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ALERT
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CASE UPDATES

U.S. SUPREME COURT

Defendant Need Not Prevail on the Merits in Order to Obtain Fees in Title VII Case

The EEOC filed a civil suit against a trucking company alleging sexual harassment against both the charging party and 250 other female employees. The district court dismissed all but 67 of the women on a variety of grounds including statute of limitations, judicial estoppel, and merits defenses. The district court then barred the EEOC from pursuing the claims of the remaining 67 women on the basis of failure to conciliate. The employer sought and received prevailing party attorneys' fees of over $4 million.

The EEOC appealed. The Eighth Circuit ruled that dismissal was proper except as to the original complainant and one other woman. It split 2-1 on the failure to conciliate question. The appellate court vacated the award of attorneys' fees because there was still a live case. The EEOC later dropped the claim for the original complainant and settled the remaining claim. The company again sought and obtained from the district court more than $4 million in fees. The Eighth Circuit ruled that attorneys' fees were not available for several of the claims including with respect to the 65 women whose claims were dismissed for failure to conciliate. The court held that fees were not available to the company for those claims because the dismissal was not on the merits. The court remanded the fees for recalculation.

Before the Supreme Court, the EEOC declined to support the Eighth Circuit's "on the merits" requirement for the award of attorneys' fees. In an opinion by Justice Kennedy, the Supreme Court unanimously agreed that the requirement was erroneous and that a defendant can be entitled to fees if it prevails on a non-merits ground. The EEOC instead argued that the defendant must obtain a judgment entitled to preclusion. The Court declined to rule on this issue because the EEOC had not raised this argument until its brief on the merits. The Court remanded the case for a determination whether the judgment was preclusive and whether the company had shown the EEOC's case was actually frivolous, which was necessary for the award of fees.

In a separate concurrence, Justice Thomas called for overruling precedent and allowing defendant attorneys' fees without a showing of frivolousness.

CRST Van Expedited, Inc. v. EEOC, 136 S. Ct. 1642 (5/19/16).

Statute of Limitations on Constructive Discharge Claim Starts Running Only When Employee Resigns

The plaintiff complained to his employer that he was denied a promotion because he was Black, and his supervisors accused him of the crime of intentionally delaying the mail. Plaintiff agreed to either retire or to accept another position with less money, and the Postal Department agreed not to pursue criminal charges. Plaintiff elected to retire.

Within 41 days after his resignation and 96 six days after the agreement, plaintiff reported an unlawful constructive discharge to the EEOC. He eventually filed suit under Title VII, and the case was dismissed because he failed to contact the EEOC within 45 days of the "matter alleged to be discriminatory." The Tenth Circuit affirmed, holding that the 45 day limitations period began

to run when the plaintiff agreed to resign and not the date of the actual resignation. The Supreme Court reversed.

Writing for a majority of six, Justice Sotomayor held that the limitations period started to run after the actual resignation from employment:

> A claim of constructive discharge therefore has two basic elements. A plaintiff must prove first that he was discriminated against by his employer to the point where a reasonable person in his position would have felt compelled to resign. *Id.*, at 148. But he must also show that he actually resigned. *Ibid*. . . . . In other words, an employee cannot bring a constructive-discharge claim until he is constructively discharged. Only after both elements are satisfied can he file suit to obtain relief.

"[A] cause of action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and obtain relief." "Under the standard rule for limitations periods, the limitations period should begin to run for a constructive discharge claim only after a plaintiff resigns. At that point—and not before—he can file a suit for constructive discharge. So only at that point—and not before—does he have a 'complete and present' cause of action."

The Court reasoned that a claim for constructive discharge is not simply a vehicle to increase his damages. Rather, it is an entirely separate claim. *See Pennsylvania State Police v. Suders*, 542 U.S. 129, 141 (2004).

Justice Alito concurred in the judgment. He would have held that constructive discharge requires the plaintiff prove the employer created the intolerable working conditions with the discriminatory intent to force the employee to resign.

Justice Thomas dissented. He generally agreed with the Tenth Circuit's analysis.

Green v. Brennan, 136 S. Ct. 1769 (5/23/16).

NINTH CIRCUIT

Cash Payments for Unused Benefits Must be Included in Employees' Regular Rate of Pay; Absence of Controlling Legal Authority Doesn't Provide a Defense to Willful Violation

Plaintiffs were current or former San Gabriel police officers. They brought a suit under the FLSA claiming that the City violated that law by not including in the regular rate of pay used for overtime the unused portion of their employee benefits. The benefits at issue were funds available to the employees to purchase medical coverage, which the employee could decline if he or she had alternative coverage. Such employees received additional cash compensation in lieu of benefits. The City failed to include that compensation in employee regular rates.

The plaintiffs filed suit and the district court granted their motion for summary judgment. The district court held that the violations were not willful so the two-year rather than the three year statute of limitations applied. The district court also found that the City was entitled to invoke a statutory exception that increases the overtime threshold for law enforcement personnel and fire fighters. The district court refused to award liquidated damages. Both sides appealed.

The Ninth Circuit affirmed the grant of summary judgment to the plaintiffs regarding the improper exclusion of the cash compensation from the regular rate. Although the court considered it a "close question," it rejected the City's argument that the payments were not made as compensation for hours of employment. The court looked to DOL regulations and precedent in deciding the payments were not similar to

recognized exceptions such as payment for non-working time and reimbursement for expenses. Ultimately the court relied on the rule that exemptions are to be narrowly construed in favor of the employee.

The court also rejected the City's argument that the payments were excludable as contributions irrevocably made by an employer to a third party for benefits because 40% of the total contributions went to employees.

The appellate court reversed the district court's ruling in favor of the City on liquidated damages. The court held that the City failed to meet its burden of showing it had reasonable grounds to believe it was following the law, which is necessary under the FLSA to avoid presumed liquidated damages. Neither the payroll department nor human resources took any steps to see if its conduct complied with the law.

The circuit court also found the City's conduct willful for the purpose of the three-year statute of limitations. The tribunal rejected the district court's conclusion that the City's conduct was not willful simply because there was no case law directly on point. "It is likely to be an exception, rather than the rule, that controlling case law addresses the precise question faced by an employer trying to determine its obligations under the FLSA." What mattered more was that the City never undertook an effort to see whether its actions were lawful.

The court affirmed the district court's ruling on the law enforcement exemption.

Judges Owens and Trott filed a separate concurrence asserting that the Ninth Circuit precedent that required the court to reverse the district court's findings regarding lack of willfulness for statute of limitations purposes should be reconsidered.

Flores v. City of San Gabriel, --- F.3d --- (9th Cir. 6/2/16) (Davis (4th Cir.), Trott, Owens).

Court Replaces Inscrutable ADA Opinion with Less Confusing One

Plaintiff worked full-time as a bookkeeper for a small parish church. She took sick leave for ten months, during which the pastor of the church took over the bookkeeping duties himself and determined that the job could be done by a part-time bookkeeper. When she returned from sick leave, there no longer was a full-time bookkeeping position, so the pastor offered her a part-time job, which she declined. Plaintiff brought suit under the ADA, 42 U.S.C. § 12112.

The district court granted summary judgment because plaintiff failed to raise a genuine issue of material fact on the issue of pretext. The Ninth Circuit issued a confusing opinion affirming. 819 F.3d 1204 (9th Cir. 4/14/16). Apparently recognizing that the original opinion was nonsensical, the panel withdrew it and tried again.

In particular, the Court tried to fix the mess it had created previously distinguishing ADA claims from the Supreme Court's decision in *EEOC v. Abercrombie & Fitch Stores, Inc*., 135 S. Ct. 2028 (2015). There, the Supreme Court ruled that plaintiff need only show that the need for a religious accommodation was a factor motivating the employer's adverse decision. *Id*. at 2032. The Court also held knowledge that the employee's need for accommodation was religiously based is not a requirement of a Title VII claim. *Id*. at 2032-33.

Plaintiff in this case, however, did not file under Title VII but under the ADA, which defines discrimination "to include an employer's failure to make 'reasonable accommodation[] to the known physical or mental limitations.'" *Id*. (quoting 42 U.S.C. § 12112(b)(5)(A)). "The district court properly granted summary judgment to the Archbishop on Mendoza's reasonable accommodation claim because Mendoza failed to establish that a full-time

position was available. *See Dark v. Curry Cty*., 451 F.3d 1078, 1088 (9th Cir. 2006) (holding that the plaintiff has the burden to show existence of reasonable accommodation that would have enabled her to perform the essential functions of an available job)."

Mendoza v. The Roman Catholic Archbishop of Los Angeles, --- F.3d --- (per curiam) (9th Cir. 6/7/16) (Tashima, Silverman, Graber).

WASHINGTON SUPREME COURT

An Employee Who Recovered Wages from Civil Service Commission is Entitled to Attorneys' Fees Under RCW 49.48.030 When Requested in Separate Superior Court Action

Plaintiff was employed by the City of Seattle in its Human Services Department. She was demoted from her management position for failing to adequately supervise one of her employees who the City ultimately discovered had embezzled city funds. She ultimately appealed her demotion under Seattle Municipal Code (SMC) 4.04.250(l)(7), and hired an attorney. Although an employee has the right to be represented by a person of her choice, the code provides that she must do so "at his/her own expense." SMC 4.04.260(E).

The hearing examiner concluded that the discipline was too harsh and, therefore, reversed Arnold's demotion and reduced her discipline to a two-week suspension. The decision ordered the City to reinstate her to her former manager position and awarded back pay and other employee benefits. Arnold then requested attorney fees pursuant to RCW 49.48.030. The hearing examiner denied her request for attorney fees, and the Commission affirmed. After the Commission denied attorney fees, Arnold instituted a separate action in King County Superior Court requesting attorney fees under RCW 49.48.030. The trial court affirmed the Commission and dismissed the case. Arnold appealed.

The Court of Appeals reversed the trial court and held that Arnold was entitled to attorneys' fees under RCW 49.48.030. *Arnold v. City of Seattle*, 186 Wn. App. 653, 345 P.3d 1285 (2015). The Supreme Court granted review and affirmed in an opinion by Justice Fairhurst.

RCW 49.48.030 requires an employer to pay reasonable attorney fees in "any action" in which a person recovers a "judgment for wages or salary owed." The Court relied upon *International Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 42 P.3d 1265 (2002). Although *Fire Fighters* expressly declined to address whether its holding would extend to administrative or quasi-judicial proceedings outside of arbitration, the Court adopted *Fire Fighters'* rationale and ruled that he term "action" in the statute is broader than a traditional court of law proceeding. "Arnold's administrative proceeding before the Commission appears to fit within this definition of an 'action.'" The Court distinguished *Cohn v. Department of Corrections*, 78 Wn. App. 63, 895 P.2d 857 (1995), and rejected the City's argument that the Commission had no authority to grant fees because Arnold had initiated a separate lawsuit in Superior Court solely for the purpose of recovering attorney fees.

The Court also rejected the City's argument that the SMC expressly prohibits the recovery of attorney fees: "An employee may be represented at a hearing before the Commission by a person of his/her own choosing at his/her own expense." SMC 4.04.260(E). The local regulation "forbids what state law permits," and is therefore preempted. The Court also rejected the City's policy justifications for denying attorney fees.

"We hold that when an employee recovers wages in a proceeding with sufficient judicial hallmarks to constitute an "action" and seeks attorney fees in a separate court action, she is entitled to recover attorney fees in that separate proceeding under RCW 49.48.030."

Chief Justice Madsen concurred only in the result.
Arnold v. City of Seattle, 185 Wn.2d 510, 374 P.3d 111 (5/5/16).

WASHINGTON COURT OF APPEALS

"Substantial Factor" Imposes Higher Burden than a "Motivating Factor"; Invasion of Privacy by Publication Claims Subject to Three-Year Rather than Two-Year SOL

The plaintiff, Emeson, was a Department of Corrections officer. After several workplace disagreements, DOC requested he undergo a fitness for duty evaluation. The doctor ruled the plaintiff could not perform some of the job's essential functions. Emeson accepted a job as an office assistant as a reasonable accommodation. Emeson's supervisor posted on Facebook complaining that she was dealing with someone "we all know" who was a corrections officer working as an office assistant as a reasonable accommodation. Emeson's union filed a successful grievance about the post. Emeson and the supervisor continued to have a contentious relationship. Emeson himself was eventually terminated due to unprofessional behavior.

Emeson initially filed a lawsuit in the Western District of Washington alleging race discrimination, retaliation, and harassment based on race, national origin and disability. The DOC moved for summary judgment after the close of discovery. Instead of responding on the merits, the plaintiff sought Rule 41 dismissal. The district court granted the motion for summary judgment as unopposed and dismissed the claims with prejudice.

Emeson filed a state court action alleging failure to accommodate, disparate treatment, hostile work environment and invasion of privacy. The Superior Court ruled that all claims but failure to accommodate and privacy were barred by res judicata. The Superior dismissed the former for failure to state a prima facie case, and the latter based on statute of limitations and on the grounds that the Facebook post was not attributable to the employer.

The court of appeals affirmed. As part of the res judicata analysis, it analyzed the differing burdens of persuasion under federal and state discrimination law. Emeson argued these destroyed the requirement that the claims in the two actions be "identical." The court first held that the under federal law the same burden of proof applies to cases alleging a single illegal motive and mixed-motives. The court then held that the federal "a motivating factor" causation standard under Title VII is lower than the "substantial factor" standard under the WLAD. The court rejected Emeson's argument that Title VII requires the plaintiff to prove but-for causation.

The court of appeals disagreed that the invasion of privacy claim was untimely. It held that because the plaintiff alleged an invasion of privacy claim based on publication rather than intrusion it was not an intentional tort subject to the two-year rather than the three-year statute of limitations. Nor was the claim in the nature of a false light claim, which would also be subject to a two-year statute. But the court affirmed dismissal on the ground that the supervisor's Facebook post was not imputable to the DOC because she was not fulfilling any job requirement at the time she made the Facebook post. It was to her personal account after hours.

Emeson v. Department of Corrections, --- Wn. App. ---, --- P.3d --- (Div. II 5/3/16) (Lee, Worswick, Maxa).

Court Erred by Reducing In-House Counsel's Recovery of Unpaid Wages Because of Alleged Violations of the Rules of Professional Conduct

After serving as outside counsel for a construction company, Chism became in-house counsel. He eventually became president of one

of the corporation's subsidiaries. Ultimately he and the company got into a dispute about compensation. He claimed the company owed him a $750,000 bonus. The employer refused to pay and the employee resigned. He sued for the bonus and won after a month-long jury trial, also obtaining double damages under 49.52. The Superior Court then found in favor of the company on its counterclaims/defenses of breach of fiduciary duty/violations of the RPCs. The Superior Court reduced the jury's verdict by over $500,000. Chism received double damages on the reduced amounts. The court refused to reduce the attorneys' fee award because of the deductions to the jury verdict. Both sides appealed.

The court of appeals ruled that RPC violations are not designed to be a basis for civil liability, only disciplinary action. A Superior Court has only the power to impose discipline that the Supreme Court would have. The court ruled that there was no support for reducing an in-house attorney's compensation as a disciplinary sanction. Supreme Court precedent required novel applications of RPCs to have only prospective effect.

The court of appeals was skeptical of the claim that employment contracts through which a client's outside counsel becomes in-house counsel are subject to the requirements of RPC 1.8. Even if there were a basis for so holding, this was also a novel application of the rule that could not be given retroactive effect.

The court found no precedent for disgorging attorney wages as a sanction for attorney misconduct. The appellate court found that the use of disgorgement posed "a significant threat to the legislative policy of the consistent payment of employee wages." The disgorgement order was improper as a matter of law.

Chism v. Tri-State Construction Inc., 193 Wn. App. 818, 374 P.3d 818 (Div. I 5/9/16) (Dwyer, Cox, Becker).

Former Seattle Municipal Code Provision Did Not Qualify as Adequate Whistleblower Program to Supplant State Law Protections for Local Whistleblowers

Plaintiff worked for Seattle City Light as a line worker apprentice. He alleged that he was subjected to retaliation by his supervisor, who required gifts of alcohol for passing test scores, and either retaliated against plaintiff for his complaints, or influenced co-workers to retaliate. An independent investigation confirmed the allegation of requiring gifts of alcohol, which was reported in *The Seattle Times*.

Plaintiff filed a complaint for unlawful whistleblower retaliation under Seattle Municipal Code (SMC) 4.20.860 and RCW 42.41.040. The ALJ found that "after Swanson reported [that] [the Supervisor] 'solicited and accepted alcohol from apprentices in exchange for a passing grade on an oral exam,' [the supervisor] 'lobbied line workers and crew chiefs to downgrade Mr. Swanson's performance evaluations in an attempt to cancel his apprenticeship.'" He also found that the supervisor "retaliated by 'either vocally or tacitly encourage[ing]' the impersonation of plaintiff in *The Seattle Times* online comment section concerning the story about gifts of alcohol. The ALJ recommended suspending the Supervisor for six months and ordered the City to pay plaintiff's attorney fees and costs incurred in bringing his whistleblower retaliation claim under chapter RCW 42.41.

The City filed a Petition for Review to Superior Court. The City argued that a more narrow definition of retaliation under former SMC 4.20.850(D) applied rather than the broader definition under state law, RCW 42.41.020(3). In the alternative, the City argued that the decision of the ALJ was not supported by substantial evidence. The Superior Court agreed and reversed the ALJ, and the plaintiff appealed. Division One reversed the Superior Court.

The plain and unambiguous intent of the Local Government Whistleblower Protection Act, RCW 42.41, is to protect local government employees who make a good faith report of improper actions taken by officials and employees and provide remedies for whistleblowers subjected to retaliation for making such reports. RCW 42.41.020(3) defines "retaliatory action" as (a) any adverse change in the employee's terms or conditions of employment or (b) hostile actions by another employee that were encouraged by a supervisor or senior manager. RCW 42.41.050 provides that if a local government adopts a program that "meets the intent of this chapter" to protect an employee from reporting alleged improper governmental actions and retaliation, it "shall be exempt from this chapter."

The City argued that the exemption applied because the former SMC meets the intent of the Local Government Whistleblower Protection Act. The Court of Appeals disagreed. "Because the plain language of former SMC 4.20.850(D) did not provide a remedy for a whistleblower who is subjected to hostile actions by another employee that are encouraged by a supervisor, senior manager, or official as required by state law, RCW 42.41.020(3)(b), we conclude the former SMC does not meet the intent of state law." The Court of Appeals also ruled that the ALJ's decision was supported by substantial evidence.

City of Seattle v. Swanson, 193 Wn. App. 795, 373 P.3d 342 (Div. I 5/9/16) (Schindler, Leach Dwyer).

MEMBER VICTORIES AND DEFEATS

Judith Lonnquist represented the plaintiff in *Arnold.*

Lindsay Halm represented the plaintiff in *Chism.*

Jack Sheridan represented the plaintiff in *Swanson.*

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