WELA
WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION
A NELA AFFILIATE

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

ALERT

Editors: Mike Subit / Jeffrey Needle

CASE UPDATES

UNITED STATES SUPREME COURT

Donning and Doffing Protective Gear Falls into the "Changing Clothes" Exemption for Compensable Work Time under the FLSA

Plaintiffs worked for a steelmaking company. They claimed denial of pay for putting on (donning) and taking off (doffing) twelve kinds of protective gear. The relevant union CBA designated this time as non-compensable. The FLSA permits a CBA to designate the "time spent changing clothes" as non-compensable. The district court granted summary judgment to the employer and the Tenth Circuit affirmed. Both courts ruled that most of the items were "clothes" and that the time spent putting on and taking off the remaining items, such as hardhats, glasses and earplugs, was *de minimis.*

The Supreme Court unanimously affirmed the grant of summary judgment to the employer in an opinion by Justice Scalia. The bulk of the Court's opinion was devoted to an analysis of the words "clothes" and "changing." The Court held "clothes" had its ordinary meaning: "covering for the person." The Court rejected plaintiffs' definition of "clothes" to exclude protective gear as too narrow and the employer's definition—the entire outfit that one puts on to be ready for work--as too broad. The Court rejected the plaintiffs' contention that putting on or taking off protective gear over other clothes does not constitute "changing" clothes. The Court reasoned that "changing" could refer to "altering" and not just the "normal meaning" of "substituting" clothes. The Court reasoned that the object of the FLSA provision was to permit meaningful collective bargaining over "changing clothes." Limiting the phrase to "substituting clothes" would make compensability under the FLSA depend on such random factors as the personal style choices of the employee and the weather.

The Court held that safety glasses, earplugs, and respirators are not "clothes." The Court rejected the notion that a court could disregard the time an employee spends donning and doffing such items as *de minimis.* Instead, courts should determine whether taken as a whole the time at issue qualifies as time spent "changing clothes" or not. If the vast majority of the time was spent "changing clothes," the entire time spent donning and doffing is not compensable regardless of any time spent putting on and taking off equipment. If the "vast majority" of the time is spent on donning and doffing equipment, then the entire period is compensable regardless of any time spent changing clothes. The Court did not opine what the result would be where there was not a "vast majority" of time spent one way or the other.

Sandifer v. United States Steel Corp., 134 S. Ct. 870 (2014).

NINTH CIRCUIT

Plaintiff Who Declines to Characterize her Leave as FMLA not Entitled to Protection of the Statute even where Employer Knows Leave is for FMLA Qualifying Reason

Plaintiff worked in a Foster Poultry Farms, Inc. (Foster Farms) processing plant in Turlock, California. She was terminated in 2007 for failing to comply with the company's "three day no-show, no-call rule" after the end of a previously approved period of vacation leave, which she took to care for her ailing father in Guatemala. Plaintiff claimed that she had requested FMLA for a qualifying reason that

would have extended her leave to include the period for which she failed to appear at work. Plaintiff filed suit under the Family and Medical Leave Act (FMLA) and its California equivalent.

There existed a disputed question of fact about whether Plaintiff specifically declined FMLA leave. The Defendant argued that, although there was a qualifying reason, after considerable discussion Plaintiff declined to have her time off characterized as FMLA leave. The case proceeded to trial, with a verdict in favor of the Defendant. Plaintiff filed a motion for judgment as a matter of law, which was denied, and Plaintiff appealed.

Plaintiff argued that once she asked for time off for a qualifying reason the employer was obligated to give notice of her rights under the FMLA regardless of whether she expressly declined such a designation. The Ninth Circuit rejected this argument. It ruled that, although an employee need not expressly assert rights under the FMLA or even mention the statute, there are circumstances in which an employee might seek time off but intend not to exercise his or her rights under the FMLA. Simply referencing a qualifying reason does not suffice to trigger the protections of the statute. "[A]ffirmatively declining the present exercise of a right in order to preserve it for the future is fundamentally different from permanently relinquishing that right."

The Court found that the jury was properly instructed about the law without objection, and the jury found that Plaintiff explicitly declined to designate her time off as FMLA leave. The Court also found there existed substantial evidence sufficient to support the verdict.

Escriba v. Foster Poultry Farms, Inc., --- F.3d ---- (9th Cir. 2/25/14) (Gillman (6th Cir.), Rawlinson, Thomas).

WASHINGTON SUPREME COURT

Justices Limit Religious WLAD Religious Exemption to Employees Performing Religious Duties

Plaintiff was employed as a security guard. While employed by Franciscan Health System (FHS), he suffered a stroke that impaired his nondominant arm. FHS determined he could not perform the essential functions of his job with or without accommodation, refused his requested accommodation, and terminated his employment. Plaintiff brought multiple causes of action in state court, including employment discrimination on the basis of race and disability in violation of federal law and the WLAD. The employer removed the case to federal court, and then moved to dismiss several of plaintiff's claims including his claims under the WLAD. In particular, the defendant argued that plaintiff's claims under the WLAD were foreclosed by virtue of the exemption for religious non-profit corporations contained in RCW 49.60.040(11). The plaintiff challenged the constitutionality of the exemption pursuant to state and federal law and the federal court certified the state constitutional question to the Washington State Supreme Court. The certified question addressed the constitutionality of the exemptions for religious nonprofit corporations pursuant to Art. I, Section 11 and Art. I, Section 12 of the Washington Constitution.

The Court filed three separate opinions. The first opinion, designated as the lead opinion, was authored by Justice Charles Johnson, in which Justices Madsen, Owens, and James Johnson joined. A second opinion, designated as the dissenting opinion, was authored by Justice Stephens, in which Justices Gonzales, Fairhurst, and Gordon-McCloud joined. A third opinion, designated as concurring in part and dissenting, was authored by Justice Wiggins. The opinion by Justice Wiggins is actually the controlling opinion. *See Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court

decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'").

Justice Wiggins concurred with the lead opinion's conclusion that the statute was not facially unconstitutional, but agreed with the dissent that it was unconstitutional as applied to Plaintiff. Justice Wiggins reformulated the certified question to read: "If not [facially unconstitutional], is Wash. Rev. Code section 49.60.040(11)'s exemption unconstitutional as applied to an employee of a religious non-profit organization whose job description and responsibilities are wholly unrelated to any religious practice or activity?" Justice Wiggins concluded that the exemption "is constitutionally applied in cases in which the job description and responsibilities include duties that are religious or sectarian in nature." Otherwise, applying strict scrutiny, the exemption is unconstitutional as applied under Art. I., Section 12.

> But the exemption is reasonable only to the extent that it relates to employees whose job responsibilities relate to the organization's religious practices. When the exemption is applied to a person whose job qualifications and responsibilities are unrelated to religion, there is no reasonable ground for distinguishing between a religious organization and a purely secular organization. Therefore, I agree with the dissent that the exemption is invalid when applied to an employee like Ockletree, assuming that there is no relationship between his duties and religion or religious practices.

WELA wrote an amicus brief by Jeffrey Needle and Jesse Wing.

Ockletree v. Franciscan Health System,--- Wn.2d --- 317 P.3d 1009 (2/6/14).

WASHINGTON COURT OF APPEALS

Procuring Cause Doctrine Applies Even Where Employee Resigns and Commissions Recovered under that Doctrine are Wages under RCW 49.48.030

The plaintiff, Miller, in this case worked for a subcontractor on a project as field sales representative. The field sales representative manages the subcontractor's performance under the contract through completion and it is considered the final step in the sales representative's performance. Field sales representatives do not get paid until the subcontractor is paid. Miller voluntarily resigned to start his own business but offered to complete his unfinished projects. The employer declined and assigned them to other employees. The projects took several months to complete.

An arbitrator ruled for the plaintiff and awarded him $22,802.84, but no attorneys' fees. Miller requested trial de novo. The trial judge awarded him $21,628.97 in commissions and over $75,000 in attorneys' fees and costs. The employer appealed arguing both that the Court had misapplied the procuring cause doctrine and that Miller had not improved his position after arbitration. Division III affirmed.

The court of appeals held that a broker is a procuring cause of a sale when he or she sets in motion the series of events culminating in a sale. When an employment relationship ends, the employer cannot terminate an agent's right to commission if he or she caused the sale. The Court noted that the procuring cause is an equitable doctrine and does not apply if the written contract provides how commissions will be awarded post-termination of employment. In this case Miller located the jobs at issue, submitted the bids for them, and secured the binding contracts with the customers. Although

Miller did not completely see the project through, the trial court took that into account by discounting the commissions by 20%. The Court held as a matter of first impression that a resignation does not prevent application of the procuring cause doctrine.

The Court also ruled that Miller had improved his position after arbitration even though the trial court awarded him $1,200 less in commissions. Miller had requested fees at the arbitration but was improperly denied them. "To truly compare the comparables, the success of the aggregate claims should be considered."

The employer argued that commissions recovered under the procuring cause doctrine do not qualify as "wages" under 49.48.030 because the doctrine is equitable. The Court recognized that commissions are wages and it makes no difference whether the wages are recovered based on legal or equitable principles.

Miller v. Paul M. Wolff Co. – Wn. App. ---, 316 P.3d 1113 (Div. III 1/16/14) (Brown, Korsmo, Siddoway).

MEMBER CONTRIBUTION

Seattle Whistleblower Ordinance Expanded to Protect Employees

By J. Denise Diskin, Teller & Associates, PLLC

In December 2013, the Seattle City Council and the Ethics and Elections Commission ("SEEC") significantly amended the City's Whistleblower Protection Code. The new protections went into effect January 16, 2014. Seattle's Whistleblower Protection Code may be found at SMC 4.20.800 through 4.20.880.

The most significant changes to the Code relate to retaliation. Under the new Code, employees may report wrongdoing to their supervisors or others in their chain of command, not just the SEEC, and are protected from retaliation when they do so. "Whistleblowers" are now not simply defined as employees reporting improper activity or waste, but also employees who are perceived to have done so, or who participate in an investigation. Additionally, investigations will be performed by the SEEC – previously the responsibility of the mayor's office which typically asked the employee's own department to investigate.

Employees who experience retaliation in relation to a whistleblower complaint must make a complaint to the Executive Director of the SEEC within 180 days of when they knew or reasonably should have known the retaliatory action occurred. The reporting period was previously only 30 days. The SEEC must investigate sufficient complaints within 90 days, and where it finds reasonable cause to believe retaliation occurred, the SEEC shall provide the opportunity for the involved City agency and the reporting employee to reach a joint settlement. Failing that, the employee may opt to pursue a streamlined review hearing with a City Examiner. At any time after making the complaint, the employee may instead opt to pursue a civil claim. Damages in either forum may consist of future pay, emotional distress up to $20,000, and reasonable attorney's fees up to $20,000. Previously employees were only entitled to reinstatement and reasonable attorney's fees.

The SEEC reported to the *Seattle Times* in December 2013 that only ten complaints of whistleblower retaliation were reported in the previous four years. Because employees are now allowed to report retaliation to supervisors and not just the Ethics Commission, WELA members may see that more City employees follow the correct reporting procedure, thereby preserving their retaliation claims. Similarly, the previous 30 day reporting deadline may have barred the complaints of employees who did not clearly understand their legal rights in the time allotted. Allowing employees 6 months to report retaliation instead gives them time to talk with an

attorney and decide what their best course of action is, and is a time period more in accord with other agency reporting periods. Finally, by putting investigatory duties and enforcement in the hands of the SEEC or the courts, which are independent of the reporting employee's own department, the hope is that more employees will report improper activity and seek recourse for retaliation.

As WELA members, we may see an increased number of City employees contacting us to bring retaliation claims, and with these favorable Code changes, we can do more to help them. Many thanks to WELA members Jack Sheridan, Kathy Barnard, and Lorena Gonzalez for their advocacy in achieving these worker-friendly amendments.

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

Jeffrey Needle (206) 447-1560
jneedlel@wolfenet.com

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