WELA
WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION
A NELA AFFILIATE
936 NORTH 34TH ST. SUITE 300
SEATTLE, WA 98103
www.welalaw.org
ALERT
Editors: Mike Subit / Jeffrey Needle

CASE UPDATES

NINTH CIRCUIT

Adverse Determination on Breach of Duty of Fair Representation Claim Against a Union Does Not Preclude Employee's ADA Claim against the Union

Plaintiff was a disabled employee working for the U.S. Postal Service. She alleged that she was able to perform the essential functions of many jobs but that management refused to grant reasonable accommodations. Plaintiff repeatedly complained about the lack of accommodation to her union, the American Postal Workers Union, AFL-CIO ("APWU"). She alleges that APWU, rather than filing and processing her grievances, sided with management, discriminating and retaliating against her because of her disabilities. She alleges that the union steward not only failed to file her grievances, but withdrew roughly a dozen grievances previously filed and failed to represent her in employment proceedings. Plaintiff filed complaints against the union with the EEOC and NLRB. She was eventually terminated from her position. She filed suit alleging a violation of Title VII, the ADA, and conspiracy under 42 U.S.C. §§ 1985 and 1986. She also alleged state tort claims of negligent retention and intentional infliction of emotional distress.

The district court liberally construed the Title VII claim as a claim for disparate treatment under the ADA. After first denying the motion to dismiss the ADA claim against the union, the Court subsequently ruled that Garity's ADA claims "must be dismissed because each requires [Garity] to prove the . . . breach of the duty of fair representation," with the same "nucleus of operative facts" which the court had ruled to be not actionable in a different complaint filed by plaintiff. Plaintiff appealed and was appointed counsel by the Ninth Circuit Court Commissioner.

The Ninth Circuit ruled that the ADA claim is not precluded because a claim of disability discrimination against a union does not require a showing of breach of duty of fair representation. The Court relied upon *Green v. American Federation of Teachers/Illinois Federation of Teachers Local 604*, 740 F.3d 1104 (7th Cir. 2014), where that circuit held that a breach of the duty of fair representation was not part of a prima facie Title VII discrimination claim against a union. Because Title VII and the ADA are analyzed in parallel fashion, "the *Green* court's analysis applies with equal force to union members with disabilities seeking to challenge their union's discriminatory actions under the ADA. Accordingly, Garity's ADA claims . . . are not barred by issue preclusion because she need not prove a breach of the duty of fair representation to make out a prima facie case of disability discrimination."

Garity v. APWU National Labor Organization, --- F.3d --- (9th Cir. 7/5/16) (Bybee, J., Farris, N. Smith).

Employer Waives Right to Compel Arbitration by Engaging in Extensive Litigation

Plaintiffs were students at a cosmetology school. As a condition of enrollment, they had to sign an arbitration agreement under the AAA's Commercial Rules. In order to graduate, students must perform barbering, cosmetology and manicuring services. They also must clean, sweep, wash and fold laundry and sell retail products. They were paid for none of this work.

Seventy students filed an action under the FLSA and California law. The school stipulated to discovery and a judicial resolution whether the plaintiffs were employees. The school filed a motion to dismiss. The district court ruled the plaintiffs were employees under California law but not under the FLSA. The parties engaged in extensive discovery. Nearly 18 months after the filing of the case, the school moved to compel arbitration. The district court ruled the school had waived its right to arbitrate. The Ninth Circuit affirmed.

The panel reasoned there were two types of gateway issues regarding arbitration, each of which has a different presumption as to whether the court or the arbitrator resolves the question. The first is the "question of arbitrability," whether the parties have submitted a particular dispute to arbitration, including whether the parties are bound by a particular arbitration clause. These disputes are for a court to decide unless the parties clearly and unmistakably provide otherwise. Waiver by litigation falls into this category. It wasn't sufficient that the agreement provided that all determinations regarding "the scope, enforceability and effect of the arbitration agreement" would be decided by the arbitrator, particularly since a district court is in a better position than an arbitrator to decide whether litigation before that court was a waiver of the right to arbitrate.

The court ruled that the school had engaged in significant litigation inconsistent with the right to arbitrate and that the plaintiffs could easily show prejudice as a result. "When a party has expended considerable time and money due to an opposing party's failure to timely move for arbitration and is then deprived of the benefits for which it had paid by a belated motion to compel, the party is indeed prejudiced." Here, the plaintiffs would have to re-litigate in arbitration an issue they had already won in court. The panel rejected the school's "attempt to manipulate the judicial and arbitral systems and gain an unfair advantage."

Martin v. Yasuda, --- F.3d --- (9th Cir. 7/21/16) (Reinhardt, Wardlaw, and Bennett (N.D. Iowa)).

ADEA Does Not Provide Exclusive Remedy for Age-Based Retaliation Claim by Public Employee; First Amendment Claim Still Available

Plaintiff became Superintendent of the Water Department of the City of Williams, Arizona (the "City"), in 1991, and he served in that position until his termination in January 2011. During his employment he became aware that a different employee was alleging that the City retaliated against her because she complained about age discrimination toward a different employee. Plaintiff signed a sworn statement that supported his coworker's claim, and agreed to testify in her lawsuit. Following the disclosure of his involvement, he was subjected to numerous adverse actions, and on several occasions was explicitly discouraged from testifying in the underlying age retaliation lawsuit. The City continued to find fault with plaintiff's performance and eventually terminated his employment.

Plaintiff sued his city employer for retaliation, alleging that he was fired for planning to testify against the City in a lawsuit relating to age discrimination. Stillwell asserted that his termination violated both the First Amendment and the retaliation provision of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(d). The district court granted summary judgment in favor of defendants on plaintiff's § 1983 First Amendment claim on the sole ground that the retaliation provision of the ADEA, 29 U.S.C. § 623(d), precluded a § 1983 First Amendment retaliation claim. Plaintiff appealed.

The Ninth Circuit first rejected the City's argument that plaintiff's speech "was not 'speech as a citizen on a matter of public concern' and so fell outside the First Amendment's protections." "Plaintiff's sworn statement and imminent testimony were 'outside the scope of his ordinary job duties,' which means that he was engaged in 'speech as a citizen for First Amendment purposes.'" The fact that [plaintiff] had submitted only an affidavit and did not ultimately testify in court does not foreclose First Amendment protection."

Relying principally upon the analysis of *Fitzgerald v. Barnstable School Committee*, 555 U.S. 246 (2009), the Court concluded that the retaliation provision of the ADEA does not preclude a plaintiff such as Stillwell from bringing a First Amendment retaliation claim under 42 U.S.C. § 1983. "In cases in which the § 1983 claim alleges a constitutional violation," the presence of significant differences in the "rights and protections" offered by the Constitution and the statute in question make it unlikely "that Congress intended to displace § 1983 suits enforcing constitutional rights by enacting the statute." *Fitzgerald*, 555 U.S. at 252–53. Comparing the ADEA retaliation provision and § 1983 reveals differences in who may sue and be sued. First, the ADEA does not allow suits against individuals. Second, state employees cannot bring suit under the ADEA but can sue state officials acting in their individual capacity under § 1983. See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000). Third, the ADEA is generally applicable to private and public (but not state) employers. In contrast, § 1983 is inapplicable to private employers. Finally, independent contractors can sue under § 1983, but may not bring suit under the ADEA.

The Court also found significant differences in establishing liability. The ADEA plaintiff bears a greater burden of proof as to causation than a plaintiff bringing a First Amendment retaliation claim. Plaintiff in a First Amendment claim must only establish that the protected conduct was a "motivating factor" in the decision to take adverse employment action. But under the ADEA, the plaintiff must prove "but for" causation. In addition, the burden of proof differs when the defendant is a municipality. Under § 1983, plaintiff must prove an official municipal policy or custom that caused the constitutional violation. But under the ADEA, a plaintiff may prevail against a municipal employer based on the actions of its employees and no policy or practice is required.

Finally, the remedies under the two statutes differ. Employees under the ADEA may recover lost wages and liquidated damages, but may not recover damages for emotional distress. In § 1983, however, the plaintiff can recover damages for emotional distress.

The Court concluded that "these distinctions demonstrate that the ADEA's retaliation protections diverge significantly from those available under § 1983 First Amendment lawsuits." More importantly, the Court reasoned that because of the these distinctions "the ADEA's retaliation provision provides less protection to an alleged victim of retaliation than does the First Amendment." In addition, First Amendment retaliation claims are entitled to "strict scrutiny" as opposed to a rational basis review required for age discrimination claims. Therefore, while § 1983 does not state a claim for age discrimination, it does state a claim for retaliation even though the retaliation is actionable under the ADEA. "Given the substantial difference between the level of scrutiny afforded age discrimination equal protection claims and First Amendment retaliation claims, we cannot assume that Congress intended the ADEA to affect the availability of § 1983 claims in the same manner in both subject areas."

Judge Fernandez dissented. Judge Fernandez declined to distinguish between age equal

protection claims and retaliation claims. He concluded that Congress intended the ADEA to be the exclusive remedy for both.

Stillwell v. City of Williams, --- F.3d ---- (9th Cir. 8/5/16) (Friedland, Gould, Fernandez).

Class Action Waivers Violate Section 7 of the National Labor Relations Act

In this case, the Ninth Circuit weighed in on an issue that is bound for the U.S. Supreme Court. The employer required employees to sign an agreement (1) requiring arbitration and (2) requiring individual arbitration proceedings. The net effect was that employees cannot bring concerted legal claims, such as a class action, collective action or a group action, against the company in any forum. The plaintiffs filed a class and collective action under the FLSA and California law. The district court granted the company's motion to compel arbitration.

The Ninth Circuit reversed. The Court held that the NLRB's determination in several decisions that class/collective/group action waivers violate section 7 of the NLRA was entitled to deference. Section 7 guarantees "employees" under the Act the right to engage in concerted activity. Decades of NLRB and Supreme Court precedent had held that legal actions were a form of protected concerted activity. Because employees had a substantive right under the NLRA to engage in concerted legal activity, the employer's requirement that employees waive that right as a condition of employment was unlawful under the NLRA.

The majority held that the Federal Arbitration Act did not dictate a different result. Because the arbitration agreement prohibited concerted legal activity regardless of the forum, the contract was illegal under the NLRA. The FAA does not permit the waiver of substantive federal rights or permit the enforcement of illegal contractual provisions. The majority held there was no conflict between the FAA and the NLRA.

The dissent argued that the right to file a class action was merely procedural and therefore could be waived by an arbitration agreement. Judge Ikuta held that the NLRA does not create a substantive right to class-wide litigation that is contrary to the mandate of the FAA.

The Seventh Circuit is in accord with the majority's opinion. The Second, Fifth and Eighth Circuits have gone with the dissent's analysis.

Morris v. Ernst & Young, LLP, --- F.3d --- (9th Cir. 8/22/16) (Thomas, Hurwitz, Ikuta).

WASHINGTON SUPREME COURT

Retail Sales Establishment Exemption from the Washington Minimum Wage Act is Broader than Analogous Federal Exemption

Alsco is a textile rental and sales company that supplies uniforms, linens, and other products to other businesses in industrial, hospitality, health care, and other fields. Alsco does not provide products or services for resale. Alsco employees who deliver and pick up the goods can choose to be paid either by the hour or by commission with a base salary. For those who choose to be paid on commission, the commission portion comprises over half of their total pay. Alsco does not pay commissioned employees any greater compensation for hours they work over 40 in a week.

A class of commissioned delivery employees filed suit against Alsco, claiming entitlement to overtime pay under the Minimum Wage Act (MWA), chapter 49.46 RCW, and alleging Alsco willfully withheld wages in violation of the MWA. Alsco argued that it is exempt from paying commissioned workers overtime because it is a Retail Sales Establishment ("RSE") for purposes of the overtime exemption in RCW

49.46.130(3). Alsco also claimed it had not willfully withheld wages because the commission-based wage system was negotiated as part of the CBA.

The trial court granted the employees' motion regarding entitlement to overtime, finding that Alsco is not an RSE for purposes of the overtime exemption. Discretionary review at the Court of Appeals was denied. The trial court granted the employees' motion for summary judgment on the method of calculating wages owed. The court calculated the "regular rate of pay" for overtime purposes by dividing the total weekly compensation actually paid by 40 hours rather than all hours actually worked. The Supreme Court granted review and reversed on the issue of whether Alsco was a Retail Service Establishment for the purpose of the overtime exemption. The method of calculation was moot. The Supreme Court relied upon statutory interpretation in a unanimous opinion by Justice Johnson. RCW 49.46.010(6) defines an RSE as "an establishment seventy-five percent of whose annual dollar volume of sales or goods or services, is not for resale and is recognized as retail sales or services in the particular industry." It is undisputed that the products sold by Alsco to other businesses are used by the businesses and are not resold to individuals. The dispositive question is whether it is "recognized as retail sales or services in the particular industry." Relying upon *Stahl v. Delicor of Puget Sound, Inc.*, 148 Wn.2d 876, 64 P.3d 10 (2003), the Court held that it was. The Court rejected federal regulations to the contrary because they do not directly control interpretation of the state MWA, and the Court could find "no language in the definition of an RSE under our act restricting the definition to businesses that sell to individuals." The Court distinguished the federal cases cited by the employees.

Toby Marshall and Jeffrey Needle wrote an amicus brief for WELA.

Cooper v. ALSCO, --- Wn.2d --- , --- P.3d ---- (8/4/16).

WASHINGTON COURT OF APPEALS

Dismissal of Plaintiff's Claims Affirmed, as is Sanction against Plaintiff's Counsel

Plaintiff started working at the King County Wastewater Treatment Division at West Point in 2007. Plaintiff had a turbulent relationship with his supervisors. He complained to HR alleging a hostile work environment, but a County outside investigator found the complaint lacked merit. He then transferred to a different crew at the South Plant in Renton. Thereafter, his original supervisor was reprimanded for threatening retaliation.

Plaintiff's new supervisor at the South Plant restricted plaintiff's assignments for lack of training at the new plant and because plaintiff allegedly made errors placing the crew in jeopardy. Plaintiff filed a complaint with HR alleging that the crew harassed, discriminated against him, and retaliated against him. The County again hired an outside investigator who found no evidence of discrimination.

Plaintiff rejected an offer to send him back to West Point, but he rejected the offer and instead agreed to change crews at South Plant. In early 2010, Marin asked the County to make his transfer to the new crew permanent to accommodate his posttraumatic stress disorder (PTSD). The County agreed in April 2010. The new supervisor gave plaintiff a Teach/Lead/Coach memo ("TLC"), which is not discipline, though may be the basis for future discipline. Marin took medical leave on January 5, 2011. Marin sent notes from two doctors saying that work had aggravated his "acute situational stress" and PTSD. The County requested more information. Marin did not

provide it. Instead, he gave notice he would retire in May 2011.

Marin sued the County in July 2011. He alleging six causes of action: disparate treatment, hostile work environment, failure to accommodate disabilities under the Washington Law Against Discrimination (WLAD), wrongful discharge, and both intentional and negligent infliction of emotional distress.

The trial court found that secretly recorded meetings by plaintiff violated the Privacy Act, RCW 9.73, and sanctioned plaintiff's counsel $5,000 for not having produced them prior to a deposition. The court dismissed at summary judgment four of plaintiff's claims: disparate treatment under WLAD, wrongful discharge, and both types of emotional distress. At the close of evidence, the court granted the County's request for a directed verdict in part. It dismissed the retaliation component of Marin's hostile work environment claim but allowed the jury to decide the rest of his hostile work environment claim and his accommodation claim. The jury then rendered unanimous verdicts for the County on those claims. The court awarded the County $14,378.37 in costs. Marin appealed the Court's ruling on sanctions, summary judgment, directed verdict, and various evidentiary issues. The Court of Appeals affirmed, and the plaintiff's motion to publish was granted.

The Court of Appeals upheld the sanctions against plaintiff's counsel, finding that the conversation was private within the meaning of the Privacy Act, and not an abuse of discretion. The Court affirmed summary judgment because on the issue of discrimination plaintiff failed to show an "adverse employment action" and therefore failed to establish a prima facie case. It also ruled in dicta that plaintiff failed to show an inference of discrimination because the alleged comparator had a different supervisor, and plaintiff failed to show he was treated differently. In additional dicta, the Court ruled that plaintiff failed to prove pretext. Summary judgment was affirmed on the retaliation claim because he again failed to show that he suffered an "adverse employment action," distinguishing *Boyd v. State*, 187 Wn. App at 14. In dicta, the Court ruled that plaintiff also failed to show that his protected activity was a "substantial factor" in the decision to take the alleged adverse action or that the County's reasons were pretextual.

Plaintiff also argued that the court erred in excluding evidence that a coworker retaliated against him without laying a foundation that the coworker was aware of his protected conduct. The Court of Appeals disagreed with the plaintiff that his ruling limited him to direct evidence to make this showing.

Plaintiff also challenged the failure to exclude a juror for cause. But the Court ruled that this challenge was not properly preserved, by not raising it during voir dire. Moreover, "[A] party accepting a juror without exercising its available challenges cannot later challenge that juror's inclusion."

Plaintiff also challenged the Court decision to allow the County's medical expert to testify that plaintiff suffered from an "adjustment disorder with paranoid personality traits." The Court ruled that the trial court had excluded testimony about plaintiff's credibility and instructed the jury to that effect. Rather, the expert's testimony related to plaintiff's medical condition. Moreover, plaintiff opened the door to the accuracy of plaintiff's perceptions when he cross-examined the County's expert.

The trial court's directed verdict on the claim of hostile work environment based upon retaliation was likewise confirmed. The retaliation claim was affirmed because plaintiff introduced no evidence that anyone who harassed him was aware of his protected conduct.

Marin v. King County, -- Wn. App. ---, --- P.3d --- (Div. I 6/6/16) (Leach, Verellen, Dwyer).

FDIC Determination Prohibiting Bank from Paying Executive More than One Year's Severance by also Paying Prevailing Plaintiff Attorneys' Fees and Costs Preempts State Court Order of Such Fees and Costs

Employee was chief credit officer of a bank. His contract provided that he was entitled to three years' severance if his employment ended within 12 months of a change in control. The bank did not seek pre-approval of the agreement from the FDIC. The bank's later sole shareholder sold its shares and the new shareholders elected a new board of directors. Employee resigned. The bank disputed a change in control occurred and said it needed FDIC approval to pay anything.

Employee sued for breach of contract. The parties reached a $500,000 settlement, almost three years of salary, subject to FDIC approval. The FDIC said it would approve only one-year, $180,000. The trial court ordered the bank to obtain permission to pay the one year of severance. Before the FDIC responded, the trial court awarded the employee more than $300,000 in attorneys' fees and costs. The FDIC then said that the attorneys' fees and costs would count towards the golden parachute ceiling and it would only approve $180,000 total. The parties then agreed to a total $250,000 settlement inclusive of fees and costs. The FDIC rejected it as exceeding one-year. The trial court then ordered to bank to get FDIC approval for $180,000. The FDIC approved, the bank paid that amount, and the court dismissed the case.

The employee appealed. The appellate court affirmed. It ruled that FDIC regulations generally prohibit golden parachutes to certain employees such as the plaintiff. The FDIC has also adopted an exception allowing 12 months of severance when there is a change in control. The employee argued the bank should never have asked the FDIC whether attorneys' fees and costs should be included in the 12-month cap. The court didn't really address that argument. Instead, the court held that the Supremacy Clause prohibits a state court from revisiting the FDIC's determination that the fees and costs should be included in the 12-month cap.

Grogan v. Seattle Bank, --- Wn. App. ---, --- P.3d --- (Div. I 8/22/16) (Leach, Schindler, Becker).

MEMBER VICTORIES AND DEFEATS

Adam Berger and Martin Garfinkel represented the plaintiffs in *Cooper*.

Mary Ruth Mann represented the plaintiff in *Marin.*

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WELA Alert Editors

Michael C. Subit (206) 682-6711 msubit@frankfreed.com

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

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Lindsay Halm (206) 622-8000
At Large halm@sbg-law.com