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ALERT

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CASE UPDATES

FEDERAL - U.S. Supreme Court

Heightened Standard of Pleading Required Under Rule 8: To Survive a Motion to Dismiss, Well Pleaded Factual Contentions Must be Plausible to the Court.

Following the September 11, 2001 terrorist attacks, Iqbal, a Pakistani Muslim, was arrested on criminal charges and detained by federal officials under restrictive conditions. Iqbal filed a *Bivens* action against numerous federal officials, including the former Attorney General John Ashcroft, and Robert Mueller, the Director of the FBI.

The complaint alleged, *inter alia*, that the government designated Iqbal a person of "high interest" on account of his race, religion, or national origin, in contravention of the First and Fifth Amendments; that the FBI, under Mueller's direction, arrested and detained thousands of Arab Muslim men as part of its September 11th investigation; that the officials knew of, condoned, and willfully and maliciously agreed to subject Iqbal to harsh conditions of confinement as a matter of policy, solely on account of the prohibited factors, and for no legitimate penological interest; that Ashcroft was the policy's "principal architect" and Mueller was "instrumental" in its adoption and execution.

After the District Court denied a motion to dismiss on qualified immunity grounds, Ashcroft and Mueller filed an interlocutory appeal in the Second Circuit. The Court of Appeals affirmed, and ruled that the "flexible plausibility standard" announced in *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2008), was inapplicable, and that the Complaint was adequate to allege petitioners' personal involvement in discriminatory decisions which, if true, violated clearly established constitutional law.

The U.S. Supreme Court reversed, 5-4. In relevant part, the Court held that in cases such as this, where vicarious liability does not apply, Iqbal must plead sufficient factual matter to show that the defendants adopted and implemented the detention policies at issue, not for a neutral, investigative reason, but for the purpose of discriminating on account of race, religion, or national origin.

Under Federal Rule of Civil Procedure 8(a)(2), a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." "[D]etailed factual allegations" are not required, but the Rule does call for sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id.*, at 570. A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

To sufficiently plead a claim, two working principles apply. First, the tenet that a court must accept a complaint's allegations as true is inapplicable to threadbare recitals of a cause of action's elements, supported by mere conclusory statements. Second, determining whether a complaint states a plausible claim is context-specific, requiring the reviewing court to draw on its experience and common sense.

A court considering a motion to dismiss may begin by identifying allegations that, because they are mere conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the complaint's framework, they must be

supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

The Court ruled that Iqbal's pleadings did not comply with Rule 8. The Court rejected his argument that *Twombly* should be limited to its antitrust context. It now would appear that the doctrine of supervisory liability, under either Section 1983 or *Bivens,* is very much in doubt.

Ashcroft v. Iqbal, --- U.S. ----, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (May 18, 2009).

Pension Calculation Based on Unfavorable Treatment of Pregnancy, Prior to Enactment of Pregnancy, Discrimination Law is Not Actionable.

This case involved AT&T's pension system. Under the rules in effect through the mid 1970s, employees on "disability" leave got pension credit for the leave, but employees on "personal leave" did not. Until 1977 AT&T treated pregnancy leave as personal, not disability, leave. In 1977 AT&T changed its plan to allow women to credit up to six weeks of pregnancy leave as disability leave, but not more. In 1978 Congress passed the Pregnancy Discrimination Act to overrule the Supreme Court's 5-4 decision in *General Electric v. Gilbert*, 429 U.S. 125 (1976), that pregnancy discrimination wasn't sex discrimination. Among other things, the PDA prohibited the less favorable treatment of pregnancy related medical conditions. On the effective date of the PDA, AT&T began allowing full pension credit for pregnancy leave. It did not make any retroactive adjustments to accrued benefits.

The plaintiffs filed a class action suit in 1998, arguing that AT&T's failure to adjust the service credit of women disadvantaged by its pre-PDA pregnancy policies violated Title VII. The EEOC found reasonable cause. Relying on existing Ninth Circuit law holding post PDA retirement eligibility calculations incorporating pre-PDA accrual rules that disadvantaged pregnancy violated Title, the district court granted summary judgment to the plaintiffs. The Ninth Circuit affirmed, en banc.

The Supreme Court reversed, 7-2. Justice Souter held that the payment of pension benefits was the functional equivalent of a seniority system, as benefits increased with time in employment. Under Title VII, seniority systems are valid unless the result of intentional discrimination. The majority held that the disproportionate pension advantage to male employees under AT&T's pension system did not amount to intentional discrimination because the system was lawful under *Gilbert*. The Court rejected the argument that AT&T's continuation of the pension accrual system, after the enactment of the PDA, should be considered intentional because it was facial discrimination.

The Court held that the relevant time period for determining AT&T's intent was prior to the effective date of the PDA, and it was irrelevant that the PDA restored the law to what it had been for several years prior to the *Gilbert* decision. The majority held that the PDA was not retroactive. The majority rejected the plaintiffs' argument that the Lily Ledbetter Fair Pay Act of 2009 applied. That Act provides that an unlawful employment practice occurs when a person is affected by a discriminatory compensation practice. The majority held that there was no discriminatory compensation practice, because AT&T's pre-PDA pension rules were not discriminatory.

Justice Stevens, who had dissented in *Gilbert,* concurred. Justices Ginsburg and Breyer dissented. They noted that all circuit courts had held, prior to *Gilbert,* that pregnancy discrimination violated Title VII. The purpose of the PDA was to protect women against repetition or continuation of pregnancy-based disadvantageous treatment. The dissent interpreted the PDA to require employers to abandon reliance on rules that disadvantaged pregnancy. The dissent noted that the plaintiffs

sought no retrospective relief, only the payment of current and future pension benefits on equal terms. The dissent urged the Court to overrule *Gilbert.*

AT&T Corp. v. Hulteen, 556 U.S.--, 129 S. Ct. 1962, 173 L. Ed 2d 898 (May 18, 2009).

Mixed-Motives Analysis Does Not Apply to ADEA Claims

The U.S. Supreme Court granted certiorari in this case to decide whether direct evidence was necessary to obtain a mixed-motives jury instruction in an ADEA case. Instead, five Justices held that a mixed-motives instruction is simply not available in an ADEA period. Justice Thomas held that *Price Waterhouse* was limited to Title VII, and Congress' failure to amend the ADEA as part of the Civil Rights Act of 1991 showed that Congress did not believe mixed-motives should apply to the ADEA. The majority held that in an ADEA case a plaintiff must prove that age was "the but-for cause of the employer's actions. The majority all but held that the Court would decide *Price Waterhouse* differently if the case had come before the current Justices.

Justice Stevens wrote on behalf of the four dissenters. He accused the majority of disregarding precedent and judicial activism. He argued that the since the "because of" statutory language in the ADEA is exactly the same as what the Title VII statutory language was at the time of the *Price Waterhouse* decision, *Price Waterhouse's* construction of "because of" should apply to ADEA claims. The dissenters would have held that Justice White's opinion in *Price Waterhouse* was controlling, not Justice O'Connor's, and that there never has been a direct-evidence requirement. The dissenters would have applied *Desert Palace v. Costa* to the ADEA.

Three Justices also joined a separate dissent on the fallacy of attempting to prove "but-for causation." Justice Breyer endorsed a uniform standard under which a plaintiff would establish an unlawful consideration was "a motivating factor" and the defendant would have the burden of showing it would have taken the same action in any event.

Gross v. FBL Financial Services, Inc., --- U.S. ---, 129 S. Ct. 2343, 174 L .Ed. 2d 119 (June 18, 2009).

FEDERAL - Ninth Circuit

Claims Under the Government Employee Rights Act of 1991 Not Barred by 11th Amendment.

The plaintiffs in this case worked for the then-Governor of Alaska. Both were fired and filed EEOC complaints alleging race and sex discrimination and retaliation. The EEOC assigned the cases to administrative law judges. Alaska moved to dismiss on the grounds of sovereign immunity. The EEOC denied the motion. Alaska appealed. A Ninth Circuit panel ruled in favor of Alaska, but the court, en banc, held there was no 11th Amendment prohibition.

Writing for an eight-judge majority, Judge Kozinski recognized that under U.S. Supreme Court precedent the 11th Amendment applies to federal administrative proceedings that resemble civil actions and assumed, without deciding, that the EEOC proceedings fell within this category. The majority held, however, that Congress had both unequivocally and permissibly abrogated States' 11th Amendment immunity in enacting the Government Employee Rights Act of 1991. That Act extended Title VII to cover members of elected officials' personal staffs. It permitted such employees to recover damages payable by the states. The majority held this was an unequivocal waiver of 11th amendment immunity. The standard by which it is determined whether such waivers are constitutional depends on whether the statue provides a remedy for conduct that is actually unconstitutional. Prophylatic legislation reaching state action that is not itself unconstitutional must be proportional and congruent to the harm, but remedies for unconstitutional conduct do not have to meet this standard.

The majority held that pay discrimination on the basis of gender and sexual harassment were, per se, violations of the Equal Protection Clause. It also held the intentional refusal to redress sexual harassment, including retaliation against the victim, was conduct prohibited by Equal Protection Clause. Seven judges held that retaliation for complaining about sexual harassment of another employee violated the First Amendment. The majority held that such conduct did not fall within the employees' official duties, and so was protected by the First Amendment.

Judge O'Scannlain disagreed with the majority's analysis of the First Amendment claim because the fired employee was the governor's press secretary and could be fired for disloyalty. He found that the statute was not congruent and proportional legislation as far as it gave a cause of action for such a claim. Three judges dissented on the basis that the Act did not abrogate sovereign immunity because it did not explicitly say it was doing that, and did not define the state as a defendant.

Alaska v. EEOC, 564 F.3d 1062 (9th Cir. May 1, 2009) (en banc).

First Amendment Retaliation Patronage Exemption Requires Political Loyalty as Opposed to Personal Loyalty.

Plaintiff Nichols worked for the Washoe County School District for nine years, her last six as an administrative assistant to the General Counsel for the district, Jeffrey Blanck. The District had no problems with Nichols or her job performance, but it did have problems with Blanck. The District transferred plaintiff to a job in Human Resources while it decided whether to terminate Blanck. After the transfer, plaintiff spoke with Laura Dancer, the Assistant Superintendent in charge of Human Resources, about her job security. Dancer told Nichols that she "would be restored to her position as administrative assistant to general counsel, whoever that general counsel was to be."

The District's Board of Trustees held an open meeting to discuss Blanck's future with the District, among other items. Nichols attended the meeting for an unrelated reason, and also to determine what was going to happen with [Blanck's] position with the District. After arriving at the meeting, she had the great misfortune of sitting next to Blanck.

The Board voted to terminate Blanck. The next day, Dancer reconsidered her promise to reinstate Nichols as the assistant to the new Legal Counsel because of her continued contact and support for Blanck. Aside from Nichols's seat next to Blanck at the open meeting, the record provides no other reason why Dancer would reconsider her earlier statement to Nichols. According to Nichols, Dancer said that they were "forced to question" her loyalty.

Nichols sued Dancer and the Washoe County School District for First Amendment retaliation, and claimed that the Defendants violated her First Amendment right to associate with Blanck. The District Court granted defendants' motion for summary judgment, holding that Nichols was a confidential employee, vulnerable to a patronage dismissal without regard for her First Amendment rights. The Ninth Circuit reversed.

The Court acknowledged that the patronage dismissal doctrine allows public employers to terminate certain public employees on the basis of their *political beliefs and loyalties*. The District utilized this theory in granting summary judgment. However, "because Nichols was terminated for a perceived lack of *personal* loyalty, rather than *political* loyalty, we conclude that the patronage dismissal doctrine does not apply to her termination." (emphasis added). The Court remanded to the District Court so that it may conduct a traditional First Amendment analysis, utilizing the *Pickering* balancing test.

Nichols v. Dancer, 567 F.3d 423 (9th Cir. May 18, 2009) (Thomas, Wallace, Graber).

Failure to Give Pretext Instruction Not Reversible Error.

Henrietta Browning has worked at an Internal Revenue Service call center in Portland, Oregon, since 1989. In 1998, she was temporarily promoted to the position of team leader, assuming responsibility for the supervision of a group of employees. The following year, the promotion was made permanent. In 2003, plaintiff was given a new supervisor, who rated plaintiff as not having met expectations, and placed her on a 60 day performance improvement plan (PIP). At the conclusion of the PIP, plaintiff was demoted. Plaintiff alleged racial discrimination and eventually filed suit.

At the close of trial, Browning requested that the following instruction be given to the jury:

> Consistent with the general principle of law that a party's dishonesty about a material fact may be considered as affirmative evidence of guilt, if you find that the defendants' explanation about why they took adverse action against a plaintiff is not worthy of belief, you may infer a discriminatory or retaliatory motive from that fact.

She based her proposed instruction on a passage in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000). The Court refused to give the instruction and plaintiff appealed.

Although the appellate court recognized a split in the circuits, the Ninth Circuit held that "if the jury instructions set forth the essential elements the plaintiff needs to prove, the District Court's refusal to give an instruction explicitly addressing pretext is not reversible error."

Browning v. United States of America, 567 F.3d 1038 (9th Cir. May 22, 2009) (Fisher, Graber, M. Smith).

Police Officer's Early Retirement Does Not Amount To Constructive Discharge Sufficient to Support Due Process Claim.

The plaintiff was a commander with the Phoenix Police Department. He had worked for the Department for over 30 years. In 2004 the Department began an investigation into whether he had sexually harassed a fellow officer. He was then transferred to another position. He was subsequently put on paid administrative leave until the investigation was finished. The officer unsuccessfully challenged the investigation findings against him. He was also told that the Department was going to implement a new rule permitting termination for the type of conduct in which he engaged. Rather than risk being terminated and losing his health insurance benefits, he retired. He then filed suit, alleging deprivation of liberty and property without due process of law.

The District Court granted a judgment on the pleadings to the police department, because the officer could not make out a constructive discharge due to intolerable working conditions. The Ninth Circuit affirmed. It ruled that a retirement is actionable under Section 1983 when it was caused by intolerable working conditions, or was involuntary in the sense of being coerced or made under duress. The plaintiff's Complaint did not allege an involuntary retirement, and the Court found that the facts in his Complaint did not support one. The fact that his wife had a history of breast cancer did not make the choice the officer faced more than an "unpleasant one." There was no evidence that his termination was inevitable.

The Court upheld the District Court's denial of leave to amend, even though the District Court had mistakenly thought that only a constructive discharge due to intolerable working conditions was sufficient to state a claim. The Court reasoned the plaintiff had never alleged any facts from which it could be concluded that

he had determined of his free will regarding the decision to retire.

Knappenberger v. City of Phoenix, 566 F.3d 936 (9th Cir. May 26, 2009) (Ikuta, Godwin, Kleinfeld)

Stigmatized Public Employees are Entitled to Name Clearing Hearing, but Right Not Clearly Established in this Context.

The plaintiffs were former managerial employees of the Oregon State Accident Insurance Fund Corporation, which was part of the Executive branch of government. The Fund was accused of several ethics violations. One of the plaintiffs was terminated, and the other was asked to resign. The Governor's office later issued two press releases that suggested the plaintiffs had been removed for reasons related to the alleged ethics violations.

The plaintiffs filed suit, alleging that the Governor's office had violated their 14th Amendment rights by issuing stigmatizing statements without providing them with a name-clearing hearing. The District Court denied the defendant's motion for qualified immunity. The Ninth Circuit reversed. The Court recognized that if a public employer publicizes a charge that impairs the reputation of a terminated public employee, the employer must allow the former employee to refute the charge. The panel held that even though the press release did not name the plaintiffs personally, it suggested that terminated employees at the Fund had been dishonest, and therefore could be deemed stigmatizing.

The panel held, however, that one of the press releases was not connected with the plaintiffs' termination because it was issued 16 months after the fact. The other press release was issued 19 days after the termination. The Court held that the law wasn't clearly established that 19 days was sufficiently close in time to be deemed connected to the termination. The Court also held that it was not clearly established that the Governor had sufficient authority over the plaintiffs' employment to require him to provide them a name-clearing. Moreover, there was no evidence that the Governor knew, or should have known, that the Fund would not give plaintiffs a name clearing hearing.

Tibbetts v. Kulongoski, 567 F.3d 529 (9th Cir. May 29, 2009) (M. Smith, Graber, Fisher).

District Court Abuses its Discretion in Finding Rule 23(b)(3) Predominance of Common Issue Based Largely on Employers Internal Policy of Treating its Employees as Exempt.

The plaintiffs in this case were current and former home mortgage consultants of Wells Fargo Bank. The claimed they were improperly classified as exempt and entitled to overtime. The employees who had worked in California moved for class certification. The employer argued that class certification was inappropriate under Fed R. Civ. P. 23(b)(3), because an individualized analysis of the application of the white-collar overtime exemptions would be necessary, and would predominate over class issues. The District Court agreed with respect to five possible exemptions, but not two. The District Court nevertheless certified the class, because "it is manifestly disingenuous for an employer to treat a class of employees as a homogenous group for the purposes of internal policies and compensation, and then assert that the same group is too diverse for class treatment in overtime litigation."

The employer appealed and the Ninth Circuit reversed the certification of the class as an abuse of discretion. The panel agreed with the District Court that an employer's internal exemption policy is a permissible factor in determining whether common issues predominate. The appellate court nevertheless held that the District Court had given impermissible weight to the blanket exemption policy, because its existence did nothing to facilitate common proof of otherwise individualized issues. The circuit contrasted this type of uniform corporate policy with one that set the job responsibilities of

employees. The panel refused to consider Wells Fargo's argument that the FLSA forbids state law opt-out class actions, even where no FLSA claims have been asserted, because the employer did not adequately brief the pre-emption issue.

In re Wells Fargo Home Mortgage Overtime Litigation, 571 F.3d 953 (9th Cir. July 7, 2009) (Mills (C.D. Ill), Silverman and Callahan).

Rule 23 Permits Employer to File Motion to Deny Class Certification Before Plaintiffs Have Filed a Motion to Certify One.

The plaintiffs in this case sought to represent a class of home loan consultants who claimed they were improperly classified as exempt employees. Three months before the discovery cut-off, the employer filed a motion to deny class certification, on the basis that determination of the applicability of the white collar exemptions would require individual assessments that would predominate over class issues. The District Court granted the defendant's motion. The Ninth Circuit affirmed. The Court ruled that nothing in Rule 23 prevented a defendant from moving to deny class certification. The appeals court held that the plaintiffs had had nine months to conduct discovery on the issues, which was adequate. The circuit agreed that individual issues predominated, because the plaintiffs had unfettered autonomy on how to do their jobs.

Vinole v. Countrywide Home Loans Inc., 571 F.3d 935 (9th Cir. July 7, 2009) (Callahan, Silverman, and Mills (C.D. Ill.)).

Employees of Wal-Mart Suppliers in Foreign Countries Cannot Enforce Labor Standard Code of Conduct Contained in the Suppliers' Contracts.

Employees of foreign companies that sell goods to Wal-Mart brought claims against the Company, based on a code of conduct included in its supply contracts that specified basic labor standards the suppliers must meet. The District Court dismissed for failure to state a claim. The Ninth Circuit affirmed. It rejected the arguments that (1) the plaintiffs were third party beneficiaries of the supplier contracts; (2) Wal-Mart was the plaintiffs' joint employer; (3) Wal-Mart had a duty to monitor the suppliers; and (4) Wal-Mart was unjustly enriched by the suppliers' mistreatment of the plaintiffs. The Court reached these conclusions, despite the fact the contracts contained language that "Wal-Mart will undertake affirmative measures, such as on-site inspection of production facilities to monitor said standards."

Doe v. Wal-Mart Stores, Inc., 572 F.3d 677 (9th Cir. July 10, 2009) (Gould, B. Fletcher, Fisher).

Police Officers' Complaints About Their Supervisors Did Not Involve Public Concern.

The plaintiffs were long-time police department officers. They, along with other officers, filed a grievance against their supervisor. The supervisor soon transferred to another unit. The officers nevertheless pursued their grievance, which was denied. They filed a complaint with HR as well. One of the officers was transferred to another unit, and the other was the subject of an internal affairs investigation. They filed a complaint in Federal Court claiming retaliation in violation of the 1st Amendment. The District Court found that the officers' speech did not involve an issue of public concern. The Ninth Circuit affirmed 2-1. Writing for the majority, Judge O'Scannlain rejected the argument that the grievance about the morale of the unit raised an issue of public concern, despite his acknowledgement that Ninth Circuit precedent had previously employed "broad language." The majority distinguished cases, finding similar workplace complaints to be protected. The concluded the complaint was merely about their supervisors' management style, and not an issue of public concern. Judge Wardlaw dissented on the basis that when viewed in the light most favorable to the plaintiffs, the grievance was more than a "workplace gripe." She would have

held that issues of performance, discipline and morale in public safety organizations are especially matters of public concern. She concluded that a reasonable jury could find that at least some of elements of the grievances met this test.

Desrochers v. City of San Bernardino, 572 F.3d 703 (July 13, 2009) (O'Scannlain, Rymer, Wardlaw).

Police Office's Speech Not Constitutionally Protected Because They Were Undertaken Pursuant to Official Job Duties.

The police officers in this case claimed they were retaliated against for (1) assisting the District Attorney with an internal corruption investigation (2) a report and memoranda regarding an investigation; (3) cooperating with an FBI investigation regarding corruption; (4) giving grand jury testimony. The District Court held that in each of the instances, the officers were acting pursuant to their professional responsibilities, so the speech was not protected under *Garcetti v. Ceballos.* The Ninth Circuit affirmed 2-1 in an opinion by Judge Tallman. Judge William Fletcher dissented. He agreed with the majority that the first instance was unprotected "official speech." He would have held a jury could find that the report and memoranda were not protected, because the police chief ordered them not to conduct the investigation at issue. He found a genuine issue whether cooperation with the FBI was part of the officers' job duties. As to the grand jury testimony, Judge Fletcher noted that two circuits recently ruled that testimony about coin civil and criminal proceedings was protected by the First Amendment, since the testimony was pursuant to an independent obligation to obey a subpoena.

Huppert v. City of Pittsburg, 574 F.3d 696 (9th Cir. July 21, 2009) (Tallman, W. Fletcher, Bertelsman) (E.D. Ky.)).

Federal Employee Who Contacts an EEO Officer Rather than an EEO Counselor with an Intent to Begin the EEO Process Properly Exhausts Administrative Remedies.

Vickey Kraus is a female African-American lesbian, who suffers from dyslexia, depression, a back injury with sciatica, and a brain injury from lead poisoning. She worked for a federal agency for 11 years. During her employment she filed two EEO complaints. She lost before an ALJ and filed a complaint in federal district court. The District Court dismissed some claims for failure to exhaust and the rest for other reasons. The District Court held that Ms. Kaus had failed to contact a "counselor" within 45 days of the alleged unlawful actions, as EEOC regulations require.

On appeal, the Ninth Circuit held that the exhaustion ruling was error. Although Kaus had not contacted the agency's counselor, she had contacted her agency's EEO officer within 45 days. The appellate court held that contacting an EEO officer was tantamount to contacting a counselor because that official was "logically connected with the EEO process." The panel remanded for a determination whether the plaintiff had contacted the EEO officer with the intent to begin the EEO process.

Kraus v. Presidio Trust Facilities Division/Residential Management Branch, 572 F.3d 1039 (9th Cir. July 23, 2009) (Berzon, D.W. Nelson, Clifton).

Plaintiff Could Rely Upon Co-Workers To Establish Quality of Job Performance; Same Actor Inference Limited.

Two Boeing employees were laid off in a reduction in force (RIF), on the basis that they received low scores in the reduction in force assessments utilized to determine the order of lay offs. The Ninth Circuit reversed summary judgment for Boeing, and ruled that sufficient

evidence existed that Boeing's reasons for lay off were a pretext for gender discrimination.

The first plaintiff, Antonia Castron, was employed as liaison engineer in the Electrical Engineering Department. During that time, her immediate supervisor made many gender related remarks that obviously reflected bias against women. Plaintiff requested she be transferred to the Final Assembly Group because the sexual harassment was preventing her from doing her job. The supervisor refused to transfer her to that group, and instead, transferred her to the Structures- Mod Department that required different skills from what plaintiff had developed in her existing position.

Castron agreed to the transfer, despite her concerns that the new supervisor had also made gender biased comments, and because the transfer would leave her vulnerable to lay off. She agreed only after it was promised that she would not be laid off in the anticipated RIF. Just two months after plaintiff's transfer, Boeing conducted a RIF in which employees with the lowest scores were eligible for termination. Despite the former supervisor's past assurances, plaintiff was subject to the RIF, received low scores, and was ultimately terminated as a result.

The second plaintiff, Renee Wrede, worked at the Apache helicopter manufacturing assembly installation support group. Although she generally received positive evaluations, her supervisor placed her on a "performance improvement plan," which he testified was intended to improve the two areas in which she received the lowest evaluation scores. In the April 2002 RIF exercise, Wrede scored thirtieth out of thirty-seven employees in the same skill code. In July 2002, a second RIF exercise was conducted, and plaintiff survived again. In October 2002, a third assessment was completed and plaintiff was laid off, despite the fact that men who scored lower than plaintiff were not. Additional circumstantial evidence was presented that gender was a factor in the decision to lay off plaintiff.

Applying the traditional *McDonnell Douglas* shifting burden analysis, the Court found that sufficient evidence existed to infer pretext for both plaintiffs. Significantly, the Court considered testimony about plaintiffs' ability by other managers and co-workers. Adopting the rule from the Tenth Circuit, the Court ruled: "We therefore adopt the Tenth Circuit's view that 'co-workers' assessment[s]' of a plaintiff's work should be considered because they can be 'clearly probative of pretext.'"

The Ninth Circuit also ruled that the "same actor inference" does not apply, despite the fact that the supervisor who ultimately selected plaintiff for layoff had previously given her passing grades. The Court ruled that the inference does not apply to the same degree where a supervisor, who did not hire or promote, gives evaluations that decrease over time.

EEOC v. Boeing, 577 F.3d 1044 (9th Cir. August 12, 2009) (Hawkins, Berzon, Clifton).

Ninth Circuit Establishes Elements of Sarbanes-Oxley (SOX) Claim and Reverses Summary Judgment for Employer.

Shawn and Lena Van Asdale were initially hired for the position of Associate General Counsel of International Game Technology (IGT). In September 2002, Shawn was promoted to Director of Strategic Development, a position in which he was generally responsible for overseeing IGT's IP litigation. Similarly, Lena was promoted in the spring of 2003 to Director of IP Procurement, and was responsible for the transactional side of IGT's IP division, which included managing IGT's patents, trademarks, and copyrights.

In 2001, IGT began merger negotiations with Anchor Gaming ("Anchor"). The Van Asdales contend they were terminated for reporting *possible* shareholder fraud in connection with that merger. They also claim that their protected

activity involved communications protected by the attorney-client privilege. Summary judgment was entered in favor of the defendant, and the Ninth Circuit reversed.

After distinguishing Illinois law, where plaintiffs were admitted to practice, the Court ruled that attorney-client confidentiality concerns alone do not warrant dismissal of the Van Asdales' claims. Rather, "the appropriate remedy is for the District Court to use the many 'equitable measures at its disposal' to minimize the possibility of harmful disclosures, not to dismiss the suit altogether."

In a case of first impression in the Ninth Circuit, the Court addressed the elements required to prove a claim under Sarbanes-Oxley (SOX). In order to survive summary judgment, a claimant is first required to make a prima facie case of retaliatory discrimination. If the plaintiff meets this burden, the employer assumes the burden of demonstrating, by clear and convincing evidence, that it would have taken the same adverse employment action in the absence of the plaintiff's protected activity. Regulations promulgated by the Department of Labor set forth four required elements of a prima facie case under § 1514A: (a) "[t]he employee engaged in a protected activity or conduct"; (b) "[t]he named person knew or suspected, actually or constructively, that the employee engaged in the protected activity"; (c) "[t]he employee suffered an unfavorable personnel action"; and (d) "[t]he circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action." 29 C.F.R. § 1980.104(b)(1)(i)-(iv).

In order to constitute protected activity, an "employee's communications must 'definitively and specifically' relate to [one] of the listed categories of fraud or securities violations under 18 U.S.C.[ ] § 1514A(a)(1)." Neither the word fraud nor any specific code section must be cited or used. Overruling the District Court's exclusion of an inconsistent affidavit, and discussing it at length, the Court found that plaintiffs' communications involved disclosures "definitively and specifically" related to shareholder fraud. The Court of Appeals further held that the plaintiffs must have (1) a subjective belief that the conduct being reported violated a listed law, and (2) this belief must be objectively reasonable.

To prove causation, the Ninth Circuit relied upon familiar jurisprudence that allows an inference of discriminatory intent based upon the temporal proximity of the protected activity, and the adverse employment action. The Court also ruled that the employer had not shown by clear and convincing evidence that it would have taken the same adverse employment action, even in the absence of protected activity.

Van Asdale v. International Game Technology, 577 F.3d 989 (9th Cir. August 13, 2009) (Bybee, Wallace, Thomas).

Plaintiff Not Compensated For Work Off Clock And Commuting To And From Work.

Plaintiff filed a class action under the FSLA and California law, alleging that the employer failed to compensate him for work off the clock. The District Court granted summary judgment in favor of the employer, and the Ninth Circuit affirmed in part and reversed in part.

Plaintiff was employed by Lojack as one of its over 450 nationwide technicians who install and repair vehicle recovery systems in vehicles. Most, if not all, of the installations and repairs are done at the clients' locations. Plaintiff Rutti was employed to install and repair vehicle recovery systems in Orange County, and was required to travel to the job sites in a company-owned vehicle. Rutti was paid by Lojack on an hourly basis for the time period beginning when he arrived at his first job location and ending when he completed his final job installation of the day.

Rutti also asserted that Lojack required technicians to be "on call" from 8:00 a.m. until

6:00 p.m., Monday through Friday, and from 8:00 a.m. until 5:00 p.m. on Saturdays. During this time, the technicians were required to keep their mobile phones on and answer requests from dispatch to perform additional jobs, but they were permitted to decline the jobs. Rutti also alleged that he spent time in the morning receiving assignments for the day, mapping his routes to the assignments, and prioritizing the jobs. This included time spent logging on to a handheld computer device, provided by Lojack, that informed him of his jobs for the day. In addition, it appears that Rutti completed some minimal paperwork at home before he left for his first job.

During the day, Rutti recorded information about the installations he performed on a portable data terminal ("PDT") provided by Lojack. After he returned home in the evening, he was required to upload data about his work to the company.

The Court ruled that commuting with a company car did not entitle an employee for reimbursement under the Employee Commuting Flexibility Act, 29 U.S.C. § 254(a)(2). The ECFA's language states that where the use of the vehicle "is subject to an agreement on the part of the employer and the employee," it is not part of the employee's principal activities and thus not compensable. *Id*. The plaintiff argued that the use of the company car was not voluntary, but required. The Ninth Circuit, however, was unconvinced, and ruled that no compensation is required, even if the use of a company car is a condition of employment.

The plaintiff argued that the use of the vehicle was compensatory, because the restrictions placed upon its use by the company were more than "incidental", and were, therefore, part of his principal activities. The Court rejected this contention as well, because he failed to show that the employer's restrictions amount to "additional legally cognizable work."

To be entitled to compensation for off-the-clock activities, plaintiff must show that they are related to his "principal activities" for Lojack. In addition, the activity that might otherwise be compensable is not, if the time involved is *de minimis*. Pre-shift activities are compensable if they are an "integral and indispensable part of the principal activities for which covered workmen are employed," and that the term "principal activities" is to be liberally construed "to include any work of consequence performed for an employer, no matter when the work is performed." Time spent waiting for work is compensable if the waiting time is spent "primarily for the benefit of the employer and his business." If the employee was 'engaged to wait,' it is compensable. If the employee 'waited to be engaged,' it is not compensable." The proper test "is not the importance of on-call work to the employer, rather the test is focused on the employee and whether he is so restricted during on-call hours as to be effectively engaged to wait."

In considering whether the amount of time claimed was *de minimis*, the Court will consider (1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional work. The Court ruled that filling out forms prior to work, and prioritizing work, were *de minimis*, and that transmitting data from home, after the work, was an integral part of the job, and was not, as a matter of law, *de minimis*.

The Court ruled that plaintiff was not entitled to compensation for time commuting to and from work under the Continuous Work Day rule.

Rutti v. Lojack Corporation, Inc., --- F.3d --- (9th Cir. August 21, 2009) (Callahan, Hall, Silverman).

WASHINGTON - Supreme Court

Corporate Owners/Officers are Individually Liable for Payments of Wages that are Due After Chapter 7 Bankruptcy When Work Was Performed Beforehand.

The defendants in this case were the owners/officers of Funster's Casino. At some point, the Casino filed for Chapter 11 bankruptcy. The debtors remained in possession of its assets under Chapter 11 and continued to run the business. Because of the owners' refusal to infuse additional cash, the United States Bankruptcy Trustee successfully moved to convert the bankruptcy to a liquidation under Chapter 7. Once a case is converted to Chapter 7, the former owners lose all control over the company and the trustee makes all decisions. The bankruptcy trustee declined to pay the former employees their back wages.

The former employees sued the two former owners for the unpaid wages. The wages were for two pay periods. As to the first, the regular pay date had passed before the conversion of the bankruptcy to Chapter 7. As to the second, the work was performed before the conversion, but the pay date was not until after. The defendants argued that the conversion of the case to Chapter 7 rendered their failure to pay the wages for both pay periods non-willful.

Writing for a majority of six, Justice Charles Johnson disagreed. The Court held that a business' insolvency is irrelevant is to the liability of individual officers and managing agents under RCW 49.52. RCW 49.52 literally provides liability for the willful withholding of wages due under a statute, ordinance or contract. The wages for the second pay period did not become contractually due until after the conversion of the bankruptcy to Chapter 7, by which point the defendants had no legal ability to pay them. The majority held that this too was irrelevant since the owners had required their employees to perform work while they still ran the company and made the business decisions that led to the conversion to Chapter 7.

The initial version of the opinion described the owners and "directors" and broke new ground in allowing director liability under RCW 49.52. The Court subsequently issued an amended opinion that converted all references from "directors" to "officers."

Justices Jim Johnson, Sanders, and Sweeney (Pro Tem.) dissented and would have held no liability for any of the payments. The dissent argued that the real question was whether the defendants had the legal ability to pay the wages following the conversion to Chapter 7. The dissent correctly stated that the defendants did not. However, under the dissent's own analysis, the defendants had the legal ability to pay the first set of wages when they became contractually due.

Morgan v. Kingen, 166 Wn.2d 526, 210 P.3d 955 (July 2, 2009).

Public Disclosure Request - Investigative Report of Sexual Harassment is Not Exempt from Public Disclosure.

A Federal Way Municipal Court employee complained of a hostile work environment to the City. As required by the City's anti-discrimination policy, the City Attorney initiated an investigation. Richardson hired attorney Amy Stephson to conduct a factual investigation of the complaint. After meeting with Stephson, Judge Morgan attempted to terminate her investigation. The City Attorney instructed Stephson to complete a report on her investigation anyway. Later that month, Judge Morgan wrote an e-mail to the City Attorney, complaining that Stephson's investigation was creating a hostile work environment for him. He then forwarded that e-mail message to the private e-mail address of one of the city council members. The News Tribune requested a copy of the "Stephson Report," and the City agreed to produce it. Judge Morgan filed a motion to prevent the release.

The trial court granted a temporary restraining order, preventing the City from releasing the report, but ultimately denied Judge Morgan's motion and dissolved the TRO. Judge Morgan appealed to Division One of the Court of Appeals and that appeal was transferred to the state Supreme Court.

In relevant part, the Court ruled that the investigation was a city record. The Court ruled that the investigation was not work product because at the time of the request, no one had threatened litigation, as was required under the city policy. The Court dismissed out of hand Judge Morgan's argument that the report was exempt as an attorney-client communication, because the investigator was hired not by Judge Morgan, and was allegedly "independent," and because the report contained no legal advise, but was purely factual.

Judge Morgan argued that the report was exempt because it concerned matters about a person's private life that "(1) [w]ould be highly offensive to a reasonable person, and, (2) "[are] not of legitimate concern to the public." "Unsubstantiated allegations are exempt from disclosure." The Court, per Justice Chens, dismissed this argument on the grounds that the allegations are not unsubstantiated simply because he disputes them, and the report concludes that the allegations are true.

Morgan v. City of Federal Way, -- Wn2d ---, 213 P.3d 596 (August 20, 2009).

Employees Asserting "Concerted Activities" Fail to Prevail on Claim of Wrongful Discharge in Violation of Public Policy.

Nova Services is a not-for-profit corporation. Plaintiffs Briggs, Robertson, Johnson, Nunn, Smith, and Bader worked for Nova in jobs titled "manager." Plaintiffs Zeller, Clark, Castillo and Bruck worked for Nova in positions that were not titled as managerial or supervisory. Although Nova's policy prohibited them from communicating with its Board of Directors (Board), Briggs, Robertson, Johnson, Nunn, Smith, and Bader complained in a letter to the Board that the actions of Nova's Director, Linda Brennan, had negatively affected them. They complained, *inter alia*, that Brennan refused their suggestion to add staff to reduce their work load, that sick leave was accorded arbitrarily, that she unfairly tracked working hours, and that she had mis-classified some workers in order to not pay them overtime compensation. The letter expressed concern that Brennan's failure to plan for an anticipated loss of Nova's major funding source jeopardized Nova's existence and the workers' jobs, and complained that Brennan prevented communication with the Board. All this, they claimed, interfered with their job performance and caused them to be demoralized.

Although several workers finally met with the Board to present their concerns, the Board ultimately supported Brennan, who fired Briggs and Robertson for what she termed "insubordination." Plaintiff Bader then gave Brennan two weeks notice, stating that she had promised to stay or go with the others. Brennan asked Bader if she would "refrain from collaborative efforts against her" during that time and, when Bader stated she would not, Brennan terminated her employment that day.

Bader and the remaining workers responded with another letter, stating that workplace conditions were "worse than ever" after what they termed the "retaliatory" terminations. The workers stated that unless the Board responded the next day with a plan of action concerning their demands, they would "walk out" and would return to work only when those "requisites were met." The Board did not respond, the workers walked out, and Nova treated the walk-out as a group resignation.

The employees filed a complaint against Nova on September 17, 2004, alleging wrongful "termination" in violation of public policy, unlawful retaliation-wrongful discharge,

negligent infliction of emotional distress, intentional infliction of emotional distress/outrage, and negligent supervision/retention. Summary judgment was granted for the Defendant, and the employees appealed. The Court of Appeals affirmed and the Supreme Court granted review.

In support of their claim for wrongful discharge, the employees relied on the so called Norris-LaGuardia Act, RCW 49.32.020, as a source of public policy, and *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 758, 888 P.2d 147 (1995). The statute recognizes that non-union employees have a right to engage in concerted activities. The concerted activities relate to the "terms and conditions of employment," "collective bargaining" or for "other mutual aid or protections." RCW 49.32.020.

Writing for a plurality of three, Justice James Johnson gave a narrow interpretation to the statute. He ruled that "[t]he Managers were not complaining about wages and hours or supervisor harassment, nor were they requesting better benefits, more breaks, or easier work rules. These complaints simply are not about terms and conditions of employment." Because the statute was not violated, there was no claim for wrongful discharge. Moreover, Justice Johnson ruled that the terminated employees were not terminated, "they voluntarily left and promised they would not return unless the Board fired director Brennan." Justice Johnson was joined by Justices Alexander and Sanders.

Justice Charles Johnson, writing only for himself, filed a concurring opinion and agreed that the employees' activities were not concerted activities under the terms of the statute. He also agreed that this was fatal to a claim of wrongful discharge. He stated, however, that the claim under RCW 49.32.020 and the public policy wrongful discharge claim must be treated separately.

Justice Madsen, writing only for herself, filed a concurring opinion. She argued that the public policy of protecting employees' right to engage in concerted activities was raised for the first time in Plaintiffs' appellate brief, and was therefore waived. *But see Ellis v. City of Seattle*, 142 Wn.2d 450, 459 n3 (2000)(disagreeing with the Court of Appeals' decision not to consider the Seattle Fire Code because it wasn't raised in the trial court - "The Court of Appeals' approach seems misguided. A fire code provision is not evidence; it is law"). In the alternative, Justice Madsen's argues that Plaintiffs failed to establish that the jeopardy prong of the claim was satisfied, because they did not establish that there was no adequate alternative means to protect the public policy.

Justice Owens wrote a dissenting opinion, in which Justices Chambers, Stephens and Fairhurst joined.

Significantly, there is no majority for the proposition that the employees failed to engage in concerted activities within the meaning of RCW 49.32.020. This case appears to have little, if any, precedential authority.

Briggs v. Nova Services, --- Wn.2d ---, 213 P.3d 910 (August 27, 2009).

WASHINGTON - Court of Appeals

Faculty Disciplinary Hearing Must Be Public; Abuse of Students, Staff and Colleagues Not Protected Speech.

The plaintiff in this case, Mills, is a tenured theater professor. The University received numerous complaints about him from students, staff and faculty members. He threatened to "kill" people, brandished a knife in class, and carried a gun. He also made grossly sexist and homophobic comments to and about his colleagues. He verbally abused both students and staff. During class, he suggested a student who was undergoing treatment for cancer would have been better off dying.

After five years of this type of behavior, the Provost placed Mills on paid administrative

suspension, pending an internal investigation. Formal charges were eventually lodged for violation of the Faculty Ethics Code. Over the objections of both Mills and a newspaper reporter, the disciplinary hearing was conducted in secret. The Hearing Panel recommended suspension without pay for two academic quarters. Mills sought administrative review in the Superior Court, which denied relief. He then appealed.

The appellate court rejected his argument that the disciplinary action violated the terms of the Faculty Handbook. The court dubiously held that a provision preventing the suspension of a faculty member, following the filing of formal charges, absent a showing of immediate harm, had no application to suspensions before the filing of charges. The appellate court rejected the claim the Faculty Ethics Code's provisions were so vague as to violate due process. The court also found no violation of Mills' right to academic free speech. The court noted that most of the conduct at issue had no relationship to any pedagogical purpose, and did not occur in class. With respect to Mills' in class conduct, the court agreed with the Hearing Board that none of it serve a legitimate pedagogical purpose. The court held that invective and insults were not legitimate teaching tools.

The appellate panel agreed with Mills that the University violated the Administrative Procedure Act by closing his disciplinary hearing to the public. The court held that a Faculty Handbook provision allowing secret hearings, contrary to the APA, was unlawful. It reasoned that an internal agency procedural manual is not a provision of law, and that the handbook closure rule did not fall within the delegation of powers to the Board of Trustees under state law. The handbook was merely a contact which could not avoid the terms of state law. The court ruled that the APA violation entitled Mills to a new disciplinary hearing because the prior hearing was an "unlawful procedure." Because Mills was the prevailing party, and the position of the University regarding the hearing closure was not substantially justified, he was entitled to attorneys' fees.

Mills v. WWU, 150 Wn. App. 260, 208 P.3d 13 (Division I, May 26, 2009) (Dwyer, Appelwick, Leach).

Arbitration Provision that Provides for "Prevailing Party" Attorneys' Fees Unconscionable if Substantive Law Provides Only for Fees to Prevailing Plaintiffs.

This case involved a claim for overtime pay by a Marysville, Washington employee. The employee's contract contained an arbitration clause that provided, among other things, an award of attorneys' fees to the prevailing party and the arbitration of disputes in Denver. The employer moved to dismiss the employee's suit based on the arbitration clause. The Superior Court ruled for the employer and the Court of Appeals originally affirmed in a published opinion (120 Wn. App. 354, 85 P.2d 389). The Supreme Court granted review and remanded for reconsideration in light of *Adler* and *Zuver*.

On remand, Division I held that an arbitration clause providing attorneys' fees shall be awarded to the prevailing party is unconscionable, where the substantive law permits only prevailing employees an award of attorneys' fees and costs. The Court also held that the employee had shown the costs of participating in arbitration in Denver were prohibitive, even though his household income was $94,000.00. The Court found sufficient that the costs of airfare, hotel, and lost income for the plaintiff himself, his wife, his lawyer and two witnesses would have eaten up the family paycheck for the period at issue. The Court rejected the employer's arguments that because the plaintiff had family in the area, it should be presumed they would offer room and board. The Court also rejected the employer's claim that the arbitrator would likely allow the witnesses to testify telephonically, over the plaintiff's objections, as a cost-saving measure. The Court, however, severed the two offending provisions and allowed the arbitration to proceed.

Walters v. AAA Waterproofing, 211 P.3d 454 (July 20, 2009) (Becker, Leach, Lau).

Victories & Defeats

Kathy Barnard and Jeffrey Needle wrote an amicus curiae brief for WELA in the *Briggs* case.

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