WELA *ALERT*

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CASE UPDATES

FEDERAL - Ninth Circuit

Short Plain Statement Rule Applies to Complaints Alleging Section 1981 Claims

This case is more notable for its bad lawyering than the result. In *Swierkiewicz v. Sorema*, the U.S. Supreme Court held that a Title VII plaintiff does not have to plead the *McDonnell-Douglas Burdine* framework. Instead, the complaint must meet only the general notice pleading requirement of Fed. R. Civ. P. 8. Although this case involved section 1981, neither party managed to cite *Swierkiewicz* in their papers to the district court (which dismissed the case) or on appeal. Before oral argument, the circuit court asked the parties to address *Swierkiewicz.* Even then the plaintiff's counsel failed to do so. The circuit court held *Swierkiewicz* applied to section 1981 claims and remanded the case to the district court to assess compliance with Fed. R. Civ. P. 8. *Maducka v. Sunrise Hospital*, No. 03-15332 (8/16/04; Wallace, Kozinski, Thomas).

Ministerial Exception Does Not Preclude Hostile Environment Claims Against Church

Plaintiff Elvig, an associate pastor, sued her employer and her supervising pastor under Title VII for sexual harassment and retaliation. Elvig alleged that after filing a sexual harassment complaint internally and with the EEOC, she was verbally abused and intimidated, relieved of some duties, suspended, fired, and precluded from seeking a position at any other Presbyterian church in the United States. The trial court dismissed the case on the pleadings holding that such a suit would impermissibly encroach on the Church's free exercise rights or excessively entangle government and religion. While affirming the dismissal of her claims regarding adverse tangible employment actions, the Ninth Circuit reversed as to the plaintiff's hostile work environment and other retaliatory conduct (verbal abuse and intimidation) holding that they are not precluded by the ministerial exception to Title VII. While the Plaintiff is entitled to damages for retrospective emotional distress and reputational harm resulting from a hostile work environment, the Court held she is precluded from seeking lost wages and emotional damages for adverse employment actions, and from seeking prospective damages and injunctive relief. Likewise, the Court precluded Elvig from engaging in discovery on the adverse employment actions and from using them as a basis for Church liability. Reinstating only Plaintiff's corresponding RCW 49.60 claims, the Court noted that the Constitution requires application of a ministerial exception to state law as well. Responding to the dissent, the Court remarked that while on remand the Church could raise its argument that Elvig's religious vow to abide by Church discipline could be a binding agreement to "arbitrate," the vow did not explicitly forfeit judicial remedies and Washington law which might not validate an agreement providing that the employer is the "arbitrator." *Elvig v. Calvin Presbyterian Church*, No. 02-35805 (7/23/04; Trott, Fisher,

Gould).

Conditioning Equal Opportunities on Filing a Grievance is an Adverse Tangible Employment Action

Plaintiff Fonseca sued, pro se, under Title VII and 42 U.S.C. § 1981 for discrimination based on his Hispanic race and Guatemalan ethnicity. Fonseca alleged that he was singled out for unfair discipline by issuance of a warning letter, denied equal bereavement leave, denied overtime work that he was entitled to by seniority until he filed a grievance, and his supervisor mocked his accent. Reversing summary judgment for the employer, the Court held that Fonseca's evidence of comparators was sufficient to satisfy a *prima facie* case, that issuance of a warning is a tangible employment action, and that "it is an adverse employment action when an employer knows its employees are entitled to certain opportunities, but forces only employees of a certain race to use the grievance procedure to obtain them." The Court was unimpressed by the employer's conclusory assertion any disparate treatment was "inadvertent" and that it had issued a warning letter to Fonseca because it concluded, without any investigation, that he damaged company goods intentionally by dropping them in front of four supervisors. Accordingly, the Court found that the disputed facts required a trial. *Sysco Food Services of Arizona, Inc.*, No. 03-15193 (7/6/04; B. Fletcher, Reinhardt, Restani from Court of Internat'l Trade sitting by designation).

Pastor's Claim for Reasonable Accommodation and Constructive Discharge Barred by Ministerial Exception

In a per curiam decision, the Court affirmed dismissal of a pastor's claims of disability discrimination under federal and state law holding that inquiry into the allegations of failure to provide reasonable accommodation of his ADD and dyslexia disabilities and constructive discharge would violate the Church's free exercise rights under the First Amendment. Finding that Werft's claims centered on the Church's personnel decisions -- as opposed to harassing behavior -- the Court held that his claims are barred by the ministerial exception to Title VII, which must also be applied to his claims under the ADA, the Rehabilitation Act, and state law. *Werft v. Desert Southwest Annual Conference of the United Methodist Church*, No. 03-15545 (7/30/04; Fernandez, Thomas, Callahan).

WASHINGTON - Supreme Court

Accommodations for a Disability Under the WLAD Must be Medically Necessary in that They Have a Nexus to the Disabling Medical Condition

In a highly anticipated ruling, the Supreme Court attempted to clarify what it meant in *Hill v. BCTI* when it held that a plaintiff must show that any proposed accommodation was "medically necessary." While the Court's unanimous opinion rejected the most extreme version of what medically necessary could have meant, the opinion leaves matters not much clearer than before.

The plaintiff worked for the employer for seven years until his termination. The Company refused to rehire him. He suffered from PTSD. He alleged failure to accommodate and disparate treatment. The trial court dismissed both claims. The court of appeals reversed on the disparate treatment claim but affirmed the dismissal on the reasonable accommodation claim, on the basis that the employee had failed to show his proposed accommodation was medically necessary. Judge Ellington dissented on the medical necessity issue. The Supreme Court granted review and affirmed the court of appeals.

Justice Owens framed the issue as whether the

employer had to accommodate the plaintiff more than it already had, absent proof that further accommodation was medically necessary. The court held that "if challenged, the employee must come forward at summary judgment or trial with competent evidence establishing a nexus between the disability and need for accommodation." The court stated that this element was largely but not entirely subsumed in the *Pulcino* definition of disability.

The opinion contains language that will please employees and language that will please employers. Ultimately, the opinion focused on the wrong issue, as the required nexus is between the accommodation and the workplace limitations caused by the medical condition, not the medical condition itself. In the process, the court seems to set a higher standard for accommodating "non-obvious" disabilities. While it makes sense to have a higher "notice" threshold for non-obvious disabilities, it makes no sense to have a different standard for accommodation. Only time will tell what impact *Riehl* will ultimately have on Washington reasonable accommodation law.

While the court reached the "right result" on the disparate treatment issue, its opinion illustrates the continuing confusion as to the interaction between the *McDonnell Douglas-Burdine* framework and the WLAD's substantial factor causation requirement. While recent federal law in the wake of the *Costa* interpreting the interaction between *Mc Donnell Douglas* and the "a motivating factor" causation standard decision is helpful to a degree, it is important to remember there is no "same action" defense under the WLAD. *Riehl v. Foodmaker Inc.*, 73902-1 (7/22/04).

ANNOUNCEMENTS

OFFICE SPACE: Frank Freed Subit & Thomas LLP have an office to rent. Call Cliff Freed if you are interested. (206) 682-6711.

VICTORIES AND DEFEATS

Please let us know what happens in your cases, good and bad, so we can all benefit.

We didn't exactly get "medical necessity" abolished, as we had hoped, but WELA's brief in *Riehl* resulted in some good language in the opinion, particularly the footnotes.

DON'T FORGET ABOUT AMICUS HELP

Please remember that the WELA Amicus Committee, chaired by Jeff Needle, is available to consider submission of amicus briefs. The committee tries to keep informed about important issues on appeal, but needs members to help spot those cases in which WELA may want to have a say.

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.

PROGRAM COMMITTEE SOLICITS IDEAS

Vicky Vreeland and Susan Mindenbergs co-chair the programs committee. The committee plans the short programs WELA now regularly sponsors. Vicky and Susan welcome your suggestions for topics of interest.

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