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ALERT

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CASE UPDATES

NINTH CIRCUIT

Under the FLSA, Employers Must Reimburse Temporary Farmworkers for Their Travel and Immigration Expenses

This case involved a class of Mexican temporary onion farmworkers. They brought claims under the Fair Labor Standards Act alleging that their employer failed to reimburse them for travel and immigration expenses incurred during the first week of employment. The district court held the failure to reimburse such expenses did not constitute an illegal kickback of wages. The Ninth Circuit reversed.

The FLSA allows an employer to deduct "board and lodging" but not items primarily benefitting the employer. The U.S. Department of Labor had determined regulatory bulletin it had held that travel and immigration related expenses were primarily for the benefit of the employer. The Ninth Circuit determined that the bulletin was a reasonable interpretation of a regulatory ambiguity.

The Court held that the complaint's allegation that the employer's violations were "deliberate, intentional, and willful" was sufficient to plead the 3-year statute of limitation and reversed the district Court's contrary conclusion.

Rivera v. Peri & Sons Farms Inc., --- F.3d ---, (9th Cir. Nov. 13, 2013) ("O'Scannlain, M. Smith, Singleton (D. AK.))

Jury Verdict In Favor Of Plaintiff Reversed Because Speech Was Part Of Official Duties

The Plaintiff worked as a police officer for the SWAT team at the City of Eugene. Over a number of years he reported safety issues related to accidently discharged firearms. In an effort to make his growing safety concerns "as public as possible," Hagen sent an e-mail on May 23, 2007, to a number of sergeants with K-9 and SWAT team experience, inviting them to a meeting at city hall to discuss "safety issues related to our close working relationship with the SWAT team." "Most of these issues," the e-mail explained, "surround the recent accidental discharges and how [the K-9 and SWAT] teams could be better equipped or trained to function more safely together." Three days later SWAT team operations were suspended pending a review. Plaintiff continued to express his safety related concerns. Thereafter, Plaintiff was transferred out of the SWAT team because he was "the spokesman for the majority of the complaints," had a low activity level, and "repeatedly engaged in passive insubordination."

This transfer was almost immediately rescinded by the Chief of Police and almost immediately thereafter his supervisor began writing up the Plaintiff for unrelated reasons that were previously not creating a problem. More negative evaluations followed, and he was again transferred out of the unit.

Plaintiff sued the Chief of Police and his supervision alleging a violation of 42 U.S.C. Section 1983; that he was transferred in violation

of his First Amendment rights. He sought individual liability and municipal liability. The Defendants moved for summary judgment, which was denied. A jury decided in favor of Plaintiff and awarded $50,000 in compensatory damages and $200,000 in punitive damages. The Defendants appealed and the Ninth Circuit reversed.

The Ninth Circuit ruled that whether Plaintiff was speaking as a private citizen was a mixed question of law and fact. *Citing Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1129 (9th Cir. 2008). "Statements do not lose First Amendment protection simply because they concern 'the subject matter of [the plaintiff's] employment.' *Freitag*, 468 F.3d at 545. But 'speech which owes its existence to an employee's professional responsibilities is not protected by the First Amendment." "Generally, 'in a highly hierarchical employment setting such as law enforcement,' when a public employee raises complaints or concerns up the chain of command at his workplace about his job duties, that speech is undertaken in the course of performing his job, ..." "If, on the other hand, 'a public employee takes his job concerns to persons outside the work place in addition to raising them up the chain of command at his workplace, then those external communications are ordinarily not made as an employee, but as a citizen.' Neither considerations, however, are dispositive and the nature of the inquiry is fact-intensive," and "no single formulation of factors can encompass the full set of inquiries relevant to determining the scope of a plaintiff's job duties."

The Court ruled that, as a matter of law, Plaintiff's concerns about SWAT safety were inextricably intertwined with his duties as a K-9 officer. The trial court erred when it denied the Defendants' Motion of Judgment as a matter of law.

Hagen v. City of Eugene, 736 F.3d 1251 (Dec. 3, 2013) (Alarcon, M.D. Smith, Hurwititz)

WASHINGTON COURT OF APPEALS

Plaintiff Not Entitled to Attorneys' Fees After Acceptance of Rule 68 Offer

The Plaintiff accepted a Rule 68 offer of judgment dated October 5, 2013, and petitioned for fees. The offer of judgment allowed judgment to be taken in the amount of $350,000. The judgment also provided that the State would "pay [Plaintiff's] awardable costs and reasonable attorney's fees accrued in this lawsuit up to the date/time of this offer . . . Plaintiff's claimed costs and fees shall be substantiated by billing records attached to Plaintiff's acceptance of this offer detailing the nature and date of the work performed and hours accrued." Plaintiff unequivocally accepted the offer of judgment. After filing a motion for fees, Plaintiff's counsel submitted modified time records, which included reconstructed time that was not produced when the offer was accepted. The attorney's hourly rates were granted as requested, and Plaintiff's attorney was awarded a 1.3 multiplier to the lode star.

In relevant part, the trial court ruled that Plaintiff was not entitled to fees after the date of the offer of judgment, which included the time spent preparing the fee petition; only entitled to fees based on hours that were contemporaneously billed, and not reconstructed hours; not entitled to fees for time spent on a related administrative challenge; and not entitled for the costs relating to her treating physician insofar he was not listed as an expert and that time was related to his services as a treating physician. Plaintiff appealed.

In relevant part, the Court ruled that the terms of the offer of judgment control. The Court held that the administrative claim was segregable, as they did not have a common core of facts and legal theories.

Relying principally upon *Guerrero v. Cummings*, 70 F.3d 111, 1113 (9th Cir. 1995), the

Court ruled that the fees incurred for the fee petition were appropriately disallowed. The Court rejected the public policy argument to the contrary, and declined to depart from federal law because the language of the state and federal Rule 68 is virtually identical. The Court also rejected the argument that the parties' previous course of dealings should have controlled the outcome; the communications between the parties made clear that this offer was different from previous offers and that post offer fees were not intended.

In reference to costs for the treating physician, the Court ruled that the physician was not acting as an expert, and rejected the argument that the time spent responding to legal matters was nevertheless recoverable. The Court distinguished a federal line of cases where fact witness physician fees were recovered for time *while testifying*. Washington law recognizes a difference "between professionals who are experts in their field and witnesses who are experts for purposes of litigation, recognizing that the mere fact of expertise does not automatically warrant a professional's treatment as an expert witness." "We decline to hold that time spent by a fact-witness treating physician 'responding to legal matters' is recoverable as a WLAD litigation cost."

Johnson v. State, Department of Transportation, 177 Wn. App. 684, 313 P.3d 1197 (Div. I 2013) (Dwyer, Applewick, Grosse)

Hiring an Employee in Washington does not Create Personal Jurisdiction Over Out of State Company's President and Chief Executive Officer for Unpaid Wage Claim under RCW 49.52

The employer in this case is a Pennsylvania corporation headquartered in Pennsylvania. Schutz was President and CEO. In 2009 the plaintiff, Failla, e-mailed Schutz seeking a sales position with the Company that she could perform near her home in Seattle. Failla traveled to Pennsylvania for the interview and got the job. The position required telephone, e-mail and personal sales. Schutz told Failla that the company would like to do business with Starbucks. Failla did not however pursue sales with Starbucks or any other Washington company.

Schutz eventually promoted Failla to Vice-President of Sales. Schutz sent Failla an agreement saying that her employment would be governed by Pennsylvania law. The agreement was never executed.

The company did not pay Failla commissions she claimed she was owed. She sued both the company and Schutz. The company was never served. Failla moved for summary judgment on the commissions; Schutz moved to dismiss based on lack of personal jurisdiction. The Superior Court granted Failla's motion for summary judgment and awarded commissions, prejudgment interest and attorneys' fees.

Division II reversed and ordered the case dismissed for lack of personal jurisdiction. The Court rejected the argument that Schultz consummated a transaction in Washington by employing her knowing she lived in Washington. The Court held that important facts here were that Failla reached out to Schutz to seek employment and that she flew to Pennsylvania to interview. She was paid by checks initiated, issued and mailed from Pennsylvania. The company never registered to do business in Washington. It was not enough that Schutz knew Failla would reside in Washington and work from home. The Court found it significant that Failla never contacted any Washington company as a customer.

The panel claimed it was not ignoring the "potential effect of the recent, revolutionary advances in communications, such as e-mail, video conferencing, social media and the Internet, on the analysis of jurisdiction. The Court suggested that if the company had had an office here the case for jurisdiction over both it and Schutz would be "much stronger."

The Court also rejected Failla's argument that Schutz committed an injury in Washington by failing to pay her wages. The Court agreed with Schutz that the failure to pay occurred in Pennsylvania not Washington.

Failla v. Fixtureone Corp., --- Wn. App. ---, 312 P.3d 1005 (Div. II Nov. 13, 2013) (Bjorgen, Hunt, Penoyar).

Comparable Worth Statute Does Not Create Private Cause of Action

The plaintiffs were a class of psychiatric security nurses and security attendants who work in the forensic wards of state psychiatric hospitals. They alleged that that state violated their equal protection rights and rights under comparable worth statutes by paying them less than their counterparts in civil commitment wards. The trial court found in favor of the employees. The state appealed and Division II, 2-1.

The Court of Appeals agreed that the two sets of employees had similar duties. The appellate court applied rational basis scrutiny to the classification. The Court disagreed with the state that historical pay rates were a sufficient ground for the disparate treatment. Any pay difference must be based on actual job differences. The Court found the employees' different collectively bargained wage rates to be a sufficient job difference to justify the differential treatment.

The Court of Appeals held that the state comparable worth statute does not support a private right of action. Even if it did, the Court held that an employee must prove that the director of personal would have found the increase necessary, the director of financial management would have approved the increase, and the legislature would have funded the increase.

Judge Bjorgen dissented on the question of whether the comparable worth statute provided a private cause of action. Judge Bjorgen would have remanded to the trial court to provide an appropriate remedy.

Schatz v. DSHS, --- Wn. App. ---, 314 P.3d 406 (Div. II Nov. 19, 2013) (Penoyar, Hunt, Bjorgen)

Mid-Term Non-Compete Agreement Must be Supported by Consideration that is Independent of the At-Will Employment Relationship

The employee in this case began working for the employer as an at-will fitness instructor in 2004. In 2009, the employer drafted an employment agreement that imposed a non-compete. The employee's terms and conditions of employment did not otherwise change. The agreement specifically stated that the only consideration for the non-compete was the employee's continued employment. The employer fired the employee in 2011 for allegedly engaging in a sexual relationship with a customer.

The employee sought a declaratory judgment that the non-compete was void. Even though the contract contained an integration clause, the employer claimed that it orally promised the employee several additional benefits in exchange for the non-compete. The Superior Court held that this created a genuine issue of material fact and denied the employee's motion for summary judgment. The Court of Appeals granted discretionary review.

Relying on *Labriola*, the Court of Appeals held that an employer must provide consideration for a non-compete. If the non-compete is entered into mid-term in an existing at-will employment relationship the employer must provide *independent consideration* at the time of the agreement. As examples of independent consideration the Court gave "wages, a promotion, a bonus, or access to protected information." Refraining from terminating the employee for refusing to sign the

non-compete was not listed as an example of "independent consideration."

The Court held that the contract's integration clause prevented introduction of oral evidence inconsistent with the contract. The Court rejected the employer's claim it had included the integration clause by mistake, as the employer had drafted the contract.

McKasson v. Johnson, --- Wn. App. ---, 315 P.3d 1138 (Div. II Dec. 17, 2013) (Hunt, Worswick, Johanson)

Municipality That Has Its Own Whistleblower Policy Exempt From Local Whistleblower Statute; Plaintiff Failed To Prove Dismissal Was Pretextual

Plaintiff worked for the Yakima Police Department. Plaintiff complained about the unethical work practices of a fellow officer. He also complained about retaliation for making the complaints about unethical practices. Plaintiff walked out of a scheduled meeting concerning these complaints and shouted obscenities at his supervisors. He was suspended for insubordination, and received the loss of 24 hours of accrued paid leave. Plaintiff was transferred to patrol duty.

After being transferred a series of incidents led the police department to question Plaintiff's fitness for duty. He was referred to a department psychiatrist for a fitness for duty examination. The report found that he was unfit for duty primarily due to an Axis I diagnosis of "[m]ood [d]isorder due to a [g]eneral [m]edical [c]ondition with mixed features," which had been caused by a prior head injury. The psychiatrist believed that the impairment was permanent. The doctor stated that no reasonable accommodation could be made. After a series of examinations, Plaintiff filed suit in federal court alleging a variety of state and federal claims. But while is claim was pending in federal court, he also filed suit in state court alleging: (1) violation of RCW 42.41.040 (whistleblower retaliation), (2) wrongful discharge in violation of public policy, (3) negligent hiring, supervision, and retention of Chief Samuel Granato, and (4) violation of the WLAD, RCW 49.60.180. The federal court granted summary judgment to the employer and the state trial court subsequently did the same. The Plaintiff appealed.

The Court ruled that many of Plaintiff's claims were foreclosed by collateral estoppel. In reference to the state whistleblower claim, the Court found that the City of Yakima is exempt from RCW 42.41. The Court affirmed the public policy tort claim because Plaintiff was terminated from employment because he was unfit for duty and not for whistleblowing; thereby failing to prove the causation element. On the disability discrimination claim, the Court affirmed because Plaintiff failed to provide any evidence or argument that the termination for insubordination was pretextual. Significantly, the Court failed to include in its pretext the formulation that Plaintiff could still prevail if he could should in the alternative that illegal discrimination was a substantial factor. The Court effectively held that if any of the defendant's reasons were true, then plaintiff could not survive summary judgment; thereby creating the only factor standard. The accommodation claim was affirmed because Plaintiff failed to make any legal argument in his brief to support the claim. The negligent supervision and hiring claim was likewise affirmed because there existed no misconduct outside the scope of the alleged decision maker's employment.

Brownfield v. City of Yakima, --- Wn. App. ---, 316 P.3d 520 (Div. II Dec. 13, 2013, published Jan. 14, 2014) (Fearing, Kulik, Kormso)

Summary Judgment for Employer Reversed Because Plaintiff Had Direct Evidence of Discrimination

The Plaintiff was a Mexican-American Gulf War combat veteran who received partial disability due to a service related back injury and post-traumatic stress disorder. He also suffered from a speech impediment. He was hired by Quest in 1999 as an Equipment Installation Technician. After being reassigned in 2006, he received a new manager, who was also Mexican-American. Plaintiff alleged that his manager surrounded Plaintiff with co-workers who tormented him because of his military status, Mexican heritage, and disabilities. He alleged that his manager and co-worker referred to Mexican Americans as "spics," and his language as "ghetto Hispanic." Allegedly they mocked his speech impediment.

Plaintiff complained about the adverse behavior without specifically referring to his protected classifications. In response, his manager stated: "someone is throwing rocks at the big dog and that big dog is going to get you and that big dog is me." Thereafter Plaintiff complained again, alleging retaliation; that co-workers vandalized his work station, and the manager reviewed his work with greater scrutiny. The manager then reassigned Plaintiff without changing his job classification. At the new reassignment Plaintiff's van was downgraded; he was required to return his cell phone and computer; was not selected for favorable jobs; and barred from earning overtime. Plaintiff also alleged various acts of sabotage.

Plaintiff filed suit alleging a violation of the Washington Law Against Discrimination ("WLAD") on the grounds of disparate treatment, harassment, and retaliation. The trial court granted summary judgment and Plaintiff appealed. The Court of Appeals reversed.

The Court of Appeals ruled that Plaintiff presented "direct evidence" and therefore applied the so-called "direct evidence test." "Under the direct evidence test, a plaintiff can establish a prima facie case by providing direct evidence that (1) the defendant employer acted with a discriminatory motive and (2) the discriminatory motivation was a significant or substantial factor in an employment decision." The Court ruled that "[w]e generally consider an employer's discriminatory remarks to be direct evidence of discrimination." *But see Scrivener v. Clark College*, 176 Wn. App. 405, 309 P.3d 613 (2013) (distinguishing discriminatory comments as "stray remarks"). The Court held that the manager directly expressed his dislike for an employee with a protected status, referred to Mexicans as "spics" and allowed others to do so, and made fun of his speech. None of the comments relied upon by the Court involved the decision making process.

In reference to whether there existed an adverse employment action, the Court ruled that if Plaintiff's new van, cellular phone, and preference for workplace stations were tied to his former position, then he could *not* prove an adverse action. *But see Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (For particular treatment at work to amount to an adverse employment action, "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination"). The Court found, however, that there existed a question of fact about whether those benefits were tied to his previous position. The Court also ruled that Plaintiff demonstrated that the ethnic and disability bullying was severe and pervasive that "this hostile work environment amounted to an adverse employment action."

The Court of Appeals then independently analyzed whether there existed a "hostile work environment," and focused on whether the hostility adversely affected the terms and conditions of employment. The fact that Plaintiff visited a psychiatry emergency room in response

to "great stress at work" sufficiently demonstrated that the alleged harassment affected the terms and conditions of his employment. Because the harasser had the authority to affect Plaintiff's hours, wages, and working conditions, he qualified as a manager under state law and there the harassment was imputed to the employer.

On the issue of retaliation, the Court found for the Defendant because the Plaintiff failed to complain specifically on the basis of a protected classification. "A general complaint about an employer's unfair conduct does not rise to the level of protected activity in a discrimination action under WLAD absent some reference to the plaintiff's protected status."

Alonso v. Quest Communications, --- Wn. App. ---, 315 P.3d 610 (Dec. 31, 2013) (Johanson, Hunt, Worswick)

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