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ALERT

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CASE UPDATES

FEDERAL – Ninth Circuit

Failure to Give Jury Instruction on Employer Liability for Harassment by Non-Employees Requires New Trial; More Mixed Motives Confusion

The plaintiff in this case worked for the Post Office. She was eventually promoted to local postmaster. She started making some changes, which were met with hostility by customers and postal-workers. The plaintiff perceived that some of the hostility was due to her foreign national origin and accented English. She was eventually subject to discipline and suspension. She filed a claim under Title VII. The jury found for the defendants. On appeal, the plaintiff successfully argued that the district court committed reversible error by not giving a jury instruction on the post-office's duty to investigate an remedy actionable harassment by customers and community members. The panel held that an employer may be held liable based on a negligence ratification theory for the harassment of employees or others where if fails to investigate and remedy harassment of which it becomes aware. The panel rejected the argument that the plaintiff's position as postmaster relieved her employer from its obligations. The case also features another twist on the mixed motives morass. The district court instructed the jury that the plaintiff would prevail if discrimination was "a motivating factor," in her discipline but did not give the same action defense instruction. Clearly confused, the plaintiff objected to this instruction, but not the employer. As the panel recognized, the plaintiff actually received the most favorable instructions possible. The opinion implicitly recognizes that there may be cases where a same-action instruction is not required and the only appropriate instruction is "a motivating factor." *Galdamez v. Potter*, No. 03-35682 (07/15/05; Hug, Berzon, Bybee).

Requiring Arab Employee to Use Western Name Constitutes Racial Discrimination

The employee in this was named Mamdouh El-Hakem. His employer's CEO insisted on calling him "Manny" on a weekly basis, despite his objections. The employee sued both the CEO and the employer for race discrimination under section 1981. A jury found against CEO and in favor of the employer, but found the CEO was acting within the scope of his employment. The CEO appealed the denial of his post-trial motion for judgment of a matter of law. The court ruled that the CEO's refusal to use the employee's Arab name and substitution of a Western one constituted racial discrimination. The panel also ruled that the employer was vicariously liable for the CEO's conduct, despite the jury finding in favor of the employer. *El-Hakem v. BJY Inc.*, No. 03-35514 (07/21/04; Rawlinson, TG Nelson, Schwarzer (N.D. Cal)).

Despite Costa, Ninth Circuit Reaffirms Higher Burden of Proof for Plaintiff In Circumstantial Evidence Cases

This case involved a Washington commercial fisherman who was hired in 1997. In 2001, he was removed as vessel mate. He claimed discrimination because he was not Norwegian. The court granted the employer's motion for summary judgment and the Ninth Circuit affirmed. In doing so, the panel severely confused the evidentiary burdens for discrimination cases. In *Costa*, the United States Supreme Court held that Title VII does not recognize any distinction between direct and circumstantial evidence and that circumstantial evidence is often more powerful than direct. Without citing *Costa* and prior Ninth Circuit cases

following it, a Ninth Circuit panel has reaffirmed pre-*Costa* circuit law that arguably requires a plaintiff who relies on circumstantial proof of discrimination to meet a higher evidentiary standard. That law required a plaintiff to introduce "specific and substantial" evidence of pretext to survive summary judgment. The case is notable for numerous other misstatements regarding the *McDonnell Douglas Burdine* framework. The case also holds that a plaintiff must "muster [an] extraordinarily strong showing of discrimination" to overcome the same-actor inference. The panel also stated that the same-actor interference is more than an inference for a jury to draw, but "a strong inference" that a court must take into account on a summary judgment motion." Even though the record contained some evidence of discrimination, the court held it was not sufficient to overcome the "burden imposed by the same-actor inference." *Couglan v. American Seafoods, Inc.*, No. 03-35314 (07/07/05; O'Scannlain, Leavy, Bea).

Traveling to Replace the Family Car is Not Activity "to Care for" an Ailing Spouse within the Meaning of the FMLA

Charles Tellis was fired by his employer after taking leave under the FMLA to care for his wife who was suffering late-stage pregnancy difficulties. During the leave, his vehicle broke down so he flew to Atlanta to pick up another vehicle that he owned, and drove it back to Seattle. Although he regularly called his wife during his trip, his employer asserted that he breached the conditions of his leave and fired him when he refused to accept a disciplinary letter in his file. The Ninth Circuit affirmed summary judgment for the employer holding: "Instead of participating in his wife's ongoing treatment by staying with her, he left her for almost four days. Tellis claims his trip provided psychological reassurance to his wife, but he did not travel to Atlanta to participate in his wife's medical care. Having a working vehicle may have provided psychological reassurance; however, that was merely an indirect benefit of an otherwise unprotected activity – traveling away from the person needing care….Common sense suggests that the phone calls Tellis made do not fall within the scope of the FMLA's "care for" requirement." *Tellis v. Alaska Airlines, Inc.*, No. 04-35137 (07/12/05; Hug, Thompson, McKeown).

Reading is a "Major Life Activity" and Costa v. Desert Palace Applies to ADA Actions

When the loader he was driving got stuck in the mud, plaintiff Matthew Head's employer fired him for causing damage to the vehicle. Head sued under the ADA alleging various disability discrimination (depression and bipolar disorder) claims and retaliation for requesting a reasonable accommodation. The trial court granted summary judgment on his disability and record of disability claims because while Head submitted numerous affidavits and other evidence, he did not submit medical or comparative evidence that his disability substantially impaired any major life activities. Reversing, the Court held that such evidence is not required at the summary judgment stage because "a plaintiff's testimony may suffice to establish a genuine issue of material fact." Head alleged sufficient evidence to demonstrate a substantial impairment in sleeping, interacting with others, thinking, and reading. On his perceived disability discrimination and retaliation claims, a jury entered a verdict against him. Head appealed the verdict on the grounds that the trial court: (1) sustained an objection to lay witness testimony about whether Head's damage to the loader violated his employer's equipment abuse policy; and (2) erred by refusing to give the "motivating factors" jury instructions of a mixed-motive claim and instead gave instructions that Head must meet a higher standard by proving that he was fired "because of" his perceived disability or request for accommodation. Finding that the lay testimony would not have assisted the jury, the Ninth Circuit affirmed the trial court's evidentiary ruling. However, the Court held that its decision in *Costa v. Desert Palace, Inc.*, 299 F.3d (9th Cir. 2002), *aff'd* 539 U.S. 90 (2003), on jury instructions applies to ADA actions and that a properly instructed jury could have found a mixed motive. Because the error was not harmless, the Court reversed the jury verdict and remanded for another trial, ruling that each party shall bear its own costs

on appeal. *Head v. Glacier Northwest, Inc*., No. 03-35567 (07/06/05; Nelson, Rawlinson, Schwarzer sitting by designation from the Northern District of California).

WASHINGTON – Supreme Court

Notice of Tort Claim Filing Requirement Applies to Suits Against Individual Government Officials

In this non-employment case, the court held 8-1 that RCW 4.96.010-020, the tort claim filing statute applies to suits against individual state officials for acts committed within the scope of their employment. With considerable justification, Justice Fairhurst reasoned that the policies behind the tort claim requirement apply equally to a suit against individual government officials. The major flaw in the court's argument, as Justice Ireland noted in her dissent, is that the applicable statute does not mention suits against individual government actors. *Bosteder v. Renton*, No. 7934-5 (07/28/05).

Court of Appeals Erred in Remitting Jury Verdict of $260,000 in Non-economic Damages

Finding race discrimination, a jury awarded Ralph Bunch $600,000 against his employer, the King County Department of Youth Services. The Court of Appeals granted a remittitur reducing his non-economic damages from $260,000 to $25,000; Bunch appealed the remittitur. There is a statutory de novo standard of review for remittiturs, RCW 4.76.030, and the inherent authority of a court, which is subject to an abuse of discretion standard. Resolving confusion over how these two may be reconciled, the Court held: "we hold that a trial court order remitting a jury's award of damages is reviewed de novo since it substitutes the court's finding for a question of fact. Trial court orders denying a remittitur are reviewed for abuse of discretion using the substantial evidence, shocks the conscience, and passion and prejudice standard articulated in precedent." Reversing the remittitur, the Washington Supreme Court noted that the jury's award is strongly presumed to be correct, that it should rarely be disturbed by the Court of Appeals, that it was strengthened by the trial judge's denial of the defense request for a new trial on a claim of excessive damages, that the plaintiff's testimony was alone sufficient to justify the damages, and that the amount did not shock the conscience of the Court. *Bunch v. King County Dep't of Youth Services*, No. 75103-0 (07/21/05; J. Sanders for a unanimous court).

WASHINGTON – Court of Appeals

Mayor's Release of Employee Medical Information to Newspaper May Violate Right to Privacy

The plaintiff in this case had epilepsy. He worked for the Town of Winthrop as a reserve deputy marshal. He had a seizure while responding to a call in a bar. His doctor restricted him from driving or carrying a weapon for six months. The plaintiff then met with the mayor. The plaintiff told the mayor about the details of his medical condition, after saying the information was not to be shared with anyone else. The mayor asked him to resign, and the plaintiff agreed. The plaintiff's letter of resignation said it was for "health reasons." Subsequently, the mayor revealed some of the details of the plaintiff's medical history to the newspaper. The employee sued for disability discrimination and invasion of privacy. The superior court granted the defendants' motion for summary judgment. Division III reversed as to the privacy claim. Division III said it was an issue of fact whether the plaintiff's medical condition was still a private matter. Perhaps the most interesting part of the opinion is its holding that one of the reasons people avoid disclosure of private facts is to prevent others from showing them pity or sympathy. On the other hand, the panel's suggestion that the people would enjoy a lesser right to privacy in cases involving the release of information under the Public Disclosure Act is contrary to law. *White v. Winthrop*, No. 23012-1-III (07/26/02; Schultheis, Kurtz, Kato).

Court Reverses $2,026,500 Jury Verdict for Age and Religious Discrimination

The 52-year old plaintiff, Dennis Griffith, was awarded over $2 million in damages against his employer for firing him five years after it promoted him as general manager of its scrap metal facility in Tacoma. He alleged he was fired because of his religion (Mormon) asserting that his employer was predominantly Jewish, that Jews control the industry and stick together, that other employees told polygamy jokes, and that a competitor of the company questioned how he got to be manager without being Jewish. He also sued for age discrimination because his replacement was younger and explaining "I don't have anything that I can lay a tangible hold on as to why I was released." Disagreeing, the Court of Appeals reversed the jury's verdict. The Court explained that the employer established, with uncontroverted evidence, that Griffith participated in serious improper or questionable management practices including employees being paid cash for undocumented overtime and bonuses for not documenting work-related injuries, permitting an employee to run an undocumented "company store," accumulating large amounts of unprocessed scrap metal at the facility, purchasing scrap metal containing asbestos, running up hundreds of thousands of dollars in excess costs each month, and authorizing a customer with a key to the facility to take extremely hazardous chemicals free of charge and without employee assistance or protective equipment. The Court also commented that "When an employee is both promoted and fired by the same decisionmakers within a relatively short period of time, there is a strong inference that he or she was not fired due to any attribute the decisionmakers were aware of at the time of the promotion." The Court found that Griffith failed to rebut the same actor defense regarding his religious discrimination claim. *Griffith v. Schnitzer Steel Industries, Inc.*, No. 31130-5-II (07/19/05; Quinn-Brintnall, Van Deren, Morgan).

VICTORIES AND DEFEATS

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

Congratulations to Steve Connor and Anne-Marie Sargent who prevailed on a difficult case against the Department of Corrections, whose final pre-trial settlement offer was only $5,000. The plaintiff was a female permanent part-time Community Corrections Officer II passed over three times for promotion to full-time positions in favor of less experienced men. Based on nominal interpersonal issues, the Department also subjected her to an odyssey of psychological exams and evaluations with five different providers over an 18-month period. During this time she was also off of work. The jury did not find for the plaintiff on her gender discrimination claim, but awarded her $1 for disability harassment, $25,000 for discrimination based on a perceived disability, and $75,000 on her outrage claim for a total verdict of $100,001. The attorney general stipulated to approximately $83,000 in attorneys fees and costs.

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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