WELA *ALERT*

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WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION
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CASE UPDATES

FEDERAL - U.S. Supreme Court

Employers May Assert Faragher/Ellerth Affirmative Defense to Constructive Discharge Claims

Plaintiff Suders, a police communications operator, complained orally to a police EEO officer that her supervisors were subjecting her to sexual harassment. Shortly thereafter, Suders quit after being arrested for stealing her own computer-skills exam papers upon concluding that her supervisors falsely reported she had failed and when, in fact, her exams had never been graded. Reversing summary judgment for the employer because genuine issues of material fact exist, the Court also held that the employer had the right to assert the Faragher/Ellerth affirmative defense to liability because a constructive discharge is essentially a "worse case" hostile work environment claim "ratcheted up to the breaking point" to which the defense applies; it is not a case involving an adverse tangible employment action for which the employer is strictly liable and to which the affirmative defense does not apply. To establish the defense, the employer must show it exercised reasonable care to prevent and remedy harassment and that the employee unreasonably failed to avoid harm such as taking advantage of the employer's preventive or corrective policies. *Pennsylvania State Police v. Suders*, No. 03-95 (06/14/04; Ginsburg for all justices except Thomas dissenting).

FEDERAL - Ninth Circuit

Law Enforcement Employees of Tribes Do Not Have Rights Under the FLSA

Finding that matters involving pay of law enforcement officers of a tribe are "intramural matters," the Court held that the tribes are exempt from FLSA claims from such officials because they would interfere with tribal self-government. *Snyder v. The Navajo Nation*, No. 03-15395 (06/10/04; Schroeder, Tallman, Callahan).

Donning and Doffing "Bunny Suits" At Work is Compensable Time Under the FLSA

Plaintiffs filed a class action alleging that their employer failed to pay them wages for putting on and taking off clean room suits and uniforms in violation of the FLSA, for calculating their overtime pay at a rate excluding their paid lunch time in violation of the FLSA, and for withholding contributions to their employee benefit plan in violation of ERISA. Reversing summary judgment for the employer, the Court found that the Portal-to-Portal Act (which amended the FLSA) requires the employer to pay its employees for donning and doffing their "bunny suits" because the employer required them to put on and take off the suits at work and the suits were "directly related to the specific work." The Court concluded, however, that FLSA regulations allowed the employer to exclude the paid lunch time from overtime calculation rates because the parties agreed lunch was not work time. Nevertheless, the Ninth Circuit held that the employer could not credit its paid lunch (during which no work was performed) to offset its obligation to pay employees for donning and doffing their bunny suits (when work was performed). Because the employer did not properly count the hours employees worked, the Court reversed summary judgment for the employer on the ERISA claim. *Ballaris v. Wacker Siltronic Corp.*, No. 02-35956 (06/03/04; Reinhardt, Silverman, Clifton).

Even Confession of Age Discrimination Not Sufficient for Summary Judgment in Favor of Employee

The plaintiff worked for a taxi company. The company bought a new insurance program that excluded people over 70 years of age. On the day the new policy took effect, the company discharged the plaintiff because it no longer had insurance for him. At some point, the Company reinstated his employment. The plaintiff sued for age discrimination. Both parties moved for summary judgment. The district court granted the Company's motion for summary judgement, and denied the plaintiff's. On appeal, the panel reversed the grant of summary judgment for the employer. The opinion contains some unfortunate language that cases involving direct and circumstantial evidence are analyzed differently. On the other hand, it correctly ruled that it can

be error for a court to apply *McDonnell Douglas Burdine*, as it was here. By a 2-1 margin, also the panel denied the plaintiff's motion for summary judgment. The majority ruled that it was unclear that the company had a bad motive. In dissent, Judge Ferguson argued that the ADEA is violated per se when a company terminates an employee "because of" age if it relies on a facially discriminatory policy. *David Enlow v. Salen Keizer Yellow Cab Co., Inc.*, No. 02-35881 (06/10/04; Alarcon, Ferguson, Rawlinson)

WASHINGTON - Supreme Court

Under both Washington and federal law, a non-exempt employee is entitled to pay at 1.5 times the regular rate for all hours in a week in excess of 40. Under the FLSA, the regular rate must be calculated by including all compensation, unless specifically excluded by the law. The applicable MWA regulation literally requires the regular rate to be based on the hourly rate the employee is paid. In this case, Division I ruled that contract ratification payments to union members that were based on the number of hours the member works had to be included in the regular rate for computing the overtime rate under Washington law. The Supreme Court granted review and affirmed by a 5 to 4 margin. Writing for the majority, Justice Fairhurst affirmed. Although the majority did not explicitly reject the state regulation, it did so implicitly, finding the legislature intended "regular rate" to have the same broad interpretation as under the FLSA. For the dissent, Justice Bridge would have applied the regulation to exclude the payments from the regular rate. Importantly, the majority also held that claims under state minimum wage law are strongly presumed not to be pre-empted by section 301 of the National Labor Relations Act. *Hisle v. Todd Pacific Shipyards Corp.* , No. 73357-1 (06/24/04).

WASHINGTON - Court of Appeals

Nothing to report.

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.

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

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

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