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ALERT
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U.S. SUPREME COURT

Court Will Decide Next Term Whether Section 7 of the NLRA Prohibits Class Action Waivers

On January 13, 2017, the Supreme Court granted certiorari in three cases that present the issue whether section 7 of the NLRA prohibits class action waivers, including *Ernst & Young LLP v. Morris*, 834 F.3d 975 (9th Cir. 2016). The Court subsequently set the cases over until next term possibly suggesting the current eight Justices might be deadlocked.

Court Will Decide Whether an Employee Should Appeal a Mixed Case the MSPB dismisses for Want of Jurisdiction to the Federal Circuit or the District Court

On January 13, 2017, the Supreme Court granted certiorari in *Perry v. MSPB*, 829 F.3d 760 (D.C. Cir. 2016). Perry presents an arcane issue of procedure for federal employees. Normally an employee appeals an adverse MSPB decision to the Federal Circuit. However, when the MSPB's decision is in a "mixed case," one involving both an adverse action within the MSPB's jurisdiction and a discrimination claim in violation of certain federal statutes, the employee must seek review in district court. The D.C. Circuit held in *Perry* that circuit precedent existing prior to *Kloeckner v. Solis*, 133 S. Ct. 596 (2012) (holding that when MSPB dismissed mixed case appeal on timeliness, review is in district court), required the employee to appeal to the Federal Circuit when the MSPB dismisses the appeal for lack of jurisdiction. Argument is April 17.

NINTH CIRCUIT

Automobile Service Advisors Do Not Fall Within an FLSA Exemption

Plaintiffs are services advisors at Mercedes-Benz dealers. They filed a class-action for unpaid overtime. The district court held they fell within the FLSA exemption applicable to "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." The Ninth Circuit reversed based on deference to a 2011 DOL regulation. *Navarro v. Encino Motorcars, LLC*, 780 F.3d 1267 (9th Cir. 2015). The Supreme Court granted certiorari and held that deference to the regulation was improper. *Encino Motorcars LLC v. Navarro*, 136 S. Ct. 2117 (2016). The Court ordered the circuit on remand to construe the statute in the first instance.

On remand the court held that Congress did not intend to exempt service advisors. Congress was aware of the separate job category of "automobile service advisors" and did not include them in the exemption. The court held that a service advisor was not a "salesman" within the exemption because they are not primarily engaged in "servicing automobiles." Concerned about further Supreme Court scrutiny, because its decision conflicts with the Fourth and Fifth Circuits, the panel also looked to legislative history in support of its reasoning.

Navarro v. Encino Motorcars, LLC, 843 F.3d 925 (9th Cir. 1/9/17) (Graber, Wardlaw, Mahan (D. Nev.)).

Railway Labor Act Pre-Empts Fine State Agency Issued to Airline Based on Flight Attendant's Claimed Violation of Washington Family Care Act

An Alaska Airlines flight attendant called in sick in May to care for her son, who was ill. She had used up all her sick leave. She had vacation time available, but did not have an ability to access it

until December, when she had scheduled it the year before per company policy. The flight attendant claimed a right under the Washington Family Care Act to use some of her seven days of December vacation leave in May to care for her son. Alaska disagreed.

Instead of filing a grievance, she filed an administrative complaint with the Washington Department of Labor & Industries. L&I ruled in her favor and fined Alaska Airlines $200. Alaska filed suit in federal court claiming the Railway Labor Act preempted the fine. Judge Robart disagreed and granted summary judgment to the state.

The Ninth Circuit reversed, 2-1. The majority held that the grievance adjustment board should have decided whether the flight attendant should have been allowed to use her vacation time for her son's illness. The majority reasoned the flight attendant's entitlement to use the leave under the statute dependent on the collective bargaining agreement.

Judge Christen agreed with Judge Robart that there was no RLA preemption because there was no need to interpret the collective bargaining agreement to decide whether she had a right to use the leave under the statute.

Alaska Airlines Inc. v. Schurke, 846 F.3d 1081 (9th Cir. 1/25/17) (Kleinfeld, Wallace, Christen).

District Court Improperly Granted Employer Summary Judgment on Retaliation, Discrimination and Hostile Work Environment Claims

Plaintiff was born in Mexico and moved to the United States several decades ago at age 15. He became a United States citizen in 1981. From 2004 to 2010, Efrain worked as a millwright at Roseburg, where he performed his job well and received positive evaluations. Efrain's son, Richard, worked at Roseburg for about two years. Efrain and Richard were the only Hispanic millwrights at Roseburg. Plaintiff alleges numerous instances of racially derogatory language principally from a Millwright with whom he worked. He also alleges many instances of disparate treatment and retaliation.

In October 2009 the offending Millwright was coached by management and told that he can make people feel uncomfortable. Shortly thereafter, in response to a written complaint the company hired an independent investigator. Plaintiff explained to the investigator the history of racial hostility, and the harasser's work schedule was changed so that plaintiff didn't have to work with him.

After reading additional racist material on the work site, plaintiff came to work and discovered the harasser on the same shift. He immediately left the premises and notified the employer that he would not work on the same shift as the harasser. Human Resources met with plaintiff about walking off the job and explained that they would do the best they could but that it was impossible to segregate them completely, and the harasser was instructed to avoid them when they were on the same shift. Plaintiff refused to work with the harasser under these circumstances and the company suspended them.

On January 18, 2010, plaintiff received a letter explaining that his employment was terminated for walking off the job, and refusing to work on January 13, 2010. On the same date, plaintiff received a second letter explaining that he exhibited a lack of "full cooperation" with the investigation and that Roseburg was "forced to conclude [its] investigation absent a follow up and closing interview." The letter also stated that the investigation revealed "no evidence of a severe or pervasive hostile work environment," but did reveal some "personnel issues and [Roseburg] intend[ed] to address those issues . . . but [Efrain was] unwilling to meet . . . despite . . . repeated phone calls and attempts to

communicate."

Plaintiff filed suit under 42 U.S.C. §1981, Title VII of the Civil Rights Act of 1964, and Oregon state law. He alleged a hostile work environment, disparate treatment, and retaliation. The district court granted summary judgment and plaintiff appealed. The Ninth Circuit reversed in part and affirmed in part.

To succeed on a hostile work environment claim based on race, the plaintiff must demonstrate: "(1) that he was subjected to verbal or physical conduct of a racial . . . nature; (2) that the conduct was unwelcome; and (3) that the conduct was sufficiently severe or pervasive to alter the conditions of the plaintiff's employment and create an abusive work environment." The first two elements were undisputed. As to the third element, the court of appeals overruled the district court and held that the harassment was sufficiently severe or pervasive. "Contrary to the district court's conclusion, the demeaning comments that directly reference race or national origin were not 'offhand comments' or 'mere offensive utterance[s].'" "[W]e hold that a reasonable trier of fact could conclude that Branaugh's repeated racially derogatory and humiliating remarks were sufficiently severe or pervasive to create a hostile work environment." The Court relied upon a negligence theory to impose liability on the employer.

In reference to disparate treatment, the court of appeals recognized that a plaintiff has a choice to use either the *McDonnell Douglas* shifting burden model or, in the alternative, a plaintiff may simply produce direct or circumstantial evidence demonstrating that a discriminatory reason "more likely than not motivated" the employer. The court of appeals engaged in a fact intensive review of the record and concluded that there existed a question of fact on the issue of disparate treatment. The Court ruled that evidence that similarly situated employees being treated more favorable in the same precise manner was not required. The fact that the employer required the plaintiff to continue to work with a co-worker who had a proven history of repeatedly and persistently harassing plaintiff was evidence of discriminatory intent.

To establish a prima facie case of retaliation, a plaintiff must show "that he undertook a protected activity under Title VII, his employer subjected him to an adverse employment action, and there is a causal link between those two events." "[O]nly non-trivial employment actions that would deter reasonable employees from complaining about Title VII violations will constitute actionable retaliation." Plaintiff's evidence as to how he was treated during his employment, the timing of his termination being one month after his written complaint, and the disparity in punishment between Efrain and Branaugh are sufficient to establish a genuine dispute of fact as to whether Roseburg's proffered reason for terminating plaintiff's employment was pretextual. Therefore, the district court erred in granting summary judgment in favor of Roseburg on Efrain's claim of retaliatory termination.

Judge Bea concurred in the majority's decision in reference to retaliation but dissented in reference to the hostile environment and disparate treatment claims. Judge Bea concluded those claims were correctly dismissed because the employer took prompt and effective action to rectify the hostile work environment experienced and terminated him only after he repeatedly refused to work his assigned shifts with his harasser.

Reynaga v. Roseburg Forest Products, 847 F.3d 678 (9th Cir. 1/26/2017) (Pregerson, Owens, Bea).

District Court Granted Summary Judgment to Employer on Each of Employee's Claims; District Court was Wrong Each Time

Plaintiff was a single mother with seven children. She worked at an Idaho grocery store where she supervised employees on the night shift. She was fired for "gross misconduct" allegedly for taking a stale cake from the bakery to share with her fellow employees and for telling a loss prevention manager she had permission.

She claims she was fired because the company wanted to put a man in charge of the crew. Her female manager removed her from the safety crew telling her a man would be better for the position. The employee claimed that the general manager and other managers gave the employees permission to take cakes from the bakery. The bakery department had instructed her to take cakes only from the "stales cart" and did not need to show that in store inventory. A male employee took a fresh cake and was fired as well. Because the company fired her for "gross misconduct" she was statutorily ineligible for COBRA benefits. She also lost her accrued vacation in accordance with the union collective bargaining agreement.

At the plaintiff's unemployment hearing, the company identified the female manager as the deciding official. She denied it in her deposition. She claimed that HR and the loss prevention specialist had made the decision to terminate. They both denied making the decision to terminate the plaintiff.

The plaintiff sued in federal court alleging violations of Title VII, COBRA, and the Fair Labor Standards Act and Idaho wage law. The district court granted the company's motion for summary judgment finding no evidence of pretext that she was terminated for "gross misconduct." The Ninth Circuit reversed.

The panel reiterated that an employee can prove pretext by directly showing unlawful discrimination or indirectly by showing that the employer's explanation was internally inconsistent and otherwise unworthy of belief. It held that the plaintiff had shown "ample evidence of discriminatory animus." While it was unclear who the decision-maker was, the biased supervisor had at least influenced or participated in the decision. The court seemed to think this standard was consistent with *Staub v. Proctor Hosp.*, which had rejected the influence standard in favor of "proximate cause." The court held the internal investigation had taken into account the recommendation of the male manager, so it was not independent of it.

The court rejected the employer's claim that the manager's sexist comments about the safety committee lead were "stray remarks." Instead, a jury could infer she had hostility towards women in leadership positions. It didn't matter that the manager was also female.

The court also found lots of evidence of pretext. Several employees testified it was common practice for employees to take cakes to the breakroom. Management's claim that she lied about having permission to take it was unworthy of belief. And the store replaced her with a less qualified male employee. The female manager participated in his hiring.

Because the employees' other claims were derivative of her Title VII claim and there was a genuine dispute whether she was terminated for gross misconduct, the court reversed summary judgment on them as well.

Mayes v. WinCo Holdings, 846 F.3d 1274 (9th Cir. 2/3/17) (Christen, McKeown, Tallman).

State Prosecutor was Not an "Original Source" for Qui Tam Suit

Prather, the relator in this qui tam action, served as a state prosecutor for over thirty years and supervised hundreds of wiretaps. In 1994 Congress passed the Communications Assistance to Law Enforcement Agencies Act ("CALEA"), which authorized the payment of $500 million to

telecom companies for investment in the hardware and software necessary to maintain law enforcement's ability to effectively eavesdrop, despite technological developments in telecommunications.

The government is required to pay the telecom companies for their assistance with eavesdropping procedures, including "reasonable expenses incurred in providing such facilities or assistance." Prather claimed that the telecom companies have used CALEA to overcharge law enforcement agencies for wiretaps and related surveillance assistance. His concerns prompted an investigation by the FCC, which concluded that the telecoms were overcharging the federal government.

Prather filed a claim under the False Claims Act seeking to recover the amount of over payment to the government. The district court granted the defendants' motion to dismiss Prather appealed.
In relevant part, the Ninth Circuit concluded that Prather was not the "original source" if the information upon which his action was based. "To have direct knowledge required as an original source, a person's knowledge must be first hand, obtained through his own labor, and unmediated by anything else." "The person must also have 'true knowledge,' as opposed to guesswork or suspicion, since 'the purposes of the Act would not be served by allowing a relator to maintain a qui tam suit based on pure speculation or conjecture.'" The Ninth Circuit concluded Prather was without "direct knowledge."

In addition to having direct and independent knowledge of fraud, an "original source" under the pre-2010 FCA also must have "voluntarily provided the information to the Government before filing an action." The Court readily concluded that Prather was requested by the Government to provide information to the investigation, and was not a voluntary participant. Lastly, the Court acknowledged that government employees are not the quintessential qui tam relator.

Prather v. AT&T, 847 F.3d 1097 (9th Cir. 2/6/2017) (Sessions (D. Vt.), Gould, Berzon).

Unwanted Hugging Can Constitute Illegal Sexual Harassment

Plaintiff was a correctional officer. She claimed the sheriff created a sexually hostile work environment by greeting her with 100 unwanted hugs and one unwelcome kiss over a 12-year period. She claimed he pressed his chest into her breasts. She complained but her employer did not investigate. She also claimed that the sheriff also hugged many female employees but no male employees.

The district court granted summary judgment to the employer. The Ninth Circuit reversed. It held the district court erred by holding that as a matter of law that hugs or a kiss on the cheek can never constitute sexual harassment. The district court also erred by evaluating whether the conduct was "severe and pervasive" rather than "severe or pervasive." Reviewed under the proper legal standard, a jury could find the hugs went beyond the scope of "ordinary workplace socializing" The number and frequency of the hugs were factors but not the only issues. The district court failed to consider the fact that the alleged perpetrator was the highest ranking officer in the department. The district ignored the fact that the sheriff hugged and kissed other women frequently but men not as often. A jury could find this was a qualitative and quantitative difference in treatment based on gender.

Zetwick v. County of Yolo, -- F.3d – (9th Cir. 2/23/17) (Bennett (N.D. Iowa), Graber, Murguia).

Attorney Did Not Engage in Protected First Amendment Activity; Jury Verdict Reversed
The plaintiff worked for many years as a civil

litigation attorney for the Maricopa County Attorney's Office (MCAO), and later (briefly) as a direct employee of Maricopa County, defending the county and related entities in civil lawsuits, before again returning to her previous employment at the MCAO. During her time as a direct employee of the county she received a call at her office from a newspaper reporter inquiring about a case she was handling for the Maricopa County Sheriff's Department. One of her comments to the reporter about the case was later published in an article in that newspaper. This article suggested that the county substantially increased settlement offers to avoid having key county officials testify.

County officials requested that Brandon not be assigned further cases in which the county was a party and which involved risk management. Brandon was later terminated from employment with the MCAO. She filed a lawsuit against the county and certain county officials alleging violation of the First Amendment and state-law based tortious interference with her employment contract. A jury found for Brandon on her claim that she had been fired in retaliation for her exercise of First Amendment rights in speaking to the newspaper reporter, and against certain county officials. The County appealed, and the Ninth Circuit reversed.

In reference to the First Amendment claim, the Ninth Circuit reiterated three guiding principles to decide whether an employee's conduct is protected by the First Amendment:

> "First, particularly in a highly hierarchical employment setting such as law enforcement, whether or not the employee confined his communications to his chain of command is a relevant, if not necessarily dispositive, factor in determining whether he spoke pursuant to his official duties. When a public employee communicates with individuals or entities outside of his chain of command, it is unlikely that he is speaking pursuant to his duties."

"Second, the subject matter of the communication is also of course highly relevant to the ultimate determination whether the speech is protected by the First Amendment . . . . When an employee prepares a routine report, pursuant to normal departmental procedure, about a particular incident or occurrence, the employee's preparation of that report is typically within his job duties . . . . By contrast, if a public employee raises within the department broad concerns about corruption or systemic abuse, it is unlikely that such complaints can reasonably be classified as being within the job duties of an average public employee, except when the employee's regular job duties involve investigating such conduct."

"Third, we conclude that when a public employee speaks in direct contravention to his supervisor's orders, that speech may often fall outside of the speaker's professional duties. Indeed, the fact that an employee is threatened or harassed by his superiors for engaging in a particular type of speech provides strong evidence that the act of speech was not, as a 'practical' matter, within the employee's job duties notwithstanding any suggestions to the contrary in the employee's formal job description."

The Ninth Circuit concluded that the scope of Plaintiff's legally defined duty to her client included the substance of a media interview even thought it was not within the chain of command. The Court noted that this would be a different case if plaintiff had alleged misconduct by the County, but the Court concluded that she did not. "Taken together, the only possible outcome of the 'practical inquiry' required by *Garcetti* was that Brandon's speech to the *Arizona Republic* fell under the broad set of official duties she owed Maricopa County as its attorney, and so was not constitutionally protected citizen speech."

Brandon v. Maricopa County, et al. 849 F.3d 837 (9th Cir. 2/23/2017) (Bea, Ikuta, Rewstani (United States Court of International Trade)).

WASHINGTON SUPREME COURT

De Facto Corporate Officers Are Liable For Willful Withholding of Wages Earned Before a Chapter 7 Bankruptcy Regardless of Whether Pay-Day for the Wages Occurred After

Plaintiff was the CFO of a financially troubled company. After failing to obtain additional financing, the Board of Directors began to make preparations for a Chapter 7 bankruptcy filing. The Board ordered the CFO to terminate all employees other than those necessary for the bankruptcy filing. The CEO resigned and was not replaced.

The remaining Board members first decided to use the company's remaining money to pay the retained employees, their own director & officer insurance and other company insurance. By the time of the bankruptcy filing, the company owed more than $320,000 in unpaid wages and accrued vacation payments. The CFO had informed the Board that at termination he would be owed unpaid salary, accrued vacation, and a $50,000 severance payment in accordance with his offer letter. The Board paid $31,000 to employees other than the plaintiff and then filed the Chapter 7 bankruptcy.

The plaintiff filed suit against the former Board members in federal court alleging willful withholding of wages. Both sides moved for summary judgment. The district court granted the Board members' motion solely on the basis that they did not have authority to pay wages with pay days following the Chapter 7 filing. The plaintiff filed for reconsideration and asked the district court to certify the issue to the Washington Supreme Court. The district court did so.

The Supreme Court refused the Board members' request to revisit the district court's ruling that they were proper defendants under RCW 49.52. The Court, per Justice Wiggins, held that the Board members were the de facto officers at the time of bankruptcy filing. They decided who was paid, when and how much.

The Court ruled that an individual defendant may be held liable under RCW 49.52 for employee wages with pay days following his own termination as a result of a Chapter 7 bankruptcy. Such a defendant may be liable for willfully withholding employee wages earned before or on the date of the Chapter 7 bankruptcy filing. Normally the court considers withholding of wages based on the pay day for the wages. The filing of a Chapter 7 petition makes previously established pay periods and pay days irrelevant. The Court refused to allow responsible officers to circumvent the legislature's intent that employees receive all the wages owed to them simply because previously established pay date occurs after the bankruptcy.

The Court disagreed with both the defendants and district court that *Morgan v. Kingen*, 166 Wn.2d 526 (2009) and *Ellerman v. Centerpoint Prepress, Inc*., 143 Wn.2d 514 (2001), were in conflict. *Ellerman* did not require individual defendants who previously had control over the

payment of wages to have control over the payment of wages at issue on their pay day. *Ellerman* exempted low-level employees and managers who lacked control over payment of wages from liability.

The Court then held that a defendant's participation in the decision to file Chapter 7 bankruptcy tends to show willful withholding of wages by the defendant. Here the defendant Board members choose to retain the plaintiff to help with the bankruptcy, chose to file the bankruptcy, and chose to withhold his wages. Their decision to put payment of his wages beyond their control by filing the Chapter 7 shows willfulness.

Justice McCloud, joined by Justice Gonzales, filed a concurring opinion arguing that the mental intent that RCW 49.52.050 requires, i.e., "willfulness" was not subject to a liberal construction even in a civil case because it was a criminal statute. The majority responded in footnote that this case involved only civil remedies.

Allen v. Dameron, --- Wn.2d ---, 389 P.3d 487 (2/2/17).

Court Will Decide Whether Applicants Can Bring Retaliation Claims Based on Opposition With Respect to a Different Employer

The district court certified the following question to the Washington Supreme Court: "Does RCW 49.60.201(1) create a cause of action for job applicants who claim a prospective employer refused to hire them in retaliation for prior opposition to discrimination against a different employer?"

Zhu v. North Central Educational Service District - ESD 171, No. CV-00183-JLQ (Feb. 2017).

WASHINGTON COURT OF APPEALS

Family Care Act Allows Employee to Use Disability Plan to Care for Family Member Where Employer Does Not Provide Sick Leave

The employer in this case did not provide paid sick leave. When employees are ill they may receive paid leave through a short-term disability ("STD") plan. Employees also receive two paid personal days and paid vacation under the collective bargaining agreement. Plaintiffs requested time off to care for sick family members. The employer said the employee had to use vacation days or unpaid leave. They filed a complaint with Labor & Industries. L&I ruled in favor of the employer. L&I read the Family Care Act to require an employer to allow an employee to access a disability plan only where that was the only means of paid leave available.

An administrative law judge and the Superior Court affirmed L&I. The court of appeals reversed. It ruled that the statute, which said employees were "allowed" to use disability benefits when the employer does not provide paid leave for illness, entitled the employees to use such benefits even though they had vacation available as a substitute. The court concluded that L&I's contrary interpretation was unreasonable.

Honeycutt v. State Dep't of Labor & Indus., 197 Wn. App. 707, 389 P.3d 773 (Div. I 1/30/2017) (Spearman, Trickey, Schindler).

MEMBER VICTORIES AND DEFEATS

Kathy Barnard represented the employees in *Alaska Airlines* and *Honeycutt.*

Mike Subit represented the plaintiff is *Allen*. WELA filed a brief in support.

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