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ALERT

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CASE UPDATES

U.S. SUPREME COURT

Statistical Model Can Furnish Basis for Unpaid Wage Damages in Collective/Class Action

Plaintiffs filed an FLSA collective action for failure to pay overtime for donning and doffing protective gear at a Tyson Foods' pork processing plant. They also brought an Iowa state wage law class action. The employer did not record the time each employee spent putting on and taking off the protective gear. Therefore, the employees used representative evidence to show how much time was unpaid. This included an industrial relations study that established average times for time spent. Tyson did not challenge the study on the merits. The jury awarded the plaintiff class $2.9 million. The Eighth Circuit affirmed, 2-1.

The Supreme Court affirmed, 6-2. Justice Kennedy confirmed that the jury could base its damages award based on the evidence of average unpaid overtime and in particular the industrial study. The Court held that "[w]hether and when statistical evidence can be used to establish class-wide liability will depend on the purpose for which the evidence is being introduced and the elements of the underlying cause of action." If the sample could have sustained a jury verdict in an individual action, it will be sufficient to establish class-wide liability.

The Court reemphasized that the "great public policy" of the FLSA militates against making it too difficult for employees to prove the amount of their uncompensated time where the employer has failed to adhere to its statutory duty to preserve records of employee work. If the employer had a problem with the methodology of the study, it should have challenged it in court.

The Court made clear that *Wal-Mart* does not stand for the proposition that that a representative sample is an impermissible means of establishing class-wide liability. The employees there were not similarly situated because there was no common discriminatory policy. Therefore, the plaintiffs' statistical evidence could not have established liability in any individual case. By contrast, here each individual class member had a common experience.

The majority declined to reach the petition-presented question "of great importance" whether uninjured class members may recover damages because the employer did not argue that in its merits brief. Moreover, none of the damages award had yet been distributed.

Chief Justice Roberts, joined in part by Justice Alito, concurred. They expressed serious doubts whether the district court could distribute the damages award in a way that prevents uninjured class members from recovering. The jury only awarded about 40% of the damages that the industrial study had found. Therefore, the jury found that some employees in the class should not recover. But there was no way of knowing which ones.

Justice Thomas, joined by Justice Alito, dissented. They would have reversed the certification of the class action because the individualized nature of the employees' donning and doffing times should have defeated predominance. Evidence that each employee had worked unpaid overtime should have been required.

Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036 (3/22/16).

Ninth Circuit

EEOX Satisfies ITS Conciliation Obligation in a Class Action by Conciliating the Claims of the Class as a Whole; Individual Class Member Conciliation Not Required

Plaintiff filed an EEOC charge of sexual harassment against her employer, a private person. Three months later, she was fired. In its investigation, the EEOC asked for complaints by other women against the same alleged perpetrators. The EEOC and the state FEP agency eventually issued reasonable cause determinations of sex harassment and discrimination against the original complainant and a class of female employees. Conciliation failed and both the EEOC and the State of Arizona filed civil complaints in federal court.

The district court granted the employer's partial motion for summary judgment. The court ruled that the EEOC had been required to identify the other members of the class and conciliate their claims. The district court then granted the employer's second motion for partial summary judgment claiming that some of the employees' claims were untimely. The original plaintiff and several others settled. The EEOC appealed.

The Ninth Circuit reversed the district court's dismissal order for failure to conciliate. The EEOC satisfied its duty by conciliating the class claims in the context of the original employee's charge. Even if there had been a failure to conciliate, the proper remedy was a stay to conciliate.

The panel ruled that the district court had erred by requiring class members to have suffered an injury within 300 days of the reasonable cause finding rather than within 300 days of the plaintiff's original charge. The panel also reversed the district court's dismissal of one plaintiff's hostile work environment claim on the merits.

Arizona ex rel. Horne v. Geo Group, Inc., 816 F.3d 1189 (9th Cir. 3/14/16) (Callahan, Reinhardt, Tashima).

Ninth Circuit Misapplies New Wrongful Discharge Framework

Plaintiff worked in the Edmonds School District as the manager of the schools' Emotional/Behavioral Disorders ("EBD") program and the primary teacher for the students in the program. She expressed concerns to the school Principal that EBD students who were ready to move to mainstream classes were not moved or had moves delayed based on improper financial considerations. The Principal forwarded the concerns to District administrators stating that it contained false accusations and that she hoped the District would "take a very strong position in stopping this behavior." A few weeks later, the Principal expressed her disagreement with a proposal to reassign Coomes because the Principal believed that the reassignment would publicly validate her complaints.

The following year the EBD program experienced a significant change to which Coomes objected. Thereafter she started to receive criticism and poor evaluations. Although the District agreed to a transfer, she collapsed in the school hall and began sobbing uncontrollably. She was granted a medical leave, but at the expiration of the leave she decided not to return to work based upon the advice of her therapist. She claimed constructive discharge.

Plaintiff filed suit alleging the tort of wrongful discharge in violation of a clear mandate of public policy; retaliation in violation of the First Amendment; and a variety of other state law claims. The trial court granted summary judgment.

The Ninth Circuit first reiterated the familiar test for evaluating First Amendment retaliation claims: (1) that she spoke on a matter of public concern; (2) that she spoke as a private citizen rather than a public employee; and (3) that the relevant speech was "a substantial or motivating factor in the adverse employment action." If the plaintiff establishes such a prima facie case, the burden of proof shifts to the government to show that (4) "the state had an adequate justification for treating the employee differently from other members of the

general public"; or (5) "the state would have taken the adverse employment action even absent the protected speech." Citing *Eng v. Cooley*, 552 F.3d 1062 (9th Cir. 2009). The Court focused on the second consideration; the *Garcetti* factor.

The Court ruled that the principal question under *Garcetti* was whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties. To the extent that Coomes's speech was within the scope of her employment duties, such speech is not protected by the First Amendment. If Coomes's speech owes its existence to her position as a teacher, then she spoke as a public employee, not as a citizen. Whether Coomes was speaking as a private citizen or a public employee is a mixed question of law and fact. Generally, when a public employee raises complaints or concerns up the chain of command at her workplace about her job duties, that speech is undertaken in the course of performing her job. The Court ruled that because Coomes neglected to designate specific facts in the record demonstrating the existence of genuine issues of material fact for trial, summary judgment on the First Amendment claim issue was affirmed.

The trial court also granted summary judgment on Plaintiff's state law wrongful discharge claim. The judgment on this claim was vacated because the authority relied upon by the trial court, *Korslund v. DynCorp Tri-Cities*, was overruled by *Rose v. Anderson Hay & Grain Co.*, 358 P.3d 1139, 1143 (2015). In *Rose*, the Court clearly ruled that the *Perritt* formulation only applies when the four traditional categories of wrongful discharge claims are not applicable: only "when the facts do not fit neatly into one of the four above-described categories, a more refined analysis [Perritt framework] may be necessary." The Ninth Circuit incorrectly interpreted *Rose* to require the application of the *Perritt* formulation, despite the fact that Coomes claimed a traditional category of wrongful discharge; a whistleblower. The case was remanded to be decided in light of *Rose* based upon an application of the *Perritt* factors.

Coomes v. Edmonds School District No. 15, 816 F.3d 1255 (9th Cir. 3/23/16) (O'Scannlain, Wallace, McKeown).

EEOC v. Abercrombie & Fitch Does Not Affect Analysis in ADA Disparate Treatment Cases

The plaintiff brought an ADA disability discrimination claim arising out of her employer's failure to return her to work after her return from medical leave. The district court granted summary judgment to the employer and the Ninth Circuit affirmed. In the course of its analysis that panel stated that *EEOC v. Abercrombie & Fitch* did not alter the analysis in ADA disparate treatment cases. The panel was not clear whether it was talking about the "a motivating factor" standard of causation applicable to all Title VII discrimination cases or *Abercrombie & Fitch*'s holding that the plaintiff need not prove the employer actually knew about the employee's protected status. The panel cryptically stated: "We take the opportunity to reiterate that our ADA cases, which require a plaintiff who alleges disparate treatment to show a discriminatory reason more likely than not motivated the defendant, remain good law."

Mendoza v. Roman Catholic Archbishop of Los Angeles, -- F.3d – (9th Cir. 4/14/16) (per curiam) (Tashima, Silverman, Graber).

WASHINGTON SUPREME COURT

Court Gives Expansive Interpretation to Farm Labor Contractor Act

Plaintiffs are a class of 722 farm workers. The Defendant, Hancock, leased three orchards to Farmland Management Services ("Farmland"). Hancock paid Farmland a "Management Fee" in exchange for either operating and managing the orchards or subleasing the orchards to a third party operator/manager. Farmland in turn subleased the Orchards to Northwest Management ("Northwest") to "hire, employ, discharge and supervise the work of all employees and independent contractors performing labor and/or services on the [orchards and that NW] shall be the employer of record of all persons employed to perform work on the [orchards]." Plaintiffs worked at the Orchards operated by Northwest, and were never paid.

They brought suit in federal court under the Farm Labor Contractor Act ("FLCA"), RCW 19.30.010(2).

In relevant part, the FLCA defines a "farm labor contractor" as "any person, or his or her agent or subcontractor, who, for a fee, performs any farm labor contracting activity." Another FLCA provision, RCW 19.30.010(3), then defines "farm labor contracting activity" as "recruiting, soliciting, employing, supplying, transporting, or hiring agricultural employees." The statute imposes joint and several liability for FLCA violations on "[a]ny person who knowingly uses the services of an unlicensed farm labor contractor" and then states, "[i]n making determinations under this section, any user may rely upon either the license issued by the director [of the Department of Labor & Industries (Department)] to the farm labor contractor under RCW 19.30.030 or the director's representation that such contractor is licensed as required by this chapter."

Plaintiffs claimed that Northwest violated the FLCA (1) by failing to carry a current farm labor contractor's license, and (2) that Northwest violated RCW 19.30.110(7) by making false and misleading representations about worker compensation. Northwest is bankrupt. The Plaintiffs alleged, in part, that Farmland and the Hancock companies are jointly and severally liable for Northwest's violations under RCW 19.30.200 because they used the services of an unlicensed farm labor contractor without either inspecting Northwest's license or verifying licensure with the Department of Labor and Industries. The District Court granted summary judgment in favor of the farm workers and the Defendants appealed. The Ninth Circuit certified two questions to the Washington Supreme Court:

1) Does the FLCA, in particular RCW 19.30.010(2), include in the definition of a "farm labor contractor" an entity who is paid a per-acre fee to manage all aspects of farming—including hiring and employing agricultural workers as well as making all planting and harvesting decisions, subject to approval—for a particular plot of land owned by a third party?
2) Does the FLCA, in particular RCW 19.30.200, make jointly and severally liable any person who uses the services of an unlicensed farm labor contractor without either inspecting the license issued by the director of the Department to the farm labor contractor or obtaining a representation from the director of the Department that the contractor is properly licensed, even if that person lacked knowledge that the farm labor contractor was unlicensed?

In reference to the first question, in an opinion by Justice McCloud, the Court unanimously ruled that Northwest was a "farm labor contractor" under the plain language of the statute. In reference to the second question, the Court ruled that the Defendant "knowingly" used the service of an unlicensed "farm labor contractor" if it fails to inspect the contractor's license or fails to inquire about the contractor's status with the Department of Labor and Industries, as required by the statute. "The plain language of the FLCA compels us to answer yes to both certified questions."

Saucedo v. John Hancock Life & Health Insurance Co., 185 Wn.2d 171, 369 P.3d 150 (2016).

WASHINGTON COURT OF APPEALS

In Dicta, Division III Resurrects Requirement that WLAD Disability Accommodations Be "Medically Necessary"

This case was a legal malpractice case arising out of a claim for disability discrimination under the WLAD. The trial court dismissed the malpractice claim because the Plaintiff did not have an expert attorney available to testify that the underlying claim had merit. Although the appellate court disagreed with that rationale, it nonetheless affirmed because the underlying legal action would not have survived a motion for summary judgment. The appellate court's analysis included its description of the elements of a reasonable accommodation claim under the WLAD:

> (1) the employee suffered from a disability, (2) she was qualified to do the job, (3) she gave notice to her employer of the disability, and (4) the employer failed to adopt reasonable measures to accommodate the disability. The accommodation must be medically necessary before the employer has a duty to accommodate.

In *Johnson v. Chevron U.S.A., Inc.*, 159 Wn. App. 18, 244 P.3d 438 (2010), Division I ruled that the 2007 amendments to the WLAD's definition of "disability" eliminated the requirement that workplace accommodations be "medically necessary." While Division III's resurrection of the requirement was dicta, employers may rely on it in the future.

Slack v. Luke, 192 Wn. App. 909, --- P.3d ---- (3/10/16) (Korsmo, Siddoway, Lawrence-Berry).

MEMBER VICTORIES AND DEFEATS

Lori Isley and Andrea Schmitt represented the plaintiffs in *Saucedo*.

Christie Fix and Jeff Needle authored the WELA amicus brief in support of the plaintiffs in *Saucedo*.

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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 at welalaworg@gmail.com. We will verify your WELA membership, and sign you up.

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