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

Ninth Circuit

Employee Who Raises Internal Complaints About Securities Law Violations Protected Under Dodd-Frank Act

Joining the fray on an issue likely to reach the U.S. Supreme Court, the Ninth Circuit ruled 2-1 that the Dodd-Frank Act protects whistleblowers who make internal disclosures as well as disclosures to the Security & Exchange Commission. The Second Circuit is an accord; the Fifth Circuit is in conflict. The Ninth Circuit deferred to an SEC regulation interpreting the statute's anti-retaliation provision to protecting "disclosures that are required or protected under the Sarbanes-Oxley Act" to include internal complaints. Judge Owens dissented.

Somers v. Digital Realty Trust Inc. 850 F.3d 1045 (9th Cir. 3/8/2017) (Schroeder, Wardlaw, Owens).

Piece-Rate Compensation Plan Where Bonuses Used to Calculate the Regular Rate Decline with More Hours Worked Violates FLSA

The plaintiffs were cable and internet installation technicians. The company paid them a fixed rate for each task completed, which guaranteed they earned the required minimum wage in non-overtime weeks. The number of hours worked in a given week determines the installer's piece rate wage rate for the week. That rate is used for the payment of overtime hours. The company also paid a production bonus. The workers charged the formula resulted in overtime pay rates that didn't satisfy the FLSA. The district granted summary judgment to the employer. The Ninth Circuit reversed.

The FLSA requires overtime to be paid at 1.5 times the employer's regular rate. For piece rate work, the rate must include all hours worked including bonuses. The problem here was the production bonus. Here, the employer reduced the production bonus during a 40-hour week by the amount the technicians earned in overtime. This resulted in a situation where the technicians were not paid a statutory minimum wage rate for all hours worked during overtime weeks.

Brunozzi v. Cable Communications, Inc., 851 F.3d 990 (9th Cir. 3/21/2017) (Dorsey (D. Nev.), McKeown, Fletcher).

If Employer's Proffered Reason For Employment Action is Illegal, as a Matter of Law it is Not Legitimate Non-Discriminatory Reason

Plaintiff started working for USA Waste as a residential garbage truck driver in 1979. USA terminated him in December 2011 for alleged performance reasons. Santillan filed a grievance with his union. He was reinstated in May 2012 with a last chance agreement if he passed a drug test, physical examination, criminal background check, and "e-Verify." E-Verify is an "electronic verification system" that is "voluntary" under federal law and is used "to check the work-authorization status of employees through federal records." USA Waste failed to reinstate Santillan because he did not provide proof of his legal right to work in the USA.

Plaintiff filed suit alleging wrongful discharge on the basis of age and retaliation for having an attorney represent him during settlement negotiations. Summary judgment was granted to the employer on the grounds that plaintiff lacked a prima facie case of age discrimination, and that Santillan's failure to provide the documentation

that USA Waste demanded in the three-day time frame it required was a legitimate non-retaliatory reason for the July 2012 termination. Plaintiff appealed and the Ninth Circuit reversed.

Applying California law, the Court ruled that plaintiff had established a prima facie case of age discrimination. The Court also ruled as a matter of law that the employer could not rely upon Immigration Control and Reform Act of 1986 ("IRCA") as a legitimate reason for discharge. The Court explained that the IRCA exempted Santillan from having to provide proof of employment eligibility because he was not a new employee under the statute. He was also exempt because a "grandfather" provision exempts employees hired before November 7, 1986. The Court ruled that the settlement agreement making Santillan's reinstatement contingent upon proof of citizenship violated California public policy. The Court also held that his use of an attorney is protected by California public policy.

Santillan v. USA Waste of California, Inc., 853 F.3d 1035 (4/7/2017) (Pregerson, Hguyen and Owens).

Employee's Prior Salary is a Defense to Equal Pay Act Claim

Plaintiff was hired in 2009 as a math teacher. The school district determined her wages based upon its standard procedure which *inter alia* factored in her most recent prior salary. In July, 2012, she learned that a male colleague who had been recently hired was being paid more than she. Plaintiff filed suit under the Equal Pay Act, 29 U.S.C. § 206(d), Title VII of the Civil Rights Act of 1964, and California's FEHA. The district court denied the employer's motion for summary judgment and ruled that, under the Equal Pay Act, prior salary alone can never qualify as a factor other than sex, reasoning that "a pay structure based exclusively on prior wages is so inherently fraught with the risk . . . that it will perpetuate a discriminatory wage disparity between men and women that it cannot stand, even if motivated by a legitimate non-discriminatory business purpose." The Ninth Circuit reversed.

The Ninth Circuit acknowledged that "[t]he Equal Pay Act creates a type of strict liability; no intent to discriminate need be shown. Thus, to make out a prima facie case, the plaintiff must show only that he or she is receiving different wages for equal work." (citation omitted). One of the affirmative defenses to liability is "a differential based on any other factor other than sex." (quoting 29 U.S.C. § 2069(d)(1)). The Court held that under *Kouba v. Allstate Ins. Co.*, 691 F.2d 873 (9th Cir. 1982), prior salary alone can be a "factor other than sex" if the defendant shows that its use of prior salary was reasonable and effectuated a business policy and that the employer "use[s] the factor reasonably in light of the employer's stated purpose as well as its other practices." *Kouba*, at 876-77.

Contra Angove v. Williams-Sonoma, Inc., 70 Fed. App'x 500, 508 (10th Cir. 2003); *Irby v. Bittick*, 44 F.3d 949, 954 (11th Cir. 1995).

The School District offered four reasons to justify the use of prior salary as a "factor other than sex." But, the district court did not evaluate whether these reasons effectuate a business policy or determine whether the County used prior salary "reasonably," as required by *Kouba*. The Court remanded to evaluate the four business reasons offered by the County and to determine whether the County used prior salary "reasonably in light of [its] stated purpose[s] as well as its other practices." The Court emphasized that because this is an affirmative defense the burden is on the County, and plaintiff need not demonstrate pretext under the *McDonnell Douglas* shifting burden model.

Rizo v. Yovino, --- F.3d --- (9th Cir. 4/27/2017) (Adelman (E.D. Wisc.), Tashima, Hurwitz).

Qui Tam Relator Lacked Significant Protectable Interest in Government's False Claims Act Action So Could Not Intervene as of Right

Prather filed a *qui tam* False Claims Act ("FCA") action against Sprint and four other telecommunications companies alleging they were defrauding the government by overcharging them for electronic surveillance services. The Government elected not to intervene, and the district court concluded that Prather was not the original source and dismissed the claim. The Ninth Circuit affirmed. 847 F.3d 1097 (9th Cir. 2017).

While Prather's appeal was pending, the Government filed its own FCA suit against Sprint. Prather moved to intervene alleging he had a right to share in the proceeds. The motion to intervene was denied and Prather appealed. Thereafter, the Government and Sprint reached a settlement and the case brought by the Government was dismissed.

The Ninth Circuit *sua sponte* considered whether the appeal was moot. It acknowledged that the parties' settlement and dismissal of a case after the denial of a motion to intervene does not as a rule moot a putative-intervener's appeal. In this case, the Court ruled that because the settlement and dismissal of the underlying action did not make it *impossible* for the court to grant any effectual relief whatever to the putative intervener the case was not moot.

Nevertheless, the Court affirmed the lower court's denial of Prather's motion to intervene. The Court ruled that where a claim is brought by a non-original source (Prather) the Court lacks jurisdiction, and that jurisdictional defect is not cured by the Government's intervention. Prather's *qui tam* claim would have been dismissed even if the Government had intervened because he was not the original source. "Prather, . . . could not have continued to pursue his *qui tam* action against Sprint even if the Government had intervened, although the Government could have gone forward on its own behalf." If the Government declined intervention in the case brought by Prather, and pursued the case on its own behalf, it would still not have been required to pay a reward because a jurisdictionally barred relator is not entitled to any recovery.

Although the appeal was not moot, "Prather did not have a significantly protectable interest in the Government's FCA action against Sprint. His prior filing of a related, but jurisdictionally barred, *qui tam* action did not entitle him to any award under the FCA. We therefore conclude that Prather was not entitled to intervene as of right in the Government's FCA action against Sprint."

United States of America v. Sprint Communications, Inc. --- F.3d --- (9th Cir. April 28, 2017) (Berzon, Gould, Sessions (D. Vt.)).

Washington Court of Appeals

Employees Entitled to Monetary Damages for Missed Meal Breaks; Can't Receive Pre-judgment Interest and Double Damages in the Same Case

The plaintiffs in this case were 500 armored car drivers who brought a successful class action for meal and rest break violations. They prevailed at trial and obtained both double damages and prejudgment interest. On appeal, the employer claimed pre-emption and challenged class certification, the damages awarded and the attorneys' fees awarded.

The court of appeals rejected the employer's claim that Federal Aviation Administration Authorization Act and section 301 of the Labor Management Relations Act preempted the employees' claims. Consistent with Ninth Circuit precedent regarding California meal and rest break laws, the court ruled there was no

preemption under the FAAA because they are generally applicable background laws that do not single out motor carriers. The court ruled the company could have applied to L&I for a variance from the regulations but didn't.

The section 301 preemption question turned on whether the employees could have waived their meal and rest break rights through a collective bargaining agreement. While public sector and construction industry unions and employers can negotiate contracts that vary from the regulations governing meal/rest breaks, private sector employers can't. The L&I policy that allows employees to waive their meal periods requires a decision by individual employees. A CBA provision does not satisfy the policy of individual waiver. Because the employees' rights to meal and rest periods were independent of the CBA, there was no pre-emption.

The court held that by finding that whether the drivers were allowed legally sufficient meal and rest breaks was "overriding" this satisfied Rule 23.

The court ruled that the rest breaks the employer provided were insufficient. The court held that it is not enough for employers to allow employees to take breaks, employers must also affirmatively promote meaningful break time. Here because the employer required the employees to continue to be vigilant and its written policies said employees could not conduct personal business, the company didn't provide true rest breaks.

In a precedent-setting decision, the court held that even though the employees were paid for all of the hours they worked, the failure to provide them with a meal break was a wage violation. The company argued no pay was due because normally meal periods are unpaid. The court ruled that the denial of meal periods should be treated the same as the denial of rest periods. "If this court does not treat this as a wage violation, it is unclear what recourse Plaintiffs would have." The court noted that the employer benefitted from the denial of meal breaks. The court held that because there was a bona fide legal dispute whether the employer was required to provide meal breaks in these circumstances double damages for the meal break violations were improper.

Relying on a case involving tree-trespassing compensatory and punitive damages, the court (incorrectly) held that employees cannot receive both double damages and prejudgment interest in the same Washington wage action. A major flaw in the analogy is that wages are not compensatory damages awarded for a legal obligation but rather a liquidated contractual and statutory obligation. The court (correctly) agreed with the employees that double damages under RCW 49.52 are different than exemplary damages under the FLSA.

The court upheld a 1.5 multiplier on fees.

Hill v. Garda CL Northwest, Inc., --- Wn. App. ---, --- P.3d --- (Div. I 3/27/2017) (Trickey, Spearman, Schindler).

Dan Johnson, Adam Berger, and Marty Garfinkel represent the employees in *Hill*.

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

WELA Alert Editors

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

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

2017 WELA Board of Directors

Beth Terrell (206) 816-6603
Board Chair bterrell@terrellmarshall.com

Terry Venneberg (253) 858-6601
Board Vice-Chair terry@washemploymentlaw.com
Website and Social Media Co-Chair

Larry Kuznetz (509) 455-4151
Secretary larry@pkp-law.com

Sean Phelan (206) 682-6711
Treasurer sphelan@frankfreed.com

Kathleen Phair Barnard (206) 285-2828
Immediate Past Chair barnard@workerlaw.com
CLE Co-Chair

Jeffrey Needle (206) 447-1560
Amicus Chair jneedlel@wolfenet.com
Legislative Co-Chair

Jesse Wing (206) 622-1604
Legislative Co-Chair jessew@mhb.com

Teri Healy (206) 220-6916
Website and Social Media Co-Chair teri.healy@eeoc.gov

Daniel F. Johnson (206) 652-8660
Communications Chair djohnson@bjtlegal.com

Hardeep S. Rekhi (206) 388-5887
Events Chair hardeep@rekhiwolk.com

Lindsay Halm (206) 622-8000
CLE Co-Chair halm@sbg-law.com

2017 Non-Board Officers

Andrea Schmitt (360) 943-6260
Legislative Co-Chair andreaschmitt@columbialegal.org

Denise Diskin (206) 324-8969
CLE Co-Chair denise@stellarlaw.com