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ALERT

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CASE UPDATES

Ninth Circuit

Marginal Recent Improvement in Working Condition Does Not Preclude Claim for Constructive Discharge in Violation of USERRA

The plaintiff in this case was employed as a San Diego police officer. He also served in the Naval Reserve, which required annual two to three week tours of active duty. He claimed he was subjected to a pattern of harassing investigations and discipline as a result of needing leave for military service. Shortly before he returned from service in Bosnia, the Department terminated him. He appealed the termination internally and it was overturned, but he was warned any subsequent misconduct would result in discharge. He then received a transfer, which he had desired. A few weeks later he received an unacceptable performance rating and a citizen complaint against him. He then quit. He filed suit under USERRA arguing constructive discharge. He won and received $256,800 in damages from the jury. The district court granted the employer's motion for judgment as a matter of law or in the alternative a new trial. Wallace appealed and the Ninth Circuit reversed the judgment to employer and reinstated the judgment in his favor. The majority ruled that there was evidence from which a jury could find that Wallace's military service negatively affected his relationship with his supervisors. The majority ruled that federal law governing constructive discharge applied. The majority held that there was a sufficiently continuous pattern of discriminatory treatment to allow for a jury finding in Wallace's favor. The majority rejected the assertion that the transfer had so improved Wallace's working conditions that there could be no constructive discharge as a matter of law. The majority ruled the jury could hold it was reasonable for Wallace to quit based on a possible citizen complaint given that the department had a history of disciplining him based on meritless complaints. The majority also reversed the grant of a new trial to the City because it concluded that the district court's reasons for doing so were legally erroneous. In dissent, Judge Bybee asserted that no reasonable jury could have found constructive discharge under either federal or California law. In doing so, Judge Bybee failed to review the evidence in the light most favorable to Wallace. *Wallace v. San Diego*, 460 F.3d 1181 (9th Cir. 2006).

WARN Act Doesn't Apply to Federalization of Airport Security Screeners

The WARN Act prohibits an employer from ordering a mass layoff without 60 days notice. The issue in this case was whether the WARN act applied to the federalization of airport security screeners following 9/11. The district court granted the employer's motion for judgment on the pleadings and the Ninth Circuit affirmed. The court agreed with the employer that the layoff was outside the statute because it was the government rather than the employer who had ordered the layoff. Now Justice Alito had read the statute in the same manner while on the Third Circuit. The majority in the Third Circuit case had ruled that in such a circumstance the employer still "orders" the layoff but no liability attached because of "unforeseen business circumstances" exception to the WARN Act. *Deveraturda v. Globe Aviation Security Serv.*, 454 F.3d 1043 (9th Cir. 2006).

Dismissal of Plaintiff's Court Case for Spoilation of Evidence Precludes Department of Labor Investigation into Whether Termination Violated Sarbanes Oxley

The plaintiff in this Title VII/ADA/False Claims Act case deliberately destroyed data on his company issued laptop following his termination and the Company's pre-emptive initiation of a declaratory judgment lawsuit that it could lawfully terminate his employment. He also filed an administrative complaint with the U.S. Department of Labor claiming he was terminated in violation of Sarbanes Oxley ("SOX"). Judge Pechman held an evidentiary hearing before granting the employer's motion to dismiss the plaintiff's court case. The court held that there was no way of knowing how much potentially relevant evidence had been lost. The Ninth Circuit affirmed that the court had the inherent authority to dismiss the employee's case for bad conduct. The district court refused to enjoin the DOL proceeding. The DOL later found reasonable cause that the plaintiff's termination violated SOX. The Ninth Circuit reversed the district court's denial of the injunction against the DOL proceeding on the basis that the DOL was in privity with a plaintiff whose separate claims arising from similar facts had been dismissed in court. The claim preclusion decision seems an unjustified windfall for the employer. *Leon v. IDX Sys. Corp.*, (9/20/06;Tashima; Thompson; Callahan).

Termination for Disability-Related Conduct Is Not Legitimate Non-Discriminatory Reason for Action

The plaintiff had epilepsy and suffered from seizures. He worked as a heavy equipment operator for a county government in Oregon for 16 years. One morning he had an aura, which is followed by a seizure about ½ of the time. Later that day he suffered a seizure while driving a county vehicle. The County requested he undergo a medical examination, which concluded that he had poorly controlled epilepsy and shouldn't work around moving machinery. The County then fired him because he could not perform the essential functions of his position and was a direct threat to others. He appealed his termination to the Board of Commissioners who concluded that he had acted recklessly by driving after having an aura. He filed a suit alleging disability discrimination and failure to accommodate. The district court granted the employer's motion for summary judgment. The Ninth Circuit reversed. Judge O'Scannlain held that there was a factual question whether the County's original decision relying on disability rather than the Board's decision relying on misconduct was the operative one. The panel concluded that it ultimately did not matter because there was no question the plaintiff's misconduct resulted from the disability. The court held that an employer's proffered reason for a termination of a disabled employee is legitimate only where it disclaims any reliance on the employee's disability in having taken the employment action. Here, the court held that the termination for misconduct constituted termination because of disability. As to failure to accommodate, the court held the evidence established as a matter of law the plaintiff could not perform his prior job, but that the County had failed to engage in the interactive process for accommodation by reassignment. The Court held that an employer must consider not only those jobs that are currently available but also those that will be available within a reasonable period of time. The court also held that there was the possibility of accommodation through leave of absence. Judge O'Scannlain rejected the employer's argument that there is no duty to accommodate an employee who does not control his disability and fails to meet his employers legitimate job expectations. He wrote "our court has not taken an approach as unforgiving as" the Seventh and Eighth Circuits. *Dark v. Curry County*, 451 F.3d 1078 (9th Cir. 2006).

Prison Liable for Sexual Harassment of Female Guards by Male Prisoners

The plaintiff was a female prison guard who experienced sexual harassment from male prisoners. Soon after complaining she was fired. She filed claims for sexual harassment, retaliation in violation of Title VII, and retaliation for First Amendment activity. The jury found in her favor on all counts and awarded $600,000 in damages. The Ninth Circuit affirmed except on the First Amendment claim, which it remanded for reconsideration in light of *Garcetti v. Ceballos.* The panel also affirmed the grant of injunctive relief requiring the prisons to make changes to prevent further harassment or retaliation. Judge Reinhardt rejected the defendant's invitation to create a special exemption for prisons for vicarious liability for third party harassment. The panel ruled that the plaintiff acted as a citizen when she made complaints to her state senator and the Inspector General. The panel rejected the defendant's argument that complaining about sexual harassment is not a matter of public concern. The court held that internal complaints of sexual misconduct by prisoners were as a matter of law not constitutionally protected because it was her job to report inmate misconduct. The appellate court left to the district court whether a letter to the prison director was protected conduct or not under *Ceballos.* The panel affirmed the grant of permanent injunctive relief against further retaliation and sexual harassment even though the plaintiff was no longer employed by the prison because she had administratively appealed her termination and that remained pending. *Freitag v. Ayers,* No. 03 16702 (9th Cir. 9/13/06).

Ruling for Employer in ADEA Putative Class Action Reversed Because Severance Pay Release Ineffective Under OWBPA

Former employees of IBM who signed a release of claims in return for severance pay and benefits resulting from a RIF, sued for age discrimination. The EEOC issued them right to sue letters after dismissing their charges of discrimination on the ground that the releases satisfied the Older Worker Benefit Protection Act (OWBPA) minimum requirements for "knowing and voluntary" waiver of ADEA rights. The OWBPA requires that a release be "written in a manner calculated to be understood by such individual, or by the average individual eligible to participate." The employees alleged that the "release covering ADEA claims and a covenant not to sue excepting them created confusion over whether ADEA claims were excepted from the release." IBM filed a counterclaim for breach of the releases and moved to dismiss the complaint under Rule 12(b)(6), which the district court granted. Engaging in a helpful discussion of the statutory prerequisites of waiver under the ADA, the Court of Appeals found they were not met, and so reversed. The Court reasoned that the average employee would not know what to make of the language releasing "all claims" in light of the covenant not to sue IBM in the same document which contained the proviso that the "covenant not to sue does not apply to actions based solely under the ADEA." Any legal difference between the meaning of a release and a covenant not to sue, the Ninth Circuit declared, would be lost on IBM employees. The infirmity was not cured by IBM's statement in the release that employees should seek the advice of an attorney. *Syverson v. IBM Corp.*, No. 04-16449 (Aug. 31, 2006, Berzon, Rawlinson, Callahan).

EEOC Filing Deadline for Claims Against Non-Profit Religious Employers in Washington is 180 days

Plaintiff filed a charge of discrimination with the EEOC and the Washington Human Rights Commission (HRC) against her employer, a church, alleging sexual harassment by the pastor and retaliatory discharge. The trial court dismissed her Title VII claims for failing to file her charge within 180 days as required under Title VII because the state Fair Employment Practices agency, the HRC, did not have subject matter jurisdiction because non-profit religious organizations are exempt from the definition of

"employer" under RCW 49.60. Where the HRC has jurisdiction, the employee has 300 days to file. *See* 42 U.S.C. sec. 2000e-5(e)(1). On appeal, the employee challenged the exemption to HRC jurisdiction as unconstitutional violations of the Equal Protection and Establishment Clauses. The Ninth Circuit affirmed on the same grounds, declining to address the constitutionality of the exemption. Having not addressed the constitutionality of the exemption, the Court also affirmed dismissal of Plaintiff's RCW 49.60 claims on the ground that the employer was exempt. *MacDonald v. Grace Church Seattle*, No. 04-35984 (Aug. 11, 2006, Thompson, Tashima, Callahan).

Washington Supreme Court

Agricultural Exemption Applies to Trucking Company Employees

The Washington Minimum Wage Act does not apply any individual employed in "packing, packaging, grading, storing, or delivering to storage, or to market or to a carrier for transportation to market, any agricultural or horticultural commodity." The Department of Labor & Industries had issued an informal opinion that this exemption applied only to employees who were employed by agricultural employers. Relying in part on that opinion, the trial court and Division II ruled the exemption did not apply to employees of trucking companies who transported agricultural products. The Supreme Court unanimously reversed. Ignoring the maxim that exemptions to the MWA should be narrowly construed, the Court held that the plain language of the exemption covered the trucking employees. *Cerillo v. Cipriano Esparaza***,** 142 P.3d 155 (Wash. 2006).

Court Adopts ADA Definition of Disability for WLAD Undercutting Long-Standing Precedent; Motion for Reconsideration is Pending

Experienced electrician Ken McClarty sued his employer for, among other things, disability discrimination under RCW 49.60. After McClarty was diagnosed with bilateral carpal tunnel and gave his employer a "Doctor's Release for Work" with work restrictions, his employer Totem Electric terminated him as a "Reduction in work forces/lay-off." McClarty testified that the foreman said he was laid off because of his carpal tunnel diagnosis and then Totem Electric hired two electricians. The trial court granted summary judgment for Totem Electric. The Court of Appeals affirmed on McClarty's reasonable accommodation claim, but reversed on his disparate treatment claim. The Washington Supreme Court accepted a petition for review of the definition of "disability" for the disparate treatment claim. "Should it be the definition of 'disability' articulated Y in *Pulcino v. Federal Express Corp.*, 141 Wn.2d 629 (2000), for failure to accommodate claims [urged by the defense] or the definition of 'disability' promulgated by the Washington State Human Rights Commission [(HRC)] in WAC 162-22-020 [urged by the plaintiff]?" The WAC was promulgated in 1975 and followed by the Court. Without notice to the parties or the HRC, the Washington Supreme Court rejected the WAC definition as circular, declined the *Pulcino* definition, and adopted the ADA definition of "disability" effectively gutting long-standing precedent that was much more protective of disabled employees. In doing so, the Court ignored the Pattern Jury Instructions resolving the circularity, rejected the WAC definition to which it long ago gave "great weight," and imported a federal definition lacking Washington legislative intent and which is construed narrowly - whereas RCW 49.60 is construed liberally - all in favor of a definition which it held better reflects the plain meaning of "disability" as set out in dictionary definitions. A motion for reconsideration supported by various *amici* such as WELA and the HRC is pending. *McClarty v. Totem Elec.*, 157 Wn.2d 214 (2006) (J. Johnson wrote the majority opinion for Madsen, Bridge, C. Johnson, Sanders; Alexander dissented; Owens dissented joined by Chambers, Fairhurst).

Washington Court of Appeals

Employee Must be Working at Office to Establish Hostile Working Environment Claim

When Plaintiff was terminated by the Washington Attorney General's office for a raft of subpar work performance, she sued for race, ethnicity, and national origin discrimination. However, the trial court granted summary judgment to her employer finding that she failed to present any evidence of disparate treatment, that her hostile environment claim was barred by the statute of limitations, and that her motion to compel discovery was unsupported and would not have produced discovery that would have precluded summary judgment. The Court of Appeals affirmed on all grounds and held that although the Plaintiff's termination took place within the limitations period, it could not count toward her hostile environment claim because she had been reassigned to work from her home so "could not have been subjected to a hostile work environment if she was not at work." *Clarke v. State of Washington*, No. 33333-3-II (Van Deren, Quinn-Brintnall, Hunt, 6/27/06).

Insurance Adjusters Held Exempt from Overtime Pay

In this class action, the class representative alleged that three categories of claims adjusters were improperly classified as administrative employees exempt from overtime pay under Washington's Minimum Wage Act (MWA), RCW 49.46.010 *et seq*. Pemco conceded that the class of employees (auto physical damage adjusters) is non-exempt; the trial court found the other two classes (casualty and property adjusters) exempt as administrative employees because the classes met both the duties test and the salary basis test. Finding the DOL regulation, 29 C.F.R. sec. 541.203(a), persuasive, the Court of Appeals affirmed holding that the adjusters' duties met the requirements of the administrative exemption because they interviewed witnesses, performed inspections, reviewed facts to prepare damages estimates, evaluated coverage of claims, determined liability and value of claims, negotiated settlements, and made recommendations about litigation. Likewise, finding guidance in the DOL regulation, 29 C.F.R. sec. 541.202(a), the Court upheld the trial court's conclusion that the adjusters exercised sufficient discretion and independent judgment by evaluating claims, hiring experts, offering initial payments, and independently negotiating settlement of claims even though the adjusters were supervised when handling "more costly claims." Similarly, applying another C.F.R. relied on by the Washington Supreme Court, the appellate court found that Pemco paid the adjusters on a salary basis test regardless of whether plaintiff was correct in his assertion that Pemco "had a policy of taking deductions from the pay of adjusters who missed work after exhausting accrued leave." *Mitchell v. Pemco Mutual Ins. Co.*, No. 55834-0-I (Aug. 28, 2006).

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