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ALERT

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CASE UPDATES

U.S. SUPREME COURT

Justices Will Decide Whether Retaliation Cases Require Proof of "But-for" Causation.

The 1991 Civil Rights Act provides that a plaintiff can establish liability under Title VII for disparate treatment discrimination by showing an unlawful reason was "a motivating factor" in the defendant's adverse employment action. In *Gross v. FBL*, the Court held 5-4 that ADEA disparate treatment claims require proof of "but-for" causation and that the mixed motives paradigm set forth in *Price Waterhouse v. Hopkins* does not apply. The question in this case is what standard governs retaliation claims under Title VII. The 1991 Civil Rights Act did not specifically address those claims.

University of Texas Southwestern Medical School v. Nassar, 113 S. Ct. 978 (2013).

NINTH CIRCUIT

Store Manager Who Was Unable to Work at the Time of and for at Least a Year After Her Termination Not Qualified Individual with a Disability.

In this case arising under California law, the plaintiff worked as a manger of a jewelry store in a mall. After 8 years of employment, the plaintiff was diagnosed with chronic arthritis. The plaintiff asked for a reduced schedule of 25 hours. The company wrote back that being in the store 40 hours a week was an essential function of the manager position. The plaintiff's doctor wrote a note putting her on a four-week leave starting August 5, 2009. The company asked her to fax the note and plaintiff went to the jewelry store to fax the note because she didn't own a fax machine.

As it turned out a corporate vice-president was there and insisted the plaintiff perform numerous job tasks even though she was on leave and unable to perform the tasks. The vice-president threatened her job for not complying with his requests. The plaintiff then sent in a written complaint to HR about being asked to work while she was on disability leave. Her doctor extended her leave to January 5, 2010. The company terminated her employment on October 15, 2009, because of her projected five-month absence.

The plaintiff filed suit. In her deposition in November 2010, the plaintiff testified she had not worked since October 2009, had received state and company disability benefits from September 2009 until September 2010 and Social Security Disability thereafter. The plaintiff brought a claim for disability discrimination under California law but not a failure to make reasonable accommodation claim. She also brought retaliation and harassment claims. The district court granted the employer's motion for summary judgment and the Ninth Circuit affirmed.

Although California law uses slightly different terminology than the ADA, a plaintiff must prove she can perform the essential functions of her position with or without accommodation. The plaintiff agreed all of her job duties could be performed only while physically present at the store. The panel held the plaintiff's inability to perform the essential functions of her job since August 2009 and inability to perform any work since October 2009 meant no accommodation was possible.

The court affirmed the retaliation dismissal because there was no evidence that the employer dismissed her for any reason other than her inability to do her job. The court held that the vice-president's conduct on August 5 did not constitute disability harassment because the comments related to her job duties and were not pervasive. California law does not consider job related conduct to be harassment.

Lawler v. Montblanc North America LLC, 704 F.3d 1235 (9th Cir. 1/11/13) (Duffy (SDNY), Gould, M. Smith).

WASHINGTON SUPREME COURT

Arbitrator Punishment of 20-Day Suspension for Employee Bringing Noose to Work Does Not Violate Public Policy.

In IUOE an employee of the Port of Seattle hung a noose at work. After an investigation, the Port of Seattle determined that the conduct violated its zero tolerance policy against racial harassment, and terminated the employee. The employee's union, IUOE, filed a grievance and ultimately an arbitration. The arbitrator found that the employee intended the noose as a "joke" toward a 70-year-old white co-worker, who did not find it harassing. He further found credible the employee's testimony that he didn't know the noose was racial and "his impression of a noose was not racial, but derived from 'Cowboys and Indians.'" The arbitrator found that the employee was "more clueless than racist," and reduced the discipline from a termination to a 20-day suspension. The arbitrator ordered the employee reinstated with back pay. The union appealed.

The Superior Court reversed the arbitrator's ruling, and ordered a six-month suspension instead. The Superior Court found that the arbitrator's ruling was so lenient that it violated the well-established, explicit, and dominant public policy reflected in the WLAD. The Superior Court also ordered a sincere letter of apology, diversity and antiharassment training, and a four-year period of probation. The union appealed and the Court of Appeals affirmed except insofar as the Superior Court substituted its discipline for the discipline ordered by the arbitrator. *Int'l Union of Operating Eng'rs, Local 286 v. Port of Seattle*, 164 Wn. App. 307, 326, 264 P.3d 268 (2011).

On review, the Supreme Court acknowledged that "the noose has hateful, racist, and violent history in this country . . . ." "We acknowledge this terrible and tragic history and condemn the racial violence and threats of violence symbolized by the noose in the strongest terms possible." It condemned the employee's actions as "ignorance and unacceptable." The Court nevertheless acknowledged the limited review available from the decision of an arbitrator pursuant to the collective bargaining process, and that it was bound by the arbitrator's findings.

The Court acknowledged that "like any contract, an arbitration decision arising out of a collective bargaining agreement can be vacated if it violates public policy." *Citing Kitsap County Deputy Sheriff's Guild v. Kitsap County*, 167 Wn.2d 428, 435, 219 P.3d 675 (2009). A union arbitration decision can only be vacated "if it violates an 'explicit,' 'well defined,' and 'dominant' public policy, not simply 'general considerations of supposed public interests.'" The Court rejected to the union's argument to the contrary, and found that a union arbitrator's decision could be vacated if it violated that public policy reflected in the WLAD. The Court ruled that in order to qualify the statute need not "list all possible discriminatory acts" and assign levels of discipline for each.

The Court concluded that in light of the arbitrator's factual findings that a 20-day suspension in this case did not violate the public policy reflected in the WLAD: "[W]e cannot say that a 20-day unpaid suspension would not provide sufficient discipline to cause this or other employees to understand the serious nature of a noose in the workplace and thus prevent a similar incident in the future." The Court was careful to

limit its ruling to the unique facts of this case: "We choose not to speculate what level of discipline would have been insufficient to prevent a similar incident in the future . . . . We must leave those questions to another day."

Last, the Court confirmed that even where an arbitrator's ruling violates public policy, "trial courts cannot impose their own remedy after vacating an arbitration decision." "[I]nstead it should remand to the arbitrator for further proceedings."

WELA filed an amicus brief and argued that the WLAD was an explicit, well defined and dominant public policy sufficient to vacate an arbitrator's ruling. WELA took no position about whether the discipline in this case was sufficient to violate the public policy reflected in the WLAD.

International Union of Operating Engineers, Local 286 v. Port of Seattle, ___ Wn.2d ___, 295 P.3d 736 (2/21/13).

WASHINGTON COURT OF APPEALS

Local Gov't Whistleblower Laws Do Not Provide Cause of Action in Court and RCW 42.41 Does Not Provide for Emotional Distress.

The plaintiff was a deputy Seattle fire chief. He filed a whistleblower administrative complaint about the City's failure to bill for $200,000 in fire services. He was later demoted. He filed an administrative whistleblower retaliation claim under the state local government RCW 42.41 and Seattle whistleblower laws. The plaintiff then filed a complaint in Superior Court under the same provisions. The Superior Court stayed the administrative complaint.

The City moved to dismiss claiming the plaintiff had no right to bring a whistleblower claim directly in Superior Court and had no wrongful discharge claim because he had not been discharged. The Superior Court agreed and Division One affirmed.

The appellate court held that both the state and local whistleblower laws at issue provide for appellate review by a Superior Court of final administrative decisions on whistleblower complaints but they do not provide for a direct action in Superior Court. The court noted that the state government employee whistleblower statute and the WLAD retaliation provisions had clear language permitting a direct action in Superior Court.

The court also held that emotional distress damages are not available under RCW 42.41.

Woodbury v. Seattle, --- Wn. App. ---, 292 P.3d 134 (Div. 1 1/14/13) (Appelwick, Cox, Ellington).

WLAD Protects HR Director from Retaliation Based on Job Duties; Requesting Emotional Distress Damages Waives Psychologist-Patient Privilege.

Plaintiff worked as VP of HR. In July 2007 the company hired a new 37-year old CEO who made ageist comments about older workers. The plaintiff was 55. The plaintiff told the CEO that his comments were making other employees uncomfortable. A few months later the CEO promoted the plaintiff to senior vice-president. He received a pay raise and a bonus.

The plaintiff alleged that at the very same time he received a promotion the CEO recruited colleagues to report negative comments about him, which appeared in his next performance review. The CEO then put the plaintiff on probation. In March 2008 the CEO terminated the plaintiff for failing to improve his performance.

The plaintiff filed claims for age discrimination and retaliation in Superior Court. Judge Hayden dismissed the retaliation claim because it related to the plaintiff's HR job duties. The trial judge also held that when a plaintiff seeks emotional distress damages it waives the psychotherapist-

patient privilege. The plaintiff refused to provide the discovery and the judge barred him from introducing emotional distress evidence.

During discovery the company learned the plaintiff had received his $35,000 bonus twice and not deducted vacation time that he had used from his bank resulting in an overpayment of his vacation cash out. The company counterclaimed for breach of fiduciary duty.

The case went to trial. The jury ruled in favor of the company on the employee's age discrimination claims and the employer's fraud and unjust enrichment claims. The jury awarded no damages. The judge granted the employer a new trial. A second jury found for the employee on the bonus counterclaim but for the employer on the vacation hours claim and awarded the employer $42,000. Both sides appealed.

The appellate court reversed the dismissal of the employee's retaliation claim on the basis that his conduct was part of his job duties. The court held that federal cases imposing a requirement under the FLSA that the employee must "step outside his job duties" in order to engage in protected activity did not apply to the WLAD. Relying on the broad interpretation of Title VII anti-retaliation provisions under U.S. Supreme Court precedent, the court held there is no "step outside" requirement under the WLAD. The panel reasoned that adoption of the rule "would strip human resources, management and legal employees of WLAD protections. These employees are often best situated to oppose an employer's discriminatory practices."

The court refused to apply the same actor inference to retaliation claims. "[A]dopting this inference would allow an employer to grant a raise or promotion prior to implementing a termination as a means of decreasing their exposure to a valid retaliation claim."

The panel affirmed the trial court's ruling on the psychotherapist-patient waiver. The plaintiff argued no waiver because he didn't allege a specific psychiatric disorder and does not intend to rely on medical records or testimony. The panel held that the statutory medical privileges should be narrowly construed. It held that a plaintiff who alleges emotional distress has put his mental health at issue.

The court refused to follow federal cases that find waiver only when the plaintiff alleges a specific disorder or relies on psychologist testimony. The court instead held that "when a plaintiff puts his mental health in issue by alleging emotional distress, he waives his psychologist-patient privilege for relevant mental health records." The court held that even if the plaintiff stipulates that he will not introduce any psychologist or expert testimony, the records may still be relevant to show causation and magnitude." The court did not suggest that its holding applied to any other type of medical records.

On the employer counterclaims, the court held the judge erred by allowing the question of the existence of a fiduciary duty to go to jury. That is a question of law from the court. The breach of a legal duty is generally a question of fact, which does go to the jury. The court affirmed the second jury verdict in all respects and the exclusion of an allegation of sexual harassment against the plaintiff.

Lodis v. Corbis Holdings, Inc., --- Wn. App. ---, 292 P.3d 779 (Div. 1 1/14/13) (Appelwick, Cox, Ellington).

Filing Complaint With WSBA is Adequate Alternative Remedy Precluding Lawyer from Asserting Public Policy Claim.

In *Weiss v. Lonnquist*, the plaintiff was an attorney associate employed by the defendant. As part of her employment, Weiss was requested to prepare a summary judgment response in a case alleging disability discrimination and/or retaliation. The employee represented by

Lonnquist's firm alleged that she was terminated in retaliation for having requested a medical leave. The employer in the disability discrimination case alleged that the employee had already been notified that she would be terminated from employment, and therefore her request for medical leave could not have been a motivating factor in the decision to terminate her. After reviewing the file, Weiss discovered a faxed message from the client indicating that she knew that she was about to be laid off before she requested a medical leave. But in her deposition, the client testified the reason for her termination was her request for medical leave. Weiss concluded that the deposition testimony was incompatible with the faxed message, and that Lonnquist had perpetuated the false testimony. After consulting with an ethics experts, Weiss refused to continue working on the case. Lonnquist wrote the summary judgment response herself, and maintained that the client did not know that she would be terminated before requesting a medical leave, only that she was going to be offered a severance agreement, the terms of which offered the client various benefits including three months' notice and three months' severance pay.

Approximately two weeks later Lonnquist gave Weiss 30 days' notice of her termination from employment. Lonnquist argued that Weiss was terminated from employment because she failed to generate sufficient revenue. Weiss declined to return to work, relying upon her physician's advice. Weiss believed that a substantial factor in the decision to terminate her employment was her refusal to violate the public policy reflected in the Rules of Professional Conduct including RPC 3.3, which mandates candor toward a tribunal. Although Weiss considered a complaint with the WSBA, she declined to file a complaint because she "wanted to pursue a civil action and [] knew that they would put the bar complaint on hold if a civil action was pending." She also believed that the bar process was inadequate because it would not address wrongful termination. Weiss brought suit alleging *inter alia* wrongful termination in violation of public policy.

The case went to trial on the wrongful termination theory and a claim of lost wages. The jury found for Weiss and the Court entered judgment for damages in the amount of $36,465, and $128,386 in attorney fees. Lonnquist appealed. After the case was tried and appealed, the Washington Supreme Court decided *Cudney v. ALSOCO, Inc.*, 172 Wn.2d 524, 259 P.3d 244 (2011).

The Court of Appeals concluded that "[t]he jeopardy element sets up a relatively high bar." In particular, plaintiff must show "that other means of promoting the public policy are inadequate." "The question of whether adequate alternative means for promoting a public policy exist presents a question of law as long as 'the inquiry is limited to examining existing laws to determine whether they provide adequate alternative means of promoting the public policy.'" *Citing Cudney*, 172 Wn.2d at 528-29, *quoting Korslund*, 156 Wn.2d at 182. Relying upon *Cudney*, the Court concluded that the trial court erred by failing to grant summary judgment in Lonnquist's favor. The Court concluded as a matter of law that, despite the lack of any remedy for Weiss, the disciplinary process provided by the WSBA was an adequate alternative remedy to foreclose the jeopardy element of the wrongful discharge claim: "The Supreme Court has repeatedly emphasized that *it does not matter* whether or not the alternative means of enforcing the public policy grants a particular aggrieved employee any private remedy." (Emphasis original). The Court explained that "[w]e might have a different case if Weiss had reported Lonnquist to the bar association and had been discharged for taking that action." The Court rejected Weiss's argument that a report to the Bar Association would have required her to disclose confidential information in violation of RPC 1.6. A Petition for Review is pending.

WELA filed an amicus curiae brief in support of a more expansive interpretation of the public policy tort.

Weiss v. Lonnquist,---Wn. App. ---, 293 P.3d 1264 (Div. I 2/4/13) (Becker, Dwyer, Appelwick).

WELA MEMBER VICTORIES & DEFEATS

Jack Sheridan represented the plaintiffs in both *Woodbury* and *Lodis*.

JOIN THE WELA LISTSERVE

WELA members are entitled to participate in an Internet-based electronic discussion group, or "listserve," that provides almost instant feed-back to questions and thoughts related to employment law. This is a terrific way to keep on top of the latest developments in the law, new defense tactics, judges, and recent jury attitudes. To become a part of this group, contact our moderator, Jesse Wing, at jessew@mhb.com. Jesse will verify your WELA membership, and sign you up.

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