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ALERT

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CASE UPDATES

NINTH CIRCUIT

Did U.S. Supreme Court Eliminate All Unconscionability Challenges to Arbitration Agreements That Invalidate Such Agreements at a Higher Rate than Other Contracts?

In this non-employment case, broadband internet subscribers brought a class action against the provider. The provider asserted the arbitration provisions in the subscriber agreements. The district court refused to enforce the arbitration agreement based on a Montana public policy invalidating contracts of adhesion that run contrary to the reasonable expectations of the parties. The court held that the U.S. Supreme Court's decision in *AT&T Mobility v. Concepcion* preempted application of the Montana public policy. Even though the Federal Arbitration Act preserves generally applicable contract defenses such as unconscionability, *Concepcion* holds that even general contract defenses such as unconscionability are preempted if they stand as an obstacle of ensuring that private arbitration agreements are enforced according to their terms.

The Ninth Circuit interpreted *Concepcion* "to be broader than a restriction on the use of unconscionability to end-run FAA preemption…. Any general state-law contract defense, based in unconscionability or otherwise, that has a disproportionate effect on arbitration is displaced by the FAA." The court held the FAA preempted application of Montana's reasonable expectations rule because "it disproportionately applies to arbitration agreements, invalidating them at a higher rate than other contract provisions."
Mortensen v. Bresnan Communications LLC, 777 F.3d 1151 (9th Cir. July 15, 2013) (Gould, Schroeder, Rakoff (S.D.N.Y.))

Plaintiff Who Reopens Bankruptcy Case to Include Discrimination Claim Not Originally Listed as Bankruptcy Asset is Not Judicially Estopped from Pursuing Claim if Original Failure to List was "Inadvertent" or "Mistaken"

This case presented a familiar situation of a plaintiff who failed to list her potential discrimination claim as an asset on her bankruptcy petition. The plaintiff filed a federal court gender discrimination case in November 2008. She filed for Chapter 7 bankruptcy in April 2009. She didn't list the discrimination case as a pending lawsuit. The bankruptcy court issued an order of discharge in September 2009.

The plaintiff's discrimination case lawyer learned of the bankruptcy case and informed the district court in December 2009. The defendant raised the issue of judicial estoppel because the plaintiff had failed to list the lawsuit in her bankruptcy petition. In January 2010 the plaintiff moved to reopen the bankruptcy case and set aside the discharge. The bankruptcy court did so immediately. In February 2010 the employment case defendant moved to dismiss the case on the grounds of judicial estoppel. The district court granted the motion in April 2010.

In June 2010 the bankruptcy trustee abandoned the trustee's interest in the discrimination case with no objection from the creditors. In July 2010 the bankruptcy court closed the reopened Chapter 7 case.

The Ninth Circuit reversed 2-1 the district court's dismissal of the federal discrimination case on the basis of judicial estoppel. The majority held where, as here, a plaintiff has reopened her bankruptcy case to list a previously omitted legal claim, a court must consider

whether the original failure to list the claim was a mistake or inadvertent. In this situation, courts should interpret those concepts broadly. It is not enough that the plaintiff knew about her legal claim at the time she filed bankruptcy. The court noted that many people don't have lawyers when they file for bankruptcy and don't understand their obligations.

The majority carefully analyzed the typical arguments for applying judicial estoppel strictly where the plaintiff reopens the bankruptcy case, and found them all lacking. The bankruptcy courts have their own means of protecting themselves against fraud. Strict application of the judicial estoppel rule operates to the detriment of innocent creditors. The only winner is the alleged bad actor who discriminated against the plaintiff.

The majority held the evidence here could be interpreted as either mistake/inadvertence or deceit. Therefore, the district court erred by granting summary judgment to the defendant and remanded. A district court must consider whether the plaintiff subjectively omitted the bankruptcy asset with or without intent to conceal. The majority noted that the plaintiff or the creditors could move to reopen the bankruptcy case if the discrimination claim isn't dismissed, so the estate could benefit.

Judge Bybee dissented. He disagreed with the majority's legal standard. He also would have affirmed the district court even under that legal standard. He also argued that the majority's new rule shouldn't apply here because the creditors may not have an opportunity to benefit. The trustee abandoned the discrimination claim only after it had been dismissed by the district. Judge Bybee didn't find the possibility of another reopening of the bankruptcy case a sufficient solution to the problem.

Ah Quin v. County of Kauai Dep't of Transportation, --- F.3d --- (9th Cir. July 24, 2013) (Graber, Bybee, Christen)

Independent Contractor Nurse Did Not Have Property Interest in her Position Absent Tenure or For Cause Contract

Plaintiff was an independent contractor nurse with the California prison medical care system. She received a negative assessment of her performance, which she alleges was without merit and unwarranted. Thereafter she was terminated from her position without notice and without any opportunity to respond to allegations against her. After being terminated, Plaintiff applied for other work with the California Department of Corrections and Rehabilitation. She was informed by a "third party" that she had poor recommendations and was no longer qualified.

Plaintiff filed suit alleging *inter alia* that she was denied property and liberty without due process of law. The trial court dismissed the federal claims and remanded the state claims to state court. The Ninth Circuit Court of Appeals affirmed.

The Ninth Circuit recognized that "Before the state deprives someone of a protected property interest, "the right to some kind of prior hearing is paramount." *(citing Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 569–70 (1972)). "Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id*. Government employees can have a protected property interest in their continued employment *if* they have a legitimate claim to tenure or if the terms of the employment make it clear that the employee can be fired only for cause. The Court ruled that as an independent contractor Plaintiff's unilateral expectation that employment would continue was not sufficient to create an entitlement to employment, and therefore there was not a property interest in continued employment. "We hold that a state

agency does not create constitutionally protected property interests for its independent contractors simply by instituting performance review procedures." To create such an interest for an independent contractor, the State must affirmatively grant tenure or that termination can occur only for cause.

The Court also recognized that a "public employer can violate an employee's rights by terminating the employee if in so doing, the employer makes a charge 'that might seriously damage [the terminated employee's] standing and associations in his community' or 'impose[s] on [a terminated employee] a stigma or other disability that foreclose[s] his freedom to take advantage of other opportunities."' *(Citing Tibbetts v. Kulongoski*, 567 F.3d 529, 536 (9th Cir. 2009)). But liberty interests are only implicated when the stigmatizing statement prevents the employee from work in their chosen profession; all employment in the field. In this case, it was only alleged that Plaintiff could not obtain employment with the State Department of Corrections, and not all government employment more generally. This was insufficient to survive a motion for summary judgment.

Blantz v. California Department of Corrections, ___ F.3d ____ (9th Cir. Aug. 15, 2013) (Fisher, Silverman, Thomas)

Courts Must Make Practical Inquiry Whether Public Employee's Speech is Part of His/Her Job Duties; Administrative Leave May Qualify as Adverse Action

Plaintiff was a law enforcement officer with the Burbank Police Department. He observed various acts of outrageous police misconduct, and reacted in disbelief. The Plaintiff met with a Lieutenant involved in the investigation to disclose the abuse he had witnessed. The Lieutenant told Plaintiff to "stop his sniveling." At one point, the Chief of Police appeared at a briefing and, upon learning that not all of the robbery suspects were in custody, said, "Well then beat another one until they are all in custody." Plaintiff complained to the Lieutenant again, who responded that he "didn't want to hear this shit again" and that he was "tired of all the B.S."

Several months thereafter an Internal Affairs (IA) investigation commenced concerning the alleged police misconduct. Plaintiff was threatened not to say anything to IA. After being interviewed by IA, Plaintiff was repeatedly harassed and intimidated by fellow officers. Plaintiff was informed that a federal investigation might be forthcoming and was warned not to say anything. Shortly thereafter Plaintiff was confronted by one the officers accused of misconduct. The officer retrieved his gun from its holster, looked at Plaintiff, and told him, "I'm not a fucking cheese eating rat" and then commented that he was not afraid of being suspended or fired. The officer leaned forward and said, "Fuck with me and I will put a case on you, and put you in jail. I put all kinds of people in jail, especially anyone who fucks with me!" Plaintiff reported this incident to the Burbank Police Officers' Association president, who reported it to the Burbank City Manager. The following month Plaintiff was placed on administrative leave pending discipline.

Plaintiff filed suit alleging that he was subjected to an adverse employment action as a result of his protected speech in violation of 42 U.S.C. Section 1983. The retaliatory acts include *inter alia*, threats, ostracism, denial of employment opportunities, undue scrutiny of work performance, denial of continued employment, and malicious statements calculated to destroy his reputation. The Chief of Police moved for summary judgment on the grounds of qualified immunity. The trial court denied the motion, but was reversed in an unpublished opinion from an interlocutory appeal. The remaining individual Defendants were granted summary judgment on the basis that the Plaintiff was speaking pursuant to his official duties and was not constitutionally protected. A panel of the Ninth Circuit "reluctantly" affirmed relying

upon *Huppert v. City of Pittsburg*, 574 F.3d 696 (9th Cir. 2009) (holding that a law enforcement officer's internal complaints about police misconduct and assistance to prosecutor not protected under *Garcetti*). *See Dahlia v. Rodriguez*, 689 F.3d 1094 (9th Cir. 2012). The Court granted en banc review and the panel was reversed.

The Court's analysis reviewed in detail the Supreme Court and Ninth Circuit jurisprudence concerning the First Amendment rights of public employees. Judge Paez then focused on an in depth evaluation of *Garcetti v. Ceballos*, 547 U.S. 410 (2006), and the Ninth Circuit's earlier decision in *Huppert*. The Court overruled *Huppert* "to the extent that it improperly relied on a generic job description and failed to conduct the 'practical,' fact-specific inquiry required by *Garcetti*." "Precisely because of the fact-intensive nature of the inquiry, no single formulation of factors can encompass the full set of inquiries relevant to determining the scope of a plaintiff's job duties. However, we find that existing case law and common sense dictate a few guiding principles relevant to the case before us." Those guideposts include: 1) 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; 2) relevant, if not necessarily dispositive, factor in determining whether he spoke pursuant to his official duties; and 3) 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. Applying these principles, the Court ruled questions of fact remain about whether Plaintiff was acting within the scope of his job duties.

The Court also ruled that placement on administrative leave can be an adverse employment action under some circumstances. "To constitute an adverse employment action, a government act of retaliation need not be severe and it need not be of a certain kind. Nor does it matter whether an act of retaliation is in the form of the removal of a benefit or the imposition of a burden." "[T]he proper inquiry is whether the action is 'reasonably likely to deter employees from engaging in protected activity.'" "We conclude that, under some circumstances, placement on administrative leave can constitute an adverse employment action."

Judge Pregerson concurred by separate opinion. Judge O'Scannlain (joined by Chief Judge Kozinski) concurred in result but dissented from the majority's analysis.

Dahlia v. Rodriguez, ___ F.3d ____ (9th Cir. Aug. 21, 2013) (en banc).

Plaintiffs Have Wide Latitude in Explaining Apparent Inconsistencies Between FMLA or Benefit Applications and Claiming to be a Qualified Individual under the ADA

The plaintiff was an elementary school teacher. Smith suffered a back injury that led her to become a literary specialist because it was less physically demand. She did that position for four years. The school then reassigned her to be a kindergarten teacher. She rejected the position because she could not perform the physical demands. Soon thereafter she aggravated her back injury and became unable to work.

She applied for FMLA and disability benefits. Her doctor stated she was presently incapacitated and could not work until released by a doctor. On her disability application Smith said she wasn't sure when her total disability would end but that she planned to return to work in August or September. She later extended her FMLA leave stating she would be out of work indefinitely. She then applied for disability retirement. The reason she applied for disability retirement was that the school district refused to accommodate her disability by assigning her to some position other than kindergarten teacher. The school offered some accommodations for the teacher position.

Smith sued claiming an ADA failure to accommodate violation. The district court granted summary judgment to the school district on the basis that her statements on the disability retirement claim rendered her unqualified under the ADA. The Ninth Circuit reversed. The panel concluded that the Supreme Court's decision in *Cleveland v. Policy Management Sys. Corp.* applied to retirement benefits as well as disability benefits. But there was no inherent conflict between the retirement application and Smith's claim she could work if accommodated, because the retirement application doesn't consider jobs modified by accommodation. The court also held that Smith's failure to claim she was able to work in a "limited capacity" did not bar coverage under the ADA because that too isn't the same as working with reasonable accommodation. The panel further reasoned that the retirement form did not preclude a change in medical condition allowing an employee to work in the future.

That all said, the panel noted there were statements in Smith's applications for retirement and FMLA that were inconsistent with her being qualified under the ADA. Under *Cleveland* the question is whether the employee provides a sufficient explanation for the inconsistencies. The court held that the standard is "not an exceedingly demanding one." It gives plaintiffs with latitude to overcome apparent conflicts. Smith's explanation that the FMLA application was intended to request temporary leave and was not an admission of permanent inability to work was sufficient. Smith's explanation that her retirement application statements were not intended to preclude performing the literacy specialist position with accommodation or another vacant position the school refused to assign to her.

The panel held there were genuine disputes of fact whether the school denied her reasonable accommodation.

Smith v. Clark County School Dist., --- F.3d --- (9th Cir. Aug 21, 2013) (Gould, Fletcher, Christen).

A Party Must Show Prejudice from Opposing Party's Delay in Asserting Arbitral Rights in Order to Establish Waiver

This case involved a wage and hour class action. The employer engaged in litigation on the merits and the lead plaintiff's meal and rest break claims were dismissed without prejudice. The district court also ruled that former employees had no standing to ask for injunctive relief. The district court held that the employer waived its right to compel arbitration. The Ninth Circuit reversed.

The court held that the waiver of a contractual right to arbitration is not favored and the party arguing waiver must show prejudice. The court held that the district court's rulings were not decisions on the merits. Although the employer had engaged in discovery, the employee did not show that it was discovery that wouldn't have occurred in the arbitration. The court held that any expense incurred by the plaintiff as a result of the employee's deliberate choice of an improper forum could not constitute prejudice.

The panel refused to affirm the district court decision on the basis of the NLRB's decision in *D.R. Horton*. The plaintiff had not raised this argument in the district court. Most courts have rejected *D.R Horton* and it conflicted with the Supreme Court's decision in *American Express v. Italian Colors Restaurant.* Congress did not claim to override the FAA when it enacted the Norris LaGuardia Act or the NLRA. *Richards v. Ernst & Younng LLP*, -- F.3d – (9th Cir. Aug. 21, 2013) (per curiam) (Schroeder, Ripple (7th Cir.), Callahan)

WASHINGTON COURT OF APPEALS

Comprehensive Administrative Remedies of Washington Health Care Act Precludes Wrongful Discharge Claim

Plaintiff was employed as an Advanced Registered Nurse Practitioner. She was subject to a patient confidentiality policy as it related to protected health information, and understood that violation of the policy could result in discipline including termination from employment. Moreover, the employer's Code of Conduct policy specifically forbid employees from taking patient data offsite except as necessary and in accordance with departmental policies. "Confidentiality" includes "[k]eeping information private that should not be shared with anyone else." The Code of Conduct further encouraged employees to contact a compliance officer if they suspected a regulatory violation, but that they would not be protected from "the results of their misconduct if they are responsible for a violation or any other act that harmful to Providence."

The Plaintiff was counseled about her performance, and also received a written warning. Seven areas of deficiency were specifically identified. Thereafter, she was issued a final warning about her performance.

The day after receiving the final warning, the Plaintiff reported compliance issues about alleged improper Medicare billing and having to read and interpret complex orthopedic X-rays. That same day it was reported that Plaintiff took home several patient face sheets which contained confidential medical information. When confronted Plaintiff explained that she took the documents home because she was asked by the compliance officer to fax documents which reflected her concerns. She claimed to have redacted patient information before taking them from the premises. She never faxed the documents, but did show them to her boyfriend, who was an attorney. She never contacted a governmental administrative agency about her concerns.

Plaintiff was terminated from employment for removing confidential patient information, and insubordination for refusing to return the documents when originally asked. She brought suit alleging wrongful discharge in violation of a clear mandate of public policy and a breach of a promise contained in the employer's code of conduct. The trial court granted summary judgment, and the Court of Appeals affirmed.

The Court of Appeals ruled that Plaintiff had not satisfied the jeopardy element of the public policy tort as a matter of law. The Court ruled that Washington Health Care Act (WHCA), RCW 43.70, provides comprehensive remedies to promote the public policy claim. The Court ruled that the WHCA was similar to the WISHA administrated scheme at issue in *Cudney v. ALSCO, INC.*, 172 Wn.2d 524, 259 P.3d 244 (2011). The Court also relied upon *Weiss v. Lonnquist*, *Hubbard v. Spokane County*, and *Korslund v. Dyncorp Tri-Cities*.

In reference to the *Thomson v. St. Regis* Handbook claim, the Court ruled that there existed no breach of a promise. As a matter of law, Plaintiff was not terminated because she contacted the compliance officer, but because she violated the employer's confidentiality policy.

A Petition for Review is pending.

Worley v. Providence Physician Services Co., 175 Wn. App. 566, 307 P.3d 759 (Div. III July, 2013) (Brown, Korsmo, Kulik)

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