WELA
WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION
A NELA AFFILIATE

18 WEST MERCER ST. SUITE 400
SEATTLE, WA 98119-3971
www.welaweb.org

ALERT

Editors: Mike Subit / Jeffrey Needle

CASE UPDATES

U.S. SUPREME COURT

Justices Will Decide FLSA Donning and Doffing Case.

A group of steelworkers brought an FLSA collective action seeking pay for the time they spend putting on and taking off protective gear in the locker room and for walking to and from the locker room to their work stations. The union collective bargaining agreement did not provide for such payments. The district court granted the employer's summary judgment motion on the changing clothes issue but denied it on the walking time. On appeal, the Seventh Circuit held that the protective gear fell within an exception of the FLSA that applies where a collective bargaining agreement or custom did not provide for compensation for changing clothes. The Seventh Circuit specifically disagreed with *Alvarez v. IBP Inc.*, 339 F.3d 894 (9th Cir. 2003), *aff'd on other grounds*, 546 U.S. 21 (2005). Judge Posner then ruled that because the "changing clothes" was not compensable work time, the work day didn't begin until the employees arrived at their work site and the walking time was also non-compensable. The Supreme Court granted certiorari.

Sandler v. United States Steel Corp., 133 S. Ct. 1240 (2/19/2013).

Court Grants Cert. Whether Section 1983 Precludes ADEA Claims.

Plaintiff worked as an Illinois Assistant Attorney General for almost six years. He was over 60 at the time of his termination. He believed he was fired because of his age and gender, and sued the State of Illinois, the Office of the Illinois Attorney General, Illinois Attorney General Lisa Madigan (in her individual and official capacities), and four additional Attorney General employees in their individual capacities.

The individual capacity defendants argued at the district court that they were entitled to qualified immunity for the §1983 age discrimination claim because the ADEA is the exclusive remedy for age discrimination claims. The district court disagreed.

The Seventh Circuit Court of Appeals affirmed that decision on interlocutory appeal. The appellate court noted that the ADEA is not the exclusive remedy for age discrimination in employment claims, and does not preclude a §1983 equal protection claim. Although age is not a suspect classification, the Supreme Court has held that states may not discriminate on that basis if such discrimination is not "rationally related to a legitimate state interest." Since, at the time of the alleged wrongdoing, it was clearly established that age discrimination in employment violates the Equal Protection Clause, the Seventh Circuit concluded that the individual defendants were not entitled to qualified immunity.

The decision created a 4-1 circuit split.

Madigan v. Levin, 133 S. Ct. 1600 (3/18/2013).

NINTH CIRCUIT

FLSA Class Certification Reversed for Reconsideration in Light of Dukes v. Wal-Mart.

Plaintiffs were newspaper workers who claimed they were made to work more than 8 hours a day and 40 hours per week; denied overtime and meal and rest breaks. The district court certified an FLSA collective action/state law class action

and found in favor of the employees after a bench trial. In 2010 the Ninth Circuit affirmed but the Supreme Court remanded in light of *Dukes.* The panel reversed the 23(b)(2) certification and remanded to the district court to reconsider its analysis under Rule 23(a) and Rule 23(b)(3). The employer had never argued there was an issue with commonality but the panel ruled that *Dukes* represented an intervening changing in the law, allowing for the new argument. The panel recognized that the *Wal-Mart* was "factually distinguishable."

Importantly, it held that under 23(a)(2) the plaintiffs need not show every question in the case, or even a preponderance of questions, is capable of class-wide resolution. Indeed, a single common question would be sufficient. As for Rule 23(b)(3), the court held that the employer's uniform policy of classifying the plaintiffs as exempt was insufficient. The panel also noted that in California an employer need not ensure its employees actually take their meal breaks. The employer must have known or should have known the employees were working through their meal breaks.

Wang v. Chinese Daily News, Inc., 709 F.3d 829 (9th Cir. 3/4/2013) (W. Fletcher, Trott and Breyer (N.D. Cal.)).

Delay in Salary Increase Sufficient for Claim of First Amendment Retaliation.

The Plaintiff was the President of the Sierra Madre Police Association ("Union"). Acting in his capacity of President, the union issued two press releases critical of the Chief's performance and announcing a membership vote of "no confidence." The Union alleged a "lack of leadership, wasting of citizens' taxdollars, hypocrisy, expensive paranoia, and damaging inability to conduct her job." *Ellins*, 710 F.3d at 1054. At the time of the press release, Plaintiff was the subject of three internal investigations, including a criminal investigation concerning "alleged sales and use of anabolic steroids, assault with his duty weapons, and other matters relating to sexual misconduct while on duty." *Id*. at 1055.

After having been disciplined for at least some of the alleged misconduct, Plaintiff submitted an application for a training certificate, which would have entitled Plaintiff to a 5% raise in salary. The Chief refused to sign the certificate allegedly because it required her to attest to Plaintiff's good moral character. Plaintiff filed suit alleging a violation of First Amendment rights.

While the litigation was pending, the prosecutor decided not to file criminal charges against the Plaintiff. The Chief then signed the certificate of training and expressed the hope that if Plaintiff would dismiss the litigation the raise would be retroactive. The district court held that Plaintiff failed to establish that (1) he spoke as a private citizen in leading the no-confidence vote; (2) he suffered an adverse employment action; and (3) his protected act was a substantial or motivating factor in the alleged adverse employment action.

The Ninth Circuit reversed on the retaliation claim against the Chief but affirmed the dismissal of the claim against City because the Chief was not the final decision maker or policy maker which could give rise to municipal liability under Section 1983. *See Monell v. Dept. of Soc. Servs.*, 436 U.S. 658 (1978).

The Ninth Circuit quickly concluded that the press release involved more than a personnel dispute or grievance, and that the speech addressed issues of public concern. The Court also ruled that Plaintiff's speech was made as a private citizen and not as part of his employment responsibilities. "[A] public employee speaks as a private citizen 'if the speaker had no official duty to make the questioned statements, or if the speech was not the product of performing the tasks the employee was paid to perform. While the question of the scope and content of a plaintiff's job responsibilities is a question of fact, the ultimate constitutional significance of

the facts as found is a question of law." *Ellins*, 710 F.3d at 1058-59. The Court ruled that Plaintiff's duties as President of the Union were unrelated to his duties as a Police Officer. *Id.* "Given the inherent institutional conflict of interest between an employer and its employees' union, we conclude that a police officer does not act in furtherance of his public duties when speaking as a representative of the police union." *Id.*

The Court also ruled that the delay in salary increase was an adverse employment action. The Court concluded that action would deter protected activity.

The Ninth Circuit also ruled that there was sufficient temporal proximity between the protected speech and the adverse action to infer causation. "Whether Diaz would have withheld her signature in the absence of the no-confidence vote and the press releases, and whether she had an adequate justification for doing so, are entirely questions of fact."

The Ninth Circuit ruled that, contrary to the district court, the Chief was not entitled to qualified immunity. The Court defined that constitutional right at issue broadly: "[W]e conclude that a reasonable official . . . would have known that delaying Ellins's application . . . because of his union activity, . . . violated Ellins's First Amendment rights; that in leading a union vote Ellins acted as a private citizen addressing a matter of public concern; and that depriving Ellins of salary in retaliation for his protected speech was unconstitutional.

Ellins v. City of Sierra Madre, 710 F. 3d 1049 (9th Cir. 3/22/2013) (Wardlaw, Paez, Rawlinson).

Three Months in the Workplace Isn't Long Enough for Sexually Hostile Work Environment Claim Where Harassment Isn't Severe and Doesn't Affect Work Performance.

Plaintiff brought a Title VII action against her former employer, West Coast Contractors, claiming sexual harassment and retaliatory discharge. The district court granted summary judgment to West Coast, and Ms. Westendorf appealed. The Ninth Circuit affirmed the judgment on the harassment claim, and reversed and remanded the retaliation claim.

The Plaintiff was employed for approximately four months as an assistant project manager. She alleged that two managers repeatedly made sexual comments and remarks, including describing her work as "girly work," frequent lewd remarks about breast size, comments about women's private bodily functions, saying "f___ you" to Plaintiff on several occasions, etc. Plaintiff insisted that the manager stop that language on each occasion, and he refused to stop. She also complained after each comment to the company President.

The President of the company promised to discuss the issue with both managers. The behavior continued. After three months of continuous complaints, the President questioned the relevant managers and Plaintiff with a court reporter taking a transcript. During the interview the offending supervisor was recalcitrant stating that he was "sick of this, totally sick of it."

Thereafter the retaliation began. Plaintiff was criticized for trivial issues which previously were satisfactory. Her supervisor was rude and abusive. Finally, after she was reprimanded using obscene language, she complained again to the company President, who told her that she just couldn't get along with the manager, and that she was terminated from employment. The employer denied that it fired her.

The Ninth Circuit ruled that the work environment was not sufficiently severe or pervasive to sustain the claim. The Court noted that Plaintiff was only required to work with the offending managers once a week for three months. "The harassment was not physical and Westendorf did not say that her work suffered because of it." Plaintiff failed to show that the

abusive behavior altered the terms of employment.

The Court reversed on the issue of retaliation. "Even though we have held that the evidence did not support Ms. Westendorf's sexual harassment claim, we think that it could support a reasonable belief that she was subjected to actionable sexual harassment, and that she had such a belief. In such circumstances, her complaints about that conduct would be protected activity."

The Court applied a "but for" standard of causation and not "motivating factor." Plaintiff "had to show that her protected conduct was a but-for cause — but not necessarily the only cause — of her termination." The Ninth Circuit found that Plaintiff has satisfied this standard, and remanded for additional proceedings.

Judge Rawlinson concurred in part and dissented in part. She concurred in the dismissal of the harassment claim and would have affirmed the dismissal of the retaliation claim as well.

Westendorf v. West Coast Contractors, 712 F.3d 417 (9th Cir. 4/1/2013) (Arnold (8th Cir.) Bybee, Rawlinson).

Courts May Certify State Law Class Action Along With FLSA Collective Action.

Employers have been arguing for years that it is impermissible for a court to certify a state law wage and hour class action and a federal FLSA collective action. The Nevada district judge in this case accepted that argument but the Ninth Circuit reversed. The Ninth Circuit noted that not a single circuit had held there is a conflict between having an FLSA collective action and state law class action in the same case. The Ninth Circuit recognized the FLSA permits more protective state laws, which including laws allowing class actions. It makes no difference that the size of the FLSA collective action is likely to be smaller than the state law class. The court relied on the Class Action Fairness Act as support for its reasoning.

On the merits, the panel held that the time the employees spent undergoing security screenings to prevent theft was compensable time under the FLSA, reversing the district court. The panel agreed with the district court that the workers had no claim for shortened lunch periods under the FLSA. Walking to the lunchroom did not constitute compensable time. Interruption of a meal break does not violate the FLSA. However, being on call during the meal break might require compensation. Unlike Washington, Nevada law does not provide for a private right of action to enforce meal breaks.

Busk v. Integrity Staffing Solutions, 713 F.3d 525 (9th Cir. 4/12/2013) (Thomas, Farris, N.R. Smith).

District Court Abused Its Discretion in Denying Wage Class Action Certification Based on Individualized Damages Calculations.

The plaintiffs brought a class action on behalf of 558 employees for violations of California wage laws. Applying *Dukes v. Wal-Mart*, the district court denied certification on the basis that the damages inquiries will be highly individualized and the class difficult to manage.

The Ninth Circuit reversed holding that individualized damages calculations cannot defeat certification. The panel noted that damages calculations are almost always individualized. The court distinguished the U.S. Supreme Court's recent decision in *Comcast Corp. v. Behrend*, 133 S. Ct. 1246 (2013). "Here, unlike *Comcast*, if putative class members prove . . . liability, damages will be calculated on the wages each employee lost due to [employer's] unlawful practices."

The panel also held that the district court applied the wrong standard in finding that a class action was not the superior method for resolving the claims. The fact that the court would need to calculate damages on an individual basis was not sufficient to defeat manageability. Damages

could be calculated based in large part on the employer's payroll records.

Leyva v. Medline Industries, Inc., (9th Cir. 5/28/2013) (Pregerson, Paez, Hurvitz).

WASHINGTON SUPREME COURT

Employee's Physician's FMLA Certification Sufficient; Employee Entitled to Judgment as a Matter of a Law for FMLA Violation.

The plaintiff worked for Providence Hospital. He used a lot of FMLA leave and leave donated by other employees. The employer ordered the plaintiff to take a drug test. He tested positive for methadone, for which he had a prescription. The employer ordered the plaintiff to go to a doctor of its choosing for a fitness for duty evaluation. The employee's own physician submitted a letter saying he was fit for duty. The employer's doctor said the plaintiff was not fit for duty due to the methadone. On July 31 the hospital wrote the employee a letter saying it was retroactively placing him on FMLA leave as of July 16. The employee had only six weeks of leave left, and the employer said it would terminate him once his leave ran out.

The employer neglected to obtain a certification from the employee's own physician justifying the FLMA leave. On August 10, he certified that the plaintiff needed only two to four weeks of FMLA leave (running from July 16) and was "ok to return to work as soon as the employer allows." On August 16 the employee asked to return to work. The employer insisted that the physician it had retained had to sign off on the return to work, which was contrary to the FMLA. He refused and the employer fired the employee the day his FMLA leave expired.

The employer prevailed at trial. The Superior Court refused to grant the employee's Rule 50 motion. The court of appeals disagreed and ruled that the employee was entitled to judgment as a matter of law. The employer appealed and the Supreme Court affirmed 5-4. The employer argued that the because the employee's physician's statement authorizing two to four weeks of medical leave was not made contemporaneously with the plaintiff's ability to return to work. Justice Chambers held that the employee's physician's August 10 statement that as of July 16 the employee needed two to four weeks leave meant that by the date of the letter, the physician was stating that the employee could return to work as of August 10. The majority said that the if the employer had any concerns about the statement "ok to return to work as soon as the employer allows," under the FMLA it should have returned him to work and sought clarification. The majority held that there were no genuine material factual disputes.

Justice Charles Johnson wrote the dissent, joined by Justices Owens, Jim Johnson and Madsen. They said it was up to the jury to decide whether the August 10 statement was prospective or retroactive to July 16. (The majority held the statement wasn't ambiguous). The dissent also would have left it up to the jury whether the August 10 statement was really a fitness for duty determination, which would seem to be a question of law.

Chaney v. Providence Health Care, 176 Wn.2d 727, 295 P.3d 728 (2/21/13).

WASHINGTON COURT OF APPEALS

Constructive Wrongful Discharge Jury Verdict for Employees Affirmed Based On Employer Pressure to Commit Perjury.

In *Barnett v. Sequim Valley Ranch*, several employees were pressured to lie under oath or give misleading testimony in order to support a litigation in which their employer was involved. The employees refused to lie, and felt compelled to quit. They brought suit alleging wrongful discharge in violation of a clear mandate of public policy. After a protracted litigation, a jury found in their favor and awarded them

collectively $427,320. The employer appealed, and the Court of Appeals affirmed.

On appeal, the employer alleged that the claim was barred by the statute of limitations. The Court of Appeals recognized a three year statute of limitations, and that either an actual or constructive discharge would support the claim. The Court rejected the argument that the statute began to run from the last date that the unlawful employment practice occurred. The Court ruled instead that the statute begins to run from the date of resignation or the last day the employee actually works. In this case, the employees wrote a letter on September 20, 2004, stating that their last day of work was September 18, 2004. Because the employees filed suit on September 17, 2007, the statute of limitations had not expired.

The employer also challenged the jury instruction on the subject of constructive discharge. The trial court instructed as follows: 1. That the defendant deliberately made working conditions intolerable for him/her; 2. That a reasonable person in his/her position would be forced to quit; 3. That he/she did quit because of the conditions and not for any other reason; and 4. That he/she suffered damage as a result of being forced to quit. The Court rejected the employer's argument that the employees must prove that they had no alternative but to quit. The Court distinguished *Molsness v. City of Walla Walla*, 84 Wn. App. 393, 928 P.2d 1108 (1996), where the Plaintiff resigned rather than challenge a decision to discharge for cause.

The employer further objected to the failure to instruct the jury about the criminal elements of perjury, witness tampering, or witness intimidation. The Court of Appeals found that such instructions were unnecessary. "This was not a criminal trial related to the crimes of perjury, witness tampering, or witness intimidation. This was a trial related to wrongful termination. The trial court's instructions, as a whole, clearly articulated the elements of the tort claim and its statement of the applicable public policy satisfactorily distilled Washington law in a manner that allowed any reasonable juror to decide the issue."

The employer attempted to raise the jeopardy issue; that there were adequate alternative means of vindicating public policy. Because this issue was raised for the first time on appeal, it was not considered.

Barnett v. Sequim Valley Ranch LLC, -- Wn. App. ---, --- P.3d --- (Div. II 3/5/2013) (Qunn-Brintnall, Van Deren, Penoyar).

Employee Who Quit His Job To Follow Wife to Finland for Fulbright Grant Ineligible for Unemployment Benefits.

Plaintiff was a school teacher at the University Place School District. He quit to follow his wife, who received a Fulbright teaching grant, in Finland. He was denied unemployment benefits and appealed.

After the Department denied benefits, an administrative law judge found that claimant's wife had a four month teaching grant from February to May, 2011, and that claimant, after being denied a leave of absence, quit his teaching position on June 15, 2010. The Claimant appealed the ESD Commissioner, who adopted the findings of fact and concluded that to be eligible for unemployment benefits, Claimant would have to establish good cause for voluntarily quitting his job. "Good cause to quit is established when a claimant relocate[s] for the employment of his spouse outside the existing labor market area." Citing RCW 50.20.050(2)(b)(iii). RCW 50.20.050(2)(b)(iii) also requires that the Claimant remain employed as long as reasonable prior to the move. The commissioner determined that Plaintiff failed to establish that the Fulbright grant was employment, and also that Campbell quit his job prematurely.

On appeal, the Claimant argued that he quit at the end of the school year instead of February of

the following year out of consideration for the employer and his students; he wanted to avoid quitting in the middle of the school year. The Court of Appeals was unconvinced. It ruled that "under the statute's plain language, 'reasonable' does not equate to considerate, understandable, commendable, or ethical . . . ." "The statute requires that the claimant 'remained employed as long as was reasonable *prior to the move*.'" RCW 50.20.050(2)(b)(iii)(B) (emphasis added). "Campbell's decision to quit at the end of the school year had no relation to the timing of the temporary relocation to Finland. Therefore, Campbell failed to show that he remained employed as long as reasonable."

Campbell v. State of Washington Department of Employment Security, --- Wn. App. --, 297 P.3d 757 (Div. II 3/26/2013) (Quinn-Brintnall, Van Deren, Worswick).

Jury Verdict for Employee Reversed on the Basis that Driving Equipment that Required Commercial Driver's License was "Essential Function" of the Position.

The plaintiff worked as a groundskeeper. His employer refused to interview him for a promotion because he had a genetic eye condition that prevented him from obtaining a commercial drivers' license ("CDL") which was necessary to drive certain equipment. Federal law requires a CDL to drive vehicles over 26,000 lbs. The employer failed to comply with federal law for a number of years. The union and the employer then agreed that certain positions would require a CDL. Those positions' job descriptions were modified to list obtaining a CDL within 6 months as a requirement. The employer and the union agreed to "grandfather" certain employees with medically disabling conditions into positions that now required a CDL.

The employer refused to consider the plaintiff for promotion to a position that now required a CDL, because they knew he could never obtain one. The person hired for the position didn't have a CDL, and did not obtain one in six months, or in 12 months. The employer then demoted the successful applicant and reopened the position. The plaintiff applied again, requesting a waiver of the CDL requirement. The employer refused.

The plaintiff sued for refusing to accommodate his disability. He introduced evidence that the equipment requiring a CDL was used less than 12 days per year and that another vehicle for which a CDL was not necessary would have been just as effective. The jury found in the employee's favor and awarded $7,500 in wages and no emotional distress. The Superior Court granted the employee's motion for a $50,000 emotional distress additur.

On appeal, the court of appeals recognized that federal law recognizes a BFOQ defense when an employee has proved the employer has relied on a facially discriminatory qualification. The court of appeals also recognized that federal law requires the employer to prove a business necessity defense where an employer relies on a facially neutral criterion that has a disparate impact. The court recognized that the business necessity defense would apply to a claim under the ADA where the standard at issue screens out an applicant.

The court ruled, however, that the plaintiff here failed to make a claim for either disparate treatment or disparate impact discrimination. Because the only claim the plaintiff raised was failure to accommodate, the only issue was whether waiver of the CDL requirement was reasonable. If it was not, then the plaintiff was not qualified for the position he desired. The court then ruled that being able to drive the vehicles that required the CDL was an essential function of the position.

The problem with the court's analysis is that the function of the job of groundskeeper was to keep the grounds clear of snow, not drive particular vehicles. The ability to drive the specific vehicles was a qualification standard. The court

relied on *Davis v. Microsoft*, 149 Wn.2d 521, 70 P.3d 126 (2003) and *Samper v. Providence St. Vincent Medical Center*, 675 F.3d 1233 (9th Cir. 2012). Both of those cases also mistakenly consider qualification standards under the rubric of "essential functions."

Fey v. State of Washington Community Colleges of Spokane, --- Wn. App. ---, 300 P.3d 435 (Div. III 4/18/13) (Sidoway, Korsmo, Kulik).

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.

WELA *ALERT* EDITORS

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

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

2013 WELA BOARD OF DIRECTORS