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

FEDERAL – U.S. Supreme Court

High Court will Resolve Circuit Split on Whether Pharmaceutical Representatives are Exempt Outside Salespersons under the FLSA

In *Novartis Pharm Corp. v. Lopes*, 611 F.3d 141 (2nd Cir. 2010), the Second Circuit deferred to the litigation position of the U.S. Department of Labor and held that pharmaceutical representatives are entitled to overtime pay. Refusing to defer, the Ninth Circuit held that the such employees are outside salespersons exempt from overtime pay. *Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383 (9th Cir. 2011). The Supreme Court granted review of the Ninth Circuit's decision on November 28, 2011.

FEDERAL - Ninth Circuit

Two Employees Need only Have Similar Jobs and Engage in Similar Conduct to Be Similarly Situated Comparators

Plaintiff worked as a recruiter for Nielsen, which measures television program audiences and provides the results to advertisers and media outlets. The Plaintiff alleged that she was subjected to age and disability discrimination under the California Fair Employment and Housing Act (FEHA), and wrongful discharge in violation of public policy. Plaintiff argued, *inter alia*, that she was treated differently than comparable employees who were substantially younger, and because the defendant deviated from established policy and practice regarding progressive discipline. The District Court granted summary judgment on the grounds that she had not produced sufficient evidence of pretext. The Plaintiff appealed and the Ninth Circuit reversed.

Applying California law, the Court followed the *McDonnell Douglas* shifting burden model. The Court also relied upon Ninth Circuit law in ruling that pretext may be established by showing that the employer's proffered explanation is unworthy of credence because it is internally inconsistent or otherwise not believable. The Court also acknowledged that the standard for raising a triable issue on the subject of pretext is "hardly an onerous one."

Relying on federal law, the Ninth Circuit expounded upon the degree to which employees must be similarly situated. In that regard, the Court ruled that other employees are similarly situated to the plaintiff when they "have similar jobs and display similar conduct." The employees need not be identical, but must be similar in material respects. Materiality depends on the context and is a question of fact that "cannot be mechanically resolved." It is "important not to lose sight of the common-sense aspect" of the similarly situated inquiry. "It is not an unyielding, inflexible requirement that requires near one-to-one mapping between employees" because one can always find distinctions in "performance histories or the nature of the alleged transgressions." *Humphries v. CBOCS West, Inc.*, 474 F.3d 387, 405 (7th Cir. 2007).

The Court also ruled that a comparison with younger employees within the protected class is not improper as a matter of law. The proper inquiry is not whether the other employees are outside the protected class, but whether they are significantly younger than Plaintiff.

The Ninth Circuit also found pretext through evidence that an employer's deviation from established policy or practice worked to her disadvantage.

Earl v. Nielsen Media Research, Inc., 658 F.3d 1108 (9th Cir. 2011), (W. Fletcher, Hug, Reavley (5th Cir.)).

No Accommodation Required Unless Employee Has the Skills, Experience, Education and Other Job Related Requirements for the Position at Issue.

The Plaintiff was a special education teacher for a school district in Idaho who suffered from depression and bipolar disorder. Her contract required that she "maintain the legal qualifications to teach," which in turn required that she hold a certificate issued by the board of education. In order to renew her certificate, which had expired in September 1, 2007, Plaintiff was required to complete six semester hours of professional development training. Although she made substantial progress, she was unable to complete the training because of depression. Plaintiff requested as an accommodation that the Board apply to the state for a provisional authorization to teach without the certificate for the upcoming year. The Board denied the request.

Plaintiff filed suit alleging numerous state causes of action and a violation of the ADA. The Defendant removed the case to federal court, which granted summary judgment for the Board on all issues. The Plaintiff appealed, and the Ninth Circuit affirmed.

The sole issue on appeal was whether the Plaintiff was a "qualified individual with a disability" within the meaning of the ADA. The Court acknowledged that a "qualified individual with a disability" is one "who satisfies the requisite skills, experience, education and other job related requirements of the employment position such individual holds or desires, *and* who, with or without reasonable accommodation, can perform the essential functions of such position." *Citing* 29 C.F.R. § 1630.2(m) (emphasis added). The Court ruled that unless a disabled individual independently satisfies the job prerequisites, she is not "otherwise qualified," and the employer is not obligated to furnish any reasonable accommodation that would enable her to perform the essential job functions. Because the Plaintiff did not meet the first prong of the test, the Defendant was under no obligation to accommodate.

The EEOC participated as amicus curiae. It argued that its Interpretative Guidance provides that "selection criteria that are related to an essential function of the job may not be used to exclude an individual with a disability if that individual could satisfy the criteria *with the provision of a reasonable accommodation*." 29 C.F.R. Pt. 1630. The Court declined to rely upon this provision on the grounds that it pertains to challenges to qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability. No such allegation was being made in this case. "In sum, an individual who fails to satisfy the job prerequisites cannot be considered 'qualified' within the meaning of the ADA unless she shows that the prerequisite is itself discriminatory in effect. Otherwise, the default rule remains that 'the obligation to make reasonable accommodation is owed only to an individual with a disability who . . . satisfies all the skill, experience, education and other job-related selection criteria.'"

Judge Paez concurred in the judgment because the School District did not have the authority to grant the accommodation requested - it only had the authority to petition for provisional authorization. He argued that there was no need to reach the question of whether the District had a duty of reasonable accommodation under the ADA to apply for provisional authorization to rehire the Plaintiff so that she could ultimately renew her certification. Moreover, Plaintiff

would not have been qualified even if the provisional waiver had been granted.

Had the issue been presented, however, Judge Paez would have deferred to the EEOC's understanding of its own Interpretative Guideline that an employer must provide a reasonable accommodation to a prospective employee if that accommodation would allow the employee to become qualified for the position at issue.

Johnson v. Board of Trustees of the Boundary County School District No. 101, --- F.3d --- (9th Cir. 12/8/11) (O'Scannlain. Paez, Kendall (N.D. Ill))

WASHINGTON – Court of Appeals
Superior Court Properly Certified and Ruled in Favor of Meal & Rest Break Class Action

Brink's pays its armored vehicle drivers for meal and rest periods. But company policy requires the employees to continuously observe their surroundings for security purposes during such breaks. They are prohibited from engaging in any personal activities. Employees filed a class action for denial of meal and rest breaks, which was certified under 23(b)(3)over the employer's objections. After a bench trial, the court ruled for the plaintiffs reasoning that Brink's required them to engage in active work duties at all times.

The employer appealed both the class certification and merits decisions. Division One affirmed. The court disagreed with Brinks that a class could not be certified because the decision when to take breaks varied from employee to employee. CR 23 does not require that the shared questions of fact or law be identical as to each class member.

The court also disagreed with Brink's that the trial judge had confused "on-duty" with "on call." The court refused to consider the argument that "vigilance" is not work, as the employer did not make that argument below. The court nevertheless distinguished between vigilance requiring active observation and mental exertion, which qualifies as work, and passive vigilance, which does not.

The panel rejected the employer's argument that Washington law requires only that an employer not stand in the way off an employee's efforts to take meal breaks. The court held that an employer has a mandatory obligation to provide those breaks. If an employee is on duty the paid meal or rest break may be interrupted, but the employee is entitled to a full 30 minutes of paid meal time and a full 10 minute rest break without performing work duties for the employer. The court held that the logic of *Wingert v. Yellow Freight Sys, Inc.* applied equally to meal breaks.

The court also rejected the argument that paying an employee for the time spent on duty during the breaks means that employees can work during the breaks. Instead the court held that if the employee is called on to engage in work activity during the break, the time does not count towards the required break time.

The appellate court affirmed the trial court's finding that brief stops to run to the restroom or grab food or drink to consume in the truck did not rise to the level of an intermittent break. They didn't provide a true break from work activity and an opportunity for relaxation. The panel agreed with the trial court that the Company had failed to show a waiver of the right to meal breaks through unequivocal conduct.

The court upheld the plaintiffs' damages calculation method which class-wide averages to supply missing data for particular days. This was a reasonable basis for estimating the loss.

Pellino v. Brink's, Inc., 164 Wn. App. 668, -- P.3d --- (Nov. 7, 2011) (Div. 1) (Schindler, Lau, Cox).

Superior Court Properly Granted Summary Judgment to Employer Because No Acts Based on a Protected Category Took Place During Three Years Prior to Filing Suit.

Plaintiffs were five State Department of Transportation employees. A supervisor repeatedly threatened to beat up one of the plaintiffs. Another supervisor made racist and sexist comments. Years later the plaintiffs filed suit for hostile work environment, wrongful termination, discrimination and retaliation. The court dismissed one of the employee's discrimination and retaliation claims to proceed to trial, but dismissed all other claims. The employees appealed.

Division Three affirmed. The court held that with respect to the majority of the plaintiffs there were no acts that could count towards a hostile work environment based on a protected category during the 3 year period prior to commencement of the action. It is not enough that offensive conduct did occur. The court also held that discrete acts of retaliation could not count towards a continuing violation with respect to a hostile work environment based on sex.

The court affirmed the dismissal of one plaintiff's hostile work environment on the merits. The plaintiff claimed that on one occasion a supervisor asked another crew member, while they were all eating hot dogs, whether the crew member wanted a bite of his wiener. Another supervisor frequently talked about sex. The Department sustained some complaints of sexual harassment against the second supervisor. He received only minor discipline. The supervisor also told the plaintiff that she should be a "cheerleader."

The court concluded that plaintiff's claims failed because the comments were not directed to her as a woman and the objectionable treatment was directed to both males and females. The court held that the "cheerleader" comment was not necessarily gender based. The court also held that none of the conduct could be attributed to the employer because there were no complaints specifically alleging sexual harassment that the Department failed to address.

Getting the law backwards, the court held that the because the employees could not show that the Department's explanation for the actions that they alleged were retaliatory was pre-textual, the employees did not have a prima facie case.

The court rejected the employees' claim of constructive discharge, despite the fact that *Martini* doesn't not require a constructive discharge for a state law discrimination claim.

Crownover v. State Dep't of Transp., --- Wn. App--, 265 P.3d 971 (Nov. 29, 2011) (Div. 3) (Brown, Kulik, Siddoway)

Victories & Defeats

Congratulations to Marty Garfinkel, Adam Berger & Maria Gonzalez for the victory in *Pellino.*

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

2011 WELA BOARD OF DIRECTORS