WELA *ALERT*

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WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION
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CASE UPDATES

FEDERAL - U.S. Supreme Court

Four-Year Statute of Limitations for Section 1981 Post-Contract Formation Discrimination

The Plaintiff class action alleged a racially motivated hostile work environment, given inferior employee status, and wrongfully terminated or transferred, in violation of 42 U.S.C. § 1981, which prohibits race discrimination in making and enforcing contracts. The employer sought summary judgment applying Illinois' two-year statute of limitations as mandated by *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660 (1987), which held that because section 1981, like section 1983, does not contain a statute of limitations, federal courts should borrow the most appropriate state statute of limitations. The Supreme Court disagreed. The Civil Rights Act of 1991 ("CRA") amended section 1981 to allow claims for post-contract formation discrimination (by defining the phrase "make and enforce contracts" to include "termination of contracts and the enjoyment of all benefits, privileges, terms, and conditions..."), remedying the holding of *Patterson v. McLean Credit Union*, 491 U.S. 164, 171 (1989), that such claims are not cognizable under section 1981. Congress then passed 28 U.S.C. § 1658(a) creating a uniform four-year statute of limitations for all causes of action "arising under an Act of Congress enacted after [December 31, 1990]." In *Jones*, the Court held that the plaintiff's post-contract formation claims arose under the 1991 CRA, so those claims are subject to the federal four-year statute of limitation of section 1658(a), not state law. Note that Washington's three-year personal injury statute of limitations, RCW § 4.16.080(2), should still apply to section 1981 claims of discrimination in contract formation (*e.g.*, failure to hire), because those claims arise under the original statute before it was amended in 1991. *Jones v. R.R. Donnelley & Sons Co.*, No. 02-1205 (05/03/04, Stevens for a unanimous Court).

FEDERAL - Ninth Circuit

Court Withdraws Opinion Holding No Jurisdiction to Review Defense Arbitration Award

In this case, the Ninth Circuit had previously held that federal courts lack jurisdiction to review arbitration awards in favor of employers since such awards, by definition, involve less than the $75,000 necessary for diversity jurisdiction. In a new opinion, the court holds that federal courts do have federal question jurisdiction where the losing party asserts that the arbitration award was in "manifest disregard of the law," in violation of section 10 of the FAA. On the merits, the panel found no manifest disregard of the law, which requires the arbitrator to recognize applicable law and then ignore it. *Vernon Vu Luong v. Circuit City*, No. 02-56522 (05/25/05; Rymer, Kozinzki, Fernandez).

Court Invalidates DOL Regulation Regarding Scheduling Compensatory Time for Public Employees

The FLSA permits public (but not private) employers to give compensatory time off in lieu of overtime. This case involved a California sheriff deputy who had a collective bargaining

agreement stating that if the Department was not able to schedule the time off within one year, the employees received cash payments. The plaintiff submitted a request to use compensatory time off on a particular date when the leave book was already full. The County denied the request. The plaintiff sued based on a U.S. DOL regulation requiring a public employer to grant a specific request unless it would unduly disrupt its operations. The district court granted the Department's motion for summary judgment, finding the employer's practices satisfied the regulation. In a dubious decision, the court ruled that the FLSA unambiguously provides that the employer has full discretion to decide when to schedule the time off. Without expressly saying so, the court invalidated the applicable DOL regulation. The court then held that, under the statute, a public employer has one year to grant a request for compensatory time off in lieu of overtime. *Mortensen v. County of Sacramento*, No. 03-15185 (05/24/04; Tallman, Schroeder, Callahan).

WASHINGTON - Court of Appeals

Government Has No Obligation to Prevent Wrongful Discharge of Contractor's Employee

Employees of a government contractor allege they were fired for complaining to their employer about work safety violations, such as failure to provide adequate protections while they removed asbestos at the SeaTac Airport terminals. They sued the Port of Seattle for failing to prevent their wrongful terminations. The court affirmed summary judgment for the defendants on the ground that the plaintiffs were not employees of the defendant Port, a *sina qua non* for a wrongful discharge claim. Likewise, the court rejected the employees' attempts to argue they were akin to independent contractors who, the employees' argued, should be protected from discharge (an unresolved issue in Washington). Noting that the plaintiffs have a claim against their employer, the court concluded: "Courts generally extend tort doctrines only where existing remedies are inadequate. Such is not the case here." *Awana v. Port of Seattle*, No. 51492-0-I (5/3/04, Ellington, Becker, Cox)

Seattle Improperly Transferred Police Functions from Civil Service Commission to Department of Personnel

RCW 41.12 is intended to insure that an independent body protects police officers from management. In late 2001, the Seattle City Council passed on ordinance transferred from the Civil Service Commission to the Department of Personnel certain functions including certain rules related to competitive examinations. The Police Guild sued to overturn the new ordinance. The superior court dismissed the Police Guild's case. The court of appeals reversed. The court held that the City's ordinance compromised the protection the law affords to police officers regarding promotion based on merit because the Department of Personnel is not independent in the way the civil service commission is. The case was remanded for the superior court to determine which portions of the new ordinance were merely ministerial and therefore enforceable. *Seattle Police Officers Guild v. City of Seattle*, No. 52042-3-I (05/03/04; Baker, Kennedy, Becker).

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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