling less experienced welders. Plaintiff's job required that he be certified for the use of a respirator, which in turn required passing a medical examination. Plaintiff's job also required occasional travel, sometimes necessitating hard manual labor. Plaintiff asserted that the overwhelming majority of his job was office work.

Plaintiff was an insulin-dependent type 2 diabetic. This medical condition necessitates insulin injections, medicine, blood tests and a strict diet. As a result of his diabetes, plaintiff suffered from chronic high blood pressure, deteriorating vision and occasional loss of feeling in his hands and feet. Moreover, plaintiff presented evidence that his condition was deteriorating. Despite daily insulin injections, medication and a stringent diet, his vision had decreased, his hands and feet sometimes felt numb, and exhaustion made him sick rather than simply tired. Sometimes he felt sick for no apparent reason. He had to follow a "very demanding regimen" to manage his diabetes. In addition to daily injections of insulin, he had to test his blood sugar three to four times a day, could not eat large meals or skip meals and needed to snack on something every few hours. While traveling he had to find a way to keep his insulin refrigerated or chilled. Changes in the length of his work day greatly affected his treatment routine.

As an accommodation, plaintiff's doctor requested, *inter alia*, that plaintiff "not be given overnight out-of-town assignments and that he avoid becoming over exhausted such as working more than 9 hours a day or being exposed to extreme heat." Although there was some medical disagreement about the prohibition against travel, the employer implemented the work restrictions.

The employer later claimed that travel was an essential function of the job. In response, plaintiff attempted to lift the travel restriction so long as he was not required to do physical labor on site. The employer did not accept this attempted modification and forced plaintiff to apply for disability benefits.

The trial court dismissed the case on summary judgment on the grounds that plaintiff was not a qualified individual with a disability within the meaning of the ADA. Plaintiff appealed.

A couple of months after oral argument, Congress passed the ADAAA of 2008, which went into effect on January 1, 2009. The Ninth Circuit acknowledged the Congressional purpose of rejecting the Supreme Court's interpretation of *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), and *Toyota Motor v. Williams*, 534 U.S. 184 (2002). In so doing, Congress significantly expanded the scope of the term "disability" under the ADA. In most relevant part, the ADAAA rejects the requirement enunciated in *Sutton* that whether an impairment substantially limits a major life activity is to be determined with reference to mitigating measures. Impairments are to be evaluated in their unmitigated state, so that, for example, diabetes will be assessed in terms of its limitations on major life activities when the diabetic does not take insulin injections or medicine and does not require behavioral adaptations such as a strict diet.

The Court, however, declined to decide whether the ADAAA applied retroactively because plaintiff was a qualified individual under the old statute. The Court also ruled that the medical exam for respiratory certification "screened out" plaintiff in violation of the statute. Lastly, the Court ruled that "[w]here there is 'conflict in the

evidence regarding the essential functions of [a position], we conclude that there is a factual dispute . . . notwithstanding the job descriptions that [an employer] has prepared.'" "[A]n employer may not turn every condition of employment which it elects to adopt into a job function, let alone an essential job function, merely by including it in a job description."

The Court ruled that whether travel was an essential job function was a question of fact for the jury, and remanded. *Rohr v. Salt River Project Agric. Improvement and Power Dist.*, 555 F.3d 850 (9th Cir. 2009) (Baer (S.D. NY), Paez, Berzon).

Plaintiff had a 1st Amendment Right in His Attorney's Speech

The plaintiff, Eng, was employed as a Los Angeles County Deputy District Attorney. He was assigned to a task force to investigate fraud and environmental crimes at a school construction project. Contrary to his supervisor's expectations, the task force concluded there were no crimes committed and no indictments should be returned. Plaintiff objected that his supervisor's erroneous report to the IRS that the financing agreement involved fraud resulted in the revocation of the finance agreement, which required that the construction project be re-finance at substantially higher rates. Plaintiff insisted that the supervisor's report to the IRS should be corrected.

The plaintiff was subjected to various forms of retaliation including suspension, false charges of sexual harassment, and a demotion to the juvenile division. Eventually misdemeanor charges were filed against him for allegedly having misused county property. Those charges were dismissed. At approximately the same time, an article appeared in the *Los Angeles Times* which included an interview with Eng's attorney and detailed Eng's allegations that he had been prosecuted because he refused to file criminal charges against individuals involved in the Belmont School project, and because he complained that it was improper for members of the Task Force to contact the IRS.

Thereafter the District Attorney offered to "resolve matters" if Eng agreed to "tell the Los Angeles Times that Geragos's comments were unauthorized and inaccurate, and if he would publicly apologize to the [District Attorney]." Eng refused, and he returned to work at an attorney entry level of employment.

Eng filed suit alleging a violation of his 1st Amendment rights and various state law claims. The district court dismissed part of the claim based upon *Garcetti*, and denied the remainder of defendants' qualified immunity arguments. The defendants filed an interlocutory appeal.

The Ninth Circuit first concluded that Eng had a 1st Amendment right to protect his attorney's speech.

Citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968), the Court recognized a sequential five-step series of questions: (1) whether the plaintiff spoke on a matter of public concern; (2) whether the plaintiff spoke as a private citizen or public employee; (3) whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action; (4) whether the state had an adequate justification for treating the employee differently from other members of the general public; and (5) whether the state would have taken the adverse employment action even absent the protected speech.

In reference to these five questions, the Court ruled (1) that the public concern inquiry is purely a question of law; (2) while the question of the scope and content of a plaintiff's job responsibilities is a question of fact, the ultimate constitutional significance of the facts as found is a question of law; (3) whether the employer took adverse employment action which was a 'substantial or motivating' factor in the adverse

action is purely a question of fact; (4) although the *Pickering* balancing inquiry is ultimately a legal question, like the private citizen inquiry, its resolution often entails underlying factual disputes; and (5) whether the government would have reached the same [adverse employment] decision even in the absence of the [employee's] protected conduct is a pure question of fact.

The Court then ruled (1) that Eng's speech involved an issue of public concern; (2) that there exists a factual issue about whether his speech about the IRS was as a private citizen; (3) that there exists a factual issue about whether the speech was a substantial factor; (4) the defendants have neither alleged nor offered any evidence to support a conclusion that investigating, suspending, prosecuting, or transferring Eng for his speech was "necessary for [the District Attorney's office] to operate efficiently and effectively;" and (5) the defendants have not met their burden to show that Eng's protected speech was not a but-for cause of the adverse employment actions taken against him.

On the issue of qualified immunity, the defendants argued only that it was unclear whether Eng spoke as a private citizen. Because this issue involved a question of fact, qualified immunity at this stage of the proceeding must be denied. *Eng v. Cooley*, 552 F.3d 1062 (9th Cir. 2009) (Hawkins, Cudahy (7th Cir.), Pregerson).

District Court Correctly Denied Qualified Immunity to Police Department in 1st Amendment Case

Plaintiff, Richard Robinson, a sergeant with the Los Angeles County Office of Public Safety, filed a civil rights complaint under 42 U.S.C. § 1983 against the County of Los Angeles and several officers alleging that he was denied promotion in violation of his 1st and 14th Amendment rights because he reported misconduct within his department and testified in a class action lawsuit alleging discrimination against the Department. Defendants appealed the denial of qualified immunity. The Ninth Circuit affirmed.

Robinson alleged direct evidence of retaliation against his supervisor and that he was not promoted to lieutenant despite having scored the highest of those taking the test. At summary judgment, the defendants argued that Robinson's reports were not protected speech because they were made as part of his professional duties or because he failed to present the reports through the chain of command as required by written department policy.

The Court ruled that the issues raised by plaintiff involved "public concern." The defendants attempted to distinguish the following complaints filed by plaintiff as "complaints about the job performance of co-workers." The Ninth Circuit disagreed. "Reports pertaining to others, even if they concern personnel matters including discriminatory conduct, can still be 'protected under the public concern test.'" "Robinson's testimony in a class action against the County is also of public concern, regardless of whether it had an impact on the result of that litigation."

The defendants argued that plaintiff's speech was part of his job duties and therefore not protected under *Garcetti*, but the Ninth Circuit ruled that questions of fact remained on that issue.

Applying the *Pickering* balance test, the Court ruled that the government's interest as an employer in a smoothly-running office outweighs an employee's 1st Amendment right, only if defendants demonstrate actual, material and substantial disruption, or "reasonable predictions of disruption" in the workplace. "[T]he workplace disruption hurdle for government employers is higher in cases, like this one, where the speech involved unlawful activities rather than policy differences."

The defendants argued that their policy of requiring complaints go through the chain of

command justified the adverse action taken against plaintiff. The Ninth Circuit again disagreed, and ruled that under some circumstances the balance can tip in plaintiff's favor even where a written policy requiring complaints go through the chain of command is violated. "Given the evidence that Defendants may have been more concerned with the nature and frequency of Robinson's reports of misconduct than his adherence to the formal chain of command, a fact-finder could conclude that Defendants' application of the chain of command policy was pretextual and not based on Defendants' interest in avoiding workplace disruption."

On the issue of qualified immunity, the Court ruled that all of the constitutional rights at issue had been decided well before the adverse action was taken against plaintiff. The Court ruled that in reference to *Pickering*, that this exception cannot serve as a "pretext," and that it was clearly established that "employers would be required to make an even 'stronger showing' of disruption when the speech dealt . . . directly with issues of public concern." *Robinson v. York*, No. 07-56312 (April 27, 2009) (Hawkins, Cudahy (7th Cir.), Pregerson).

WASHINGTON - Supreme Court

McClarty Fix Does Not Violate Separation of Powers

On July 6, 2006 the Supreme Court filed its opinion in *McClarty v. Totem Electric*, 157 Wn.2d 214, 137 P.3d 844 (2006). The Court adopted the federal statutory definition of disability contained within the American with Disabilities Act.

On or about May 4, 2007, Governor Gregoire signed new legislation which created a new statutory definition of "disability" within the meaning of the Washington Law Against Discrimination. The new legislation provided that it is "remedial and retroactive and applies to all causes of action occurring before July 6, 2006, and to all causes of action occurring on or after the effective date of this act." 2007 Wash. Laws Ch. 317, § 3.

The employer in this case challenged the constitutionality of the retroactive provision claiming that it violated the Washington Constitution's separation of powers. The Supreme Court disagreed.

In a diplomatic and scholarly opinion by Justice Chambers, the Court ruled that "where no constitutional prohibition applies, an amendment may act retroactively if the legislature so intended or if it is curative." In defense of judicial independence the Court acknowledged that retroactive application of laws may violate the ex post facto doctrine, affect vested rights and violate due process, or affect other judicial functions. There are also many policy reasons that disfavor changing the law retroactively. In addition, retroactive changes in the law alter the status quo and may disturb a party's reasonable reliance on what the law formerly said and may cause manifest injustices.

The Court nevertheless ruled that the new definition applied retroactively because "[t]he legislature was careful not to reverse our decision in McClarty nor did the legislature interfere with any judicial function." "In the absence of a clear declaration by the legislature regarding retroactivity of an amendment, it may be helpful to characterize changes to a statute as clarifying or restorative or curative or remedial to assist in determining legislative intent." But these characterizations are not required where, as here, the legislative intent is clearly expressed. *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 198 P.3d 1021 (2009).

WASHINGTON – Court of Appeals

Hearing Impaired Employee Held as Disabled But Unable to Show Substantial Limitation in Ability to Perform Her Job

A part-time assistant cook at a public high school wore hearing aids because she was clinically deaf. After she was transferred to another high school where she could earn more she had difficulty hearing because of dishwashing noise and her supervisor was not satisfied with her work resulting in the school district granting her request to transfer back to her old location nine days later. The assistant cook filed an administrative complaint alleging hostile work environment, disability discrimination, and retaliation against the supervisor who was dissatisfied, claiming she "rolled her eyes" saying "another hard of hearing person" and claimed she could not work with the plaintiff because she was "too hard of hearing." A school investigation found no harassment or discrimination but directed the supervisor to get training to better handle the situation. While she was asked to take leave for safety reasons to get her hearing aid repaired, the plaintiff nevertheless attended a kitchen training and after a dispute, she was escorted out and quit.

The trial court granted summary judgment for the school district. The court of appeals affirmed, finding that while the plaintiff had a hearing disability under either the ADA definition or the new legislative fix to *McClarty v. Totem Electric* because her hearing aids did not entirely mitigate her limitation, the court found that it nevertheless "did not have a substantially limiting effect on her ability to assist in the kitchen or wash dishes." Similarly, the court held that the plaintiff did not show that her employer deliberately created intolerable working conditions so her constructive discharge claim failed. Finally (and incorrectly) the court held that its conclusion that the plaintiff did not establish her harassment or discrimination claims "obviates the need to analyze Ms. Townsend's retaliatory discharge claims." *Townsend v. Walla Walla Sch. Dist.*, 147 Wn. App. 620, 196 P.3d 748 (2008) (Brown, J., Kulik, Korsmo).

Fee Award Under RCW 49.48.030 for Unpaid Vacation Benefits Upheld

This case was a class action for loss of vacation benefits. The employer changed its vacation policy in 2005. At the time, the employer told the employees they would not lose any vacation pay, but subsequently failed to pay vacation benefits for 2004 and 2005. The parties went to arbitration. The arbitrator awarded $1.2 million in damages for breach of contract. He did not find a violation of RCW 49.46, 49.48 or 49.52, and held that there was no clear law characterizing the payment of vacation time as wages under Washington law. The arbitrator nevertheless awarded $885,000 in attorneys' fees under RCW 49.48.030 because the plaintiffs had recovered "damages arising out of their employment." The defendant argued the award was improper because the class did not recover wages. The arbitrator, trial court, and Division III all rejected that argument. Division III held that the vacation benefits were "wages" under Washington law because they were compensation due by reason of employment. The court's decision was based in part on deference to the arbitration award but the net effect of the holding is "wages" has a broader meaning under RCW 49.48.030 than under the substantive provisions of RCW 49.46, 49.48 and 49.52. The court also upheld the arbitrator's award of attorneys' fees for opposing the defendant's motion to vacate the arbitration award. *McGinnity v. AutoNation, Inc.*, --- Wn. App. ---, 202 P.3d 1009 (2009) (Schultheis, Brown, Korsmo).

Defendant Waived Attorney-Client Privilege in Confidential Letters

The plaintiff sued the employer for breach of an employment contract and quantum meruit. One month after filing the Complaint, plaintiff served upon the defendant a discovery request and received 439 documents in response, including four confidential letters between the defendant and its attorney. Three years later and 10 days before trial plaintiff designated these letters as trial exhibits. The defendant objected to their admission on the first day of trial. In a case of first impression in Washington, the court held five factors were to be considered in determining whether an inadvertent disclosure waives the attorney-client privilege: (1) the reasonableness of precautions taken to prevent disclosure; (2) the amount of time taken to remedy the error; (3) the scope of discovery; (4) the extent of the disclosure; and (5) the overriding issue of fairness.

Applying these factors the Court ruled in favor of waiver. The Court concluded that the defendant offered no evidence of precautions taken to prevent disclosure; a "claw back" was not attempted for three years after disclosure; and only 439 documents were produced, which is not a substantial amount. *Sitterson v. Evergreen Sch. Dist.*, 147 Wn. App. 576, 196 P.3d 735 (2008) (Armstrong, Houghton, Bridgewater). Published in Part.

Retaliation Claim Wrongly Dismissed on Summary Judgment; Dismissal of Handbook, Public Policy and Breach of Contract Claims Affirmed

The plaintiff worked as the Director of Patient Care Services, one of the three top management positions at the Hospital. The Chief of Staff, to whom she reported, started having a romantic relationship with one of the plaintiff's subordinates. When the Chief of Staff learned that the plaintiff had disciplined his paramour, he ordered her removed from her position. The Hospital began an investigation instead. The subordinate resigned from her position, as did the Chief of Staff. The plaintiff was eventually terminated because of alleged insubordination. The plaintiff brought claims for breach of contract, specific treatment in specific situations, wrongful termination and retaliation. The superior court granted summary judgment to the Hospital.

Division III affirmed as to all claims but the retaliation claim. The employer had admitted the plaintiff had engaged in protected activity. The court of appeals found a factual dispute as to pretext. In response to the plaintiff's unemployment application the employer had stated the reason for the plaintiff's termination was inability to perform her job functions, not insubordination. The court dismissed the wrongful termination claim on the basis that there were other means for promoting public policy, but what it meant by that statement was unclear. The court found that the applicable employee handbook and other policies gave the Hospital discretion in applying progressive disciplinary procedures, so no promise of specific treatment existed. The court also relied on the disclaimer in the handbook. The court rejected the plaintiff's claim that she had been given a contractually binding promise that her job would not be in jeopardy if she reported the Chief of Staff's conduct. *Hollenback v. Shriners Hospital for Children (Spokane, Washington)*, No. 26626-5-III (Mar. 17, 2009) (Kulik, Sweeney, Brown, J.).

Plaintiff's Disability Discrimination and Retaliation Verdict Reinstated; Business Judgment Instruction Not Appropriate; Loss of Consortium Damages to Spouse Allowed in RCW 49.60 Case

The plaintiff began working for Boeing in 1978. He was diagnosed with leukemia in 2001. He told his supervisors and took a brief leave of

absence. He asked for a less stressful position than marketing. Boeing offered him either a downgraded position or a layoff. He accepted the downgraded position but filed an internal ethics complaint about the downgrade. He later received a corrective action memo for downloading on a company printer an article that was critical of African-Americans' claims of racial discrimination. He filed another ethics complaint. Another company took over his facility and offered jobs to 90% of the employees, but not him. He filed suit for disability discrimination and retaliation against Boeing, his Boeing manager and the new company. His wife sued for loss of consortium. The jury found for the plaintiff against Boeing and his Boeing manager only and awarded over $1 million to the plaintiff and damages to his wife. The trial court granted defendants' motion for judgment as a matter of law. The plaintiff appealed. Division III reinstated the jury's verdict. The jury was instructed using the *McClarty* standard. The court held that even though the 2007 *McClarty* fix applied to the case, the plaintiff met the *McClarty* standard because he suffered from profound fatigue on a daily basis that increased with intensity and had no realistic hope of improvement. The court upheld the jury's damages award despite the finding that his failure to be hired by the new company was nondiscriminatory because Boeing's actions had impeded his ability to be hired at other Boeing plants.

The court of appeals ruled that the trial court had properly refused to allow the plaintiff to claim the value of the Boeing life insurance policies he had lost due to his termination because he did not attempt to convert his policy to an individual life insurance policy as Boeing's policies permitted. The only damages to which the plaintiff was entitled with respect to the life insurance policy was for the premiums he had paid. The appeals court upheld the trial court's refusal to admit evidence of the co-workers who had complained to managers about alleged sexual misconduct by the plaintiff because Boeing could not prove that the allegations had been a factor in its employment decisions. The court allowed witnesses to testify that there had been complaints about the plaintiff's conduct that were a concern for management.

The appellate tribunal ruled the trial judge had correctly rejected Boeing's request for an instruction that told the jury not to second guess the defendant's business judgment or find for the plaintiff because it disagreed with the decision or thought it was unreasonable or unfair. The court held that the requested instruction on the business judgment rule was "inappropriate." It also upheld the trial judge's refusal to give an instruction on "adverse employment action." In one of the most interesting parts of the opinion, the court held that damages were awardable to the plaintiff's wife even though the plaintiff did not suffer a physical or bodily injury. The court held that an action under RCW 49.60 is a tort and that loss of consortium damages to the spouse are a traditional form of tort damages. *Burchfiel v. Boeing*, -- Wn. App. -- , 205 P.3d 145 (2009) (Sweeney, Kulik, Korsmo).

Summary Judgment Reversed in Reverse Discrimination Race Case; Proof Scheme in I-200 Cases Slightly Different Than in Other RCW 49.60 Cases

The plaintiff in this case was a white Seattle firefighter. He claimed that the Fire Department violated RCW 49.60.400, the I-200 anti-affirmative action provision, by promoting a less qualified African-American instead. I-200 prohibits preferential treatment in public employment due to race, gender, ethnicity, or national origin. Under civil service rules, the Fire Chief had discretion to promote any one of the top five highest scoring applicants. In 41 cases he promoted the highest scoring applicant. In four cases, including the plaintiff's, he promoted a person of color where the highest scoring applicant was a white male. The plaintiff scored first; the successful candidate third. The

successful candidate had a history of disciplinary problems, more than twice the number any other promoted candidate had. The plaintiff had no discipline history. The Superior Court granted summary judgment to the City.

The sole contested issue on appeal was whether the plaintiff had established a genuine issue of pretext. Division I found that there was. The court first held that *McDonnell-Douglas Burdine* paradigm applied to claims under RCW 49.60.400, with some modifications. The panel reasoned that there is no protected class in such cases, other than public employees (and applicants). The remaining prima facie elements in a RCW 49.60.400 case are: (1) the plaintiff was qualified and applied; (2) was not selected; and (3) a less qualified candidate of a different race, sex, color or ethnicity or national origin was selected instead. (The problem with this scheme is that proof of this supposed "prima facie case" is more than sufficient for finding liability under the statute). The court held that the plaintiff's higher test score and testimony by the City's Chief Fireboat Engineer (who was not involved in the selection) that the plaintiff was better qualified satisfied the third element.

The court agreed that the employer had submitted evidence of a non-discriminatory reason: the other candidate had greater experience. The panel held there are two ways the plaintiff can prove pretext: (1) showing that the employer's stated justification was false; or (2) showing that the actual reason for the other candidate's selection was his or her race, gender, ethnicity or national origin. The court held that if evidence of falsehood is weak, the plaintiff may have to use the second route. The court held that the plaintiff had sufficient statistical evidence of discrimination. The only times the Fire Chief had failed to pick the top scoring candidate was to promote a minority over a white applicant. The court also held there was sufficient comparative evidence of discrimination in that the successful candidate had scored significantly lower than the plaintiff and had a much worse disciplinary history. The court also relied on the fact that the City's explanations for the decision had shifted over time. The court concluded that the plaintiff had submitted sufficient evidence for a jury to find both that the employer's explanation was false and that the actual motivation for the decision at issue was racially based. *Dumont v. Seattle*, 148 Wn. App. 850, 200 P.3d 764 (2009) (Dwyer, Leach, Schindler).

Victories & Defeats

Congrats to Beth Terrell and Toby Marshall for their victory in *McGinnity v. AutoNation, Inc.*

Editors' Note

Beginning with this issue, Jeff Needle has taken over for Jesse Wing as co-editor of the *WELA Alert.* Thanks to Jesse for his dedicated work on the *Alert* these past six years.

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