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

Employee Prevails Under Title VII If Her Need for a Religious Accommodation was a Motivating Factor in Employer's Adverse Action; Employee Need Not Show Employer Knew Accommodation was Needed

The plaintiff is a Muslim and wears a headscarf. She applied to work at Abercrombie & Fitch which has a Look Policy that prohibits employees from wearing caps. She met all of the qualifications for the position for which she applied. The store manager who interviewed the plaintiff was concerned that the headscarf would conflict with the Look Policy and asked her supervisors. The store manager told the district manager she believed the plaintiff wore the headscarf for religious reasons. The district manager said the headscarf would violate the Look Policy and directed the store manager not to hire the plaintiff. The EEOC sued Abercrombie for violating Title VII. The district court granted summary judgment to the EEOC. The Tenth Circuit reversed because the EEOC failed to prove Abercrombie & Fitch knew the plaintiff needed a religious accommodation. The EEOC appealed.

The Supreme Court reversed 8-1. In an opinion for seven members of the Court, Justice Scalia held that a plaintiff need prove only that her need for a religious accommodation was a motivating factor in the employer's actions. She need not prove the employer actually knew she needed the accommodation. Motive and knowledge are different. An employer who has knowledge of the employee's need for accommodation does not violate Title VII by refusing to hire the applicant for some other reason. Conversely, "an employer who acts with the motive of avoiding accommodation may violate Title VII even if he has no more than an unsubstantiated suspicion that accommodation would be needed." Therefore, an employer may not make an applicant's religious practice, confirmed or not, a factor in employment decisions. The majority left open whether the statute imposed liability where the employer does not suspect the practice in question is religious in nature.

The Court rejected Abercrombie's argument that failure to accommodate claims can only be raised as disparate impact cases. The Court also disagreed that the statute only prohibits employer policies that treat religious practices less favorably than similar secular ones.

Justice Alito concurred in the judgment. He would have held that an employer may not take adverse action against an applicant or employee because of any aspect of his/her religion unless the employer demonstrates it cannot reasonably accommodate the practice without undue hardship. Justice Alito would have required the employee prove the employer knew the practice was for religious reasons, here the evidence was sufficient to survive summary judgment. Justice Alito would not have required the plaintiff prove either a failure to accommodate or that the employer took adverse action because of the religious nature of the practice.

Justice Thomas dissented. He agreed with the Court there is no claim for failure to accommodate apart from disparate treatment or disparate impact. He would have held that there is no Title VII liability for adverse actions took pursuant to a facially neutral employer policy. Under such a circumstance there has been no "intentional discrimination."

EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. --, 115 S. Ct. 2028 (6/1/15).

Supreme Court to Decide Use of Representative Proof in Collective/Class Actions

The Court granted cert. in a wage and hour collective and class action where the plaintiffs relied on representative proof. The certified questions are:

(1) Whether differences among individual class members may be ignored and a class action certified under Federal Rule of Civil Procedure 23(b)(3), or a collective action certified under the Fair Labor Standards Act, where liability and damages will be determined with statistical techniques that presume all class members are identical to the average observed in a sample; and (2) whether a class action may be certified or maintained under Rule 23(b)(3), or a collective action certified or maintained under the Fair Labor Standards Act, when the class contains hundreds of members who were not injured and have no legal right to any damages.

Tyson's Foods v. Bouaphakeo, 115 S. Ct. – (6/8/15).

NINTH CIRCUIT

Dispute Resolution Policy Containing Arbitration Agreement Enforceable Even Where Acknowledgement Form Fails to Mention Arbitration Provision or Jury Trial Waiver

Employee worked for employer for 14 years. A year before his termination the company required him to sign an acknowledgement of its dispute resolution policy, which contained an arbitration provision. He signed another acknowledgement the following year. After his termination, he filed a sex harassment case. The employer moved to compel arbitration. The district court denied the motion because the acknowledgement itself did not mention waiver of the right to jury trial. Employer appealed.

The Ninth Circuit reversed. It acknowledged that prior Ninth Circuit law required the signed acknowledgment itself mention arbitration and the waiver of the right to jury trial. The court distinguished those cases because they involved handbook acknowledgements rather than a "Dispute Resolution Policy." Because the policy, which was not provided to the employee, contained an arbitration provision, and a jury trial waiver, the employee had "knowingly" agreed to arbitration.

Ashbey v. Archstone Property Mgt., Inc., -- F.3d --- (9th Cir. 5/12/15) (Bea, Bybee, Christen).

Public Employee Who Primarily Complained about His Own Lack of Professional Advancement Has Not Engaged in Protected Speech

After amending his Complaint five times, the District Court dismissed Plaintiff's allegation that he was wrongfully discharged in retaliation for protected expression under the First Amendment to the United States Constitution. The Ninth Circuit affirmed.

Plaintiff was hired by the City of San Francisco as a "survey assistant." He was employed as a temporary exempt employee rather than as a permanent civil service employee. Turner alleged that his employers engaged in a scheme to subvert the City Charter, which authorizes the hiring of temporary employees only for special projects or professional services with limited funding. Turner alleges that, in violation of the Charter, he worked on many core department tasks, and was given extra responsibility that was incongruent with his compensation. Turner alleges that this hiring scheme was part of a broader plan by the City to make money by overcharging the public for mapping fees, while underpaying staff.

At staff meetings, union meetings, and face-to-face meetings, Turner began "speaking out against the practice" of using temporary exempt

employees "in violation of civil service rules." He also repeatedly asserted that he and other temporary exempt employees were regularly assigned to work on matters inappropriate to someone in "temporary exempt" status, and that his employers were well aware of Turner's concerns. Turner continued to confront his employer with his allegations of illegality. He was thereafter terminated from employment.

After reciting the familiar applicable law for First Amendment employment claims, the Court directly addressed the "public concern" component. In that regard, the Court inquired about "why did the employee speak? Does the speech 'seek to bring to light actual or potential wrongdoing or breach of public trust,' or is it animated instead by 'dissatisfaction' with one's employment situation?" The Court concluded that "Turner's complaints—while potentially significant in their implications—arose primarily out of concerns for his own professional advancement, and his dissatisfaction with his status as a temporary employee." "Such 'individual personnel disputes and grievances' are 'generally not of public concern.'"

Turner v. City & Cty. of San Francisco, ____F.3d ____ (9th Cir. 6/11/15) (M.D. Smith, Wallace, Friedland).

WASHINGTON SUPREME COURT

Public Employee Has No Right to Privacy Regarding Fact that He/She is the Subject of an Employer Investigation

Two employees of the Spokane School District were the subject of an investigation. Both employees were placed on paid administrative leave during the investigation. The allegations were not part of the record and the investigation was ongoing for four years. Two media outlets submitted a public records request for the administrative leave letter given to Anthony Predisik. The other public records request asked for "information on all district employees currently on paid/non-paid administrative leave."

Predisik and co-Plaintiff, Katke, separately sued the District to enjoin disclosure of the leave letter and spreadsheets about all employees, alleging each record is exempt under the "[p]ersonal information" and "investigative" record exemptions of RCW 42.56.230(3) and 42.56.240(1). The trial court found that Predisik's and Katke's identities, but not the records themselves, were exempt from disclosure under RCW 42.56.230(3). The judge ordered all three records disclosed with Predisik's and Katke's names redacted. The Court of Appeals affirmed. The Supreme Court granted review. In an opinion by Justice Yu for five members of the Court, the majority held there was no right to privacy at all.

In order to qualify for the "personal information" exemption of RCW 42.56.230(3), the employees must demonstrate that they have a right to privacy in personal information contained in a record *and* if such a right exists, that disclosure would violate it. Although the statute provides the test for determining whether the right of privacy is violated, it does not provide guidance to determine whether the right exists in the first instance. In that regard, the Court relied upon common law and the Restatement of Torts, and concluded that the PRA does not recognize a right of privacy in the mere fact that a public employer is investigating an employee. The Court distinguished, however, the investigation itself from the employee's conduct giving rise to that investigation. "[T]he mere fact there is an open investigation into allegations of misconduct is not, by itself, a reason to withhold a record from disclosure. Agencies and courts must review each responsive record and discern from its four corners whether the record discloses factual allegations that are truly of a private nature, using the Restatement as a guide." The Court concluded that "neither the leave letter nor the spreadsheets implicate a privacy right under the PRA."

In order to fall within the investigative records exemption, the record must *inter alia* "be

essential to law enforcement or essential to the protection of privacy." The Court ruled that the records released did not qualify because the District does not enforce the law, and the records are not private.

The Court concluded that "[p]ublic employees have no privacy right in the fact that they are being investigated by their public employer. The investigation is merely a status of their public employment, not an intimate detail of their personal lives, and without such a privacy right, RCW 42.56.230(3) and .240(1) are inapplicable."

Justice Fairhurst dissented joined by Wiggins, Owens, and McCloud. They would have affirmed the court of appeals decision requiring redactions.

Predisik v. Spokane School District No. 81, 182 Wn.2d 896, 346 P.3d 737 (4/2/15).

A Desire to Work Only Part Time Does Not Constitute "Good Cause" to Leave Work; Unemployment Benefits Properly Denied

The employee was a dental hygienist who worked four days a week. She suffered a neck and back injury and received workers compensation benefits for permanent impairment. She continued to work three or four days a week for a time, but then reduced her schedule to two days. Employer claimed this reduction was because she wanted to spend more time with her family.

Several years later, employer asked employee to resume working three days a week. If she couldn't do that, he offered her a position as an on-call or substitute hygienist. Employee didn't like any of these alternatives and interpreted employer's request as a notice of termination, and told him "I hear you are saying I am fired." She did not tell the employer her disability prevented her from working more than two days a week.

Employee filed for unemployment, claiming she had been fired. Employer asserted she had quit. The application did not mention a disability. ESD found she had quit for personal reasons without good cause. The ALJ and the Commissioner affirmed.

The Superior Court reversed and ordered benefits to be paid. The Court found the employee's disability prevented her from working more than two days a week. The court of appeals reversed the Superior Court and held that substantial evidence supports the denial of benefits. Employee appealed.

The Supreme Court unanimously affirmed the court of appeals and the denial of benefits. Justice Wiggins held that the employee had waived the argument that her situation constituted a "refusal to work" rather than a "quit." It was insufficient that the amicus brief supporting the employee (filed by WELA among other groups) had made this argument. The employee had also failed to meaningfully challenge the court of appeals' finding that her separation was a "quit" rather than a "termination." In any event, substantial evidence supported the agency's determination of a "quit."

Given that, the remaining issue was whether the employee could establish "good cause" to quit under the statute. The employee did not meet the statutory "disability" justification for leaving work voluntarily because disability was not the primary reason she left work and she did not exhaust all reasonable alternatives before leaving work. The Court noted the employee never presented any medical documentation to her employer regarding her disability.

The Court refused to expand the "good cause" justifications to include the employee's desire to perform part-time work. The list set forth in the current unemployment statute is exclusive. The Court also rejected the argument that RCW 50.20.119 protected her decision to decline part-time work. That statute by its terms applies only to individuals who are already unemployed.

Darkenwald v. ESD, ___Wn.2d ____, ____P.3d ____ (5/21/15).

Anti-SLAAP Suit Unconstitutionally Deprives Parties of Right to Jury Trial

The Olympic Food Cooperative Board of Directors adopted a boycott of goods produced by Israel-based companies to protest Israel's perceived human rights violations. Five members of the Cooperative brought a derivative action against the individual members of the Board alleging that Board acted *ultra vires* and breached its fiduciary duties by violating the Cooperative's written "Boycott Policy." The Defendants filed a special motion to strike under Washington's Anti-SLAPP statute, RCW 4.24.525. The Plaintiffs challenged the statute on constitutional grounds. The Superior Court rejected the constitutional challenge and granted the motion to dismiss. The Court ordered the Plaintiffs to pay attorney fees in the amount of $221,846.75; $10,000 statutory damages to each of six defendants; and costs. Plaintiffs appealed and the Court of Appeals affirmed. The Supreme Court granted review and reversed in an unanimous opinion by Justice Stephens.

Washington's Anti-SLAPP Statute, RCW 4.24.525, established a procedure for dismissing lawsuits and/or claims which are based upon "an action involving public participation and petition" as broadly defined by the statute. RCW 4.24.525(2)(a)-(e). The statute provides that the moving party may move to dismiss the pending lawsuit or claim prior to any discovery. RCW 4.24.525(5)(c). To prevail, the moving party must establish by a preponderance of the evidence that the claim is based upon "public participation," and then the burden shifts to the non-moving party (typically the plaintiff) to establish by "clear and convincing evidence a probability of prevailing on the claim." RCW 4.24.525(4)(b). If the moving party prevails, she may recover attorney fees and costs and $10,000 as liquidated damages. Every party has a right to an expedited appeal of the court's order either denying or granting the motion.

The Supreme Court ruled that Washington's Anti-SLAPP statute, RCW 4.24.525, was unconstitutional on the grounds that it violated the state constitutional right of trial by jury under Art. I, Section 21.

The Supreme Court first rejected the Defendant's argument and the Court of Appeals' ruling that the fact finding provisions of the statute were the equivalent of the summary judgment provisions of CR 56. The Court found that "[t]he plain language of RCW 4.24.525(4)(b) requires the trial court to weigh the evidence and make a factual determination of plaintiffs' 'probability of prevailing on the claim.'" "By contrast, summary judgment is proper only if the moving party shows that there is 'no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' By their terms, the two standards involve fundamentally different inquiries." The Court rejected the Defendants' and Court of Appeals' reliance on California law.

Under the Washington Constitution, "[t]he right of trial by jury shall remain inviolate." WASH. CONST. Art. I, § 21. "The term 'inviolate' connotes deserving of the highest protection and indicates that the right must remain the essential component of our legal system that it has always been. At its core, the right of trial by jury guarantees litigants the right to have a jury resolve questions of disputed material facts." The court relied heavily upon federal First Amendment law to inform its ruling. "Thus, when a suit raises 'a genuine issue of material fact that turns on the credibility of witnesses or on the proper inferences to be drawn from undisputed facts,' the First Amendment requires that the suit cannot be enjoined because that would 'usurp the traditional fact-finding function of the . . . jury.'" *Citing Bill Johnson's Rests., Inc. v. Nat'l Labor Relations Bd.*, 461 U.S. 731, 745 (1983). "In sum, the United States Supreme Court has interpreted the petition clause to expansively protect plaintiffs' constitutional right to file lawsuits seeking redress for grievances.

The only instance in which this petitioning activity may be constitutionally punished is when a party pursues frivolous litigation, whether defined as lacking a 'reasonable basis,' or as sham litigation."

The Court held that "RCW 4.24.525(4)(b) violates the right of trial by jury under Article I, Section 21 of the Washington Constitution because it requires a trial judge to invade the jury's province of resolving disputed facts and dismiss - and punish - nonfrivolous claims without a trial."

Davis v. Cox, ____Wn.2d _____, _____ P.3d _____ (5/28/15).

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

2015 WELA BOARD OF DIRECTORS