

CASE UPDATES

NINTH CIRCUIT

Issue of Fact Exists Whether HR Manager Engaged in Protected Activity Under FLSA by Making Internal Complaints

Plaintiff began working for employer in 2010. She was promoted to Director of HR in early 2011. She repeatedly told her superiors that the company wasn't complying with FLSA. The company fired her in mid-2011. The district court granted the company's motion for summary judgment on the basis she had not filed a complaint within the meaning of the FLSA.

The Ninth Circuit reversed 2-1. The majority held that the anti-retaliation provision had to be broadly interpreted. It considered the fact that the plaintiff was a manager an important fact. "Generally speaking, managers are in a different position vis-à-vis the employer because (as relevant here) their employer expects them to voice work-related concerns and suggest changes in policy to their superiors."

The court refused to decide whether the requirement of some circuits that a manager must step outside his or her role in order to engage in protected activity under the FLSA was inconsistent with *Kasten v. Saint-Gobain Performance Plastics*, 563 U.S. 1 (2011). Instead, the court adopted a more contextual approach where the employee's level of managerial responsibility was just one factor. One important factor here that weighed in favor of protection was that the plaintiff was not responsible for FLSA compliance.

Here the plaintiff had made many oral complaints about FLSA violations to her boss, who was responsible for FLSA compliance. Under these

circumstances, a jury could find the employer either understood or reasonably should have understood that she was asserting rights protected by the FLSA and calling for their protection.

A Tenth Circuit district judge sitting by designation would have applied the manager rule strictly (as the Tenth Circuit does) and affirmed the dismissal.

Rosenfield v. Globaltranz Enterp. Inc., -- F.3d --- (9th Cir. 12/14/2015) (Graber, Kozinski, Benson (D. Utah)).

University Could Deny Graduate Student Application to be Student Teacher Based on His Statements Supporting Sexual Relationships Between Adults and Children of Any Age

The plaintiff was a graduate student who enrolled in the University of Hawaii's secondary education certification program with the purpose of obtaining a teacher's certificate. While enrolled in the program Oyama made comments that a sexual relationship between adults and children should be legal so long as the child consented, regardless of the child's age. These comments and similar other comments created concern among the faculty. When confronted about his comments, Oyama stated that he would obey state law to the contrary, but still maintained his opinion. Oyama also expressed his opinion that nine of ten special education students he encountered were "fakers," and questioned professional diagnosis to the contrary. He also received some "unacceptable" field evaluations. Oyama's application for a teaching certificate was denied based upon his opinions which were deemed inconsistent with existing legal requirements and recognized professional

standards. The University also relied upon unacceptable field ratings.

Oyama filed an administrative appeal. The grievance committee concluded that Oyama “should not be allowed to student teach since dispositions as well as comments and statements made during classes and our interview are serious matters of concern.” It also found that the University committed two violations of its own procedures: it failed to timely notify Oyama of the standards for advancement in the academic program, and it failed to provide Oyama with his field experience evaluations. The University proposed reimbursing Oyama for certain expenses and allowing him to withdraw from certain courses, on the condition that Oyama release all claims related to his participation in the program. Oyama rejected the offer and filed suit alleging a violation of his First Amendment and Due Process rights. The District Court granted summary judgment and the plaintiff appealed.

On appeal, the Ninth Circuit recognized the hybrid nature of the circumstances involving both the public employee speech and student speech doctrines. It refused, however, to apply the student free speech doctrine to graduate level students. In reference to the public employee doctrine, the plaintiff argued that he was retaliated against for speech and the *Pickering* doctrine required that the court balance “the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.” The court rejected this argument also because Oyama was not a government employee. Rather, he was an applicant for a government program which *might* ultimately result in government employment.

Instead, the court relied upon a certification line of cases addressing First Amendment concerns. Applying this line of cases, the court acknowledged that “courts generally defer to certification decisions based on defined professional standards,” but are generally less

deferential when officials merely disagree with a student’s views. The court held “that the University of Hawaii’s decision to deny Oyama’s student teaching application did not offend the First Amendment because it related directly to defined and established professional standards, was narrowly tailored to serve the University’s foundational mission of evaluating Oyama’s suitability for teaching, and reflected reasonable professional judgment.”

The court also denied Oyama’s procedural due process claim because the decision to dismiss him was academic. Academic dismissals, as opposed to disciplinary dismissals, do not require a hearing and due process is satisfied “so long as the dismissal decision is ‘careful and deliberate.’” Summary judgment was affirmed.

Oyama v. University of Hawaii, --- F.3d ---- (9th Cir. 12/29/2015) (Wardlaw, Berzon, Owens).

WASHINGTON COURT OF APPEALS

Double Damages Under RCW 49.52 Unavailable in WLAD Action; Use of Prescribed Methadone is a Disability Under the WLAD

Plaintiff worked as a commercial truck driver. The employer required him to undergo an independent medical examination soon after he had accepted the job to obtain a commercial vehicle medical certificate. The plaintiff told the physician that he took methadone for chronic pain. The evidence showed that the plaintiff could drive safely and the physician issued him a medical certificate.

The employer refused to go through with the employment because he was taking methadone. Federal law allows people who are taking narcotics to drive commercial vehicles provided a doctor certifies them as safe. But non-binding federal advisory guidance prohibits commercial driving while taking methadone.

Plaintiff prevailed at trial on his claim of termination on the basis of disability in violation of the WLAD and obtained \$79,300 in back pay and \$7,500 in non-economic damages. The trial court ruled the plaintiff was not entitled to double damages pursuant to RCW 49.52 on his back wages. Division II affirmed following the reasoning of *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174 (9th Cir. 2002).

The court reasoned that RCW 49.52 requires a "pre-existing duty to pay a specific wage." In a discrimination case, there is no obligation to pay wages until the jury reaches a verdict and orders payment. The court distinguished *Allstot v. Edwards*, 114 Wn. App. 625, 60 P.3d 601 (2002), on the basis that employer and employee had entered into a stipulation to the payment of back wages and retirement that predated the jury's verdict in favor of the employee.

The court affirmed the denial of the employer's motion for judgment as a matter of law on the disability termination claim. The court held that under the WLAD "any mental or physical impairment may qualify as a disability. Without reaching the question whether the WLAD covers illegal drug use, the court held using a drug prescribed by a doctor isn't illegal drug use. The court also upheld the plaintiff's claim of termination on the basis of perceived disability and failure to accommodate. The court noted that there cannot be a reasonable accommodation claim for a perceived disability.

The court held that the trial court should have granted the employer's motion for judgment as a matter of law on the plaintiff's promissory estoppel claim because there was no promise of permanent employment subject only to dismissal for cause. Despite this, the court affirmed the judgment in favor of the plaintiff because there was no reason to believe that the jury had awarded any of the damages solely because of the erroneous promissory estoppel finding.

Finally, the court held the trial court had properly denied the plaintiff's motion for attorneys' fees as being untimely.

Clipse v. Commercial Driver Services, Inc., 189 Wn. App. 776, 358 P.3d 464 (8/25/2015) (Worswick, Maxa, Lee).

Plaintiff Not Required to Segregate Time Spent on Successful Failure to Accommodate from Time Spent on Unsuccessful Race Discrimination Claims Because they Arose from Common Core of Facts

Bright worked for the defendant's Human Resources Department. During her employment, the defendant conducted an investigation concerning possible ethical violations by her and others. While the investigation was ongoing, Bright took a leave of absence, and then filed suit alleging racial discrimination under the WLAD, RCW 48.60.180. Thereafter, Bright requested an accommodation based upon a psychological disability. The employer denied the accommodation and terminated Bright from employment due to "serious misconduct." Bright amended her complaint to allege retaliation and failure to accommodate.

On summary judgment, the racial discrimination claims were dismissed. At trial, the jury found against Bright on the retaliation claim, but in her favor on the failure to accommodate claim and awarded \$475,000 in damages. Plaintiff was awarded reasonable attorney fees on the basis that there was a "common core of facts" and "related legal theories." The defendant appealed the award of attorney fees.

The amount of an award of attorney fees under the WLAD is reviewed for abuse of discretion. A trial court abuses its discretion if a decision is manifestly unreasonable or based on untenable grounds or untenable reasons. Because the defendant did not challenge the trial court's findings of fact, they were verities on appeal.

The defendant argued that the recovery was substantially less than the amount requested and anticipated. But the Court of Appeals rejected that argument because the recovery substantially exceeded the settlement offers, and “[t]he trial court has discretion in determining the plaintiff’s degree of success.”

The court also determined that there was a “common core of facts in both her discrimination claims challenging the decision to terminate.” The court rejected the defendant’s argument that the claims could have been filed in separate lawsuits: “Courts should treat claims as separate lawsuits when they are both factually and legally unrelated.”

The award of attorney fees was affirmed and attorney fees awarded on appeal.

Bright v. Frank Russell Investments, --- Wn. App. ---, 361 P.3d 245 (11/2/215). (Cox, Lau, Applewick).

Original, Optional Arbitration Agreement Enforceable Even Though Subsequent Version is Procedurally Unconscionable in that it Required a Current Employee to Sign or Be Fired

Plaintiff worked for employer from 1997 until 2013. He relocated to Washington in 2010. He signed an arbitration agreement in 2011 and another in 2013. The 2011 agreement allowed the employee to opt-out. The 2013 agreement required the employee to sign or be fired. The plaintiff filed suit in Superior Court. The employer successfully moved to compel arbitration.

Division III affirmed and enforced the 2011 optional agreement. It, however, held that the 2013 agreement was procedurally unconscionable. The court held that under *Adler* requiring a current employee to sign an arbitration agreement or be terminated was not a meaningful choice. It makes no difference whether the employer would have actually fired the employee or not.

The court stopped short of holding that all mandatory mid-term arbitration agreements were procedurally unconscionable. The court suggested that being offered a reasonable time to find new employment might be sufficient as well as being offered additional consideration.

Mayve v. Monaco Enterp., --- Wn. App. ---, --- P.3d ---- (11/3/2015) (Korsmo, Fearing, Brown).

Employee Opened the Door at Third Trial to Adverse Jury Verdict on Separate Claim at First Trial by Referring to Evidence in Violation of Trial Court Order

Lodis worked for Corbis as a V.P. in Human Resources. The person who hired Lodis was replaced by a new CEO, Gary Shenk, who promoted Lodis to his executive team. Lodis was 55 years old at the time of the promotion. Shenk allegedly made several age-related discriminatory remarks about older workers. Lodis, as V.P. of Human Resources, expressed concern directly to Shenk about the discriminatory remarks, and also complained to the company’s General Counsel. Thereafter, Shenk promoted Lodis to senior Vice President with a pay raise and an incentive bonus.

Shortly after receiving the promotion, Lodis received a terrible performance review from executive team members and an independent consultant. He was placed on probation, and then allegedly lied to Shenk about meeting with his direct reports as the probation required. In March 2006, Lodis was terminated from employment for failing to meet the terms of his probation, lying to his superior, and retaliating against another employee regarding a sexual harassment claim.

Lodis brought suit alleging age discrimination and retaliation under the WLAD. Summary judgment was granted for the defendant on the retaliation claim. Later in the litigation, it was discovered that Lodis failed to record any of his vacation time but accepted a payout of \$41,155

for 329 hours of accrued but unused vacation time. Based upon this evidence, Corbis counterclaimed for breach of fiduciary duty, unjust enrichment, and fraudulent misrepresentation. Corbis also claimed after-acquired evidence.

The jury found in favor of the defendant on the age discrimination claim. It also found in the defendant's favor on the breach of fiduciary duty counterclaim, but awarded no damages. The Court awarded a new trial to Corbis on the counterclaim based upon the incongruous result of finding liability but no damages. At the second trial, a new jury again found a breach of fiduciary duty and awarded \$42,389 in damages.

On appeal, the Court of Appeals affirmed the judgments concerning age discrimination and breach of fiduciary duty, but reversed the summary judgment ruling on the retaliation claim which was remanded for a third trial. *See Lodis v. Corbis*, 172 Wn. App. 835 (2013).

On remand, Lodis alleged retaliation based upon the age-related remarks made by Shenk, which the defendant generally denied. He also denied having been admonished by Lodis. Shenk did admit to having referred to a new executive team as the "young team," but argued that the comment was unrelated to age and was meant to express the passion, energy, and new thinking of team members. Shenk again denied that Lodis raised the issue with him. Likewise, the company's General Counsel also denied having received complaints from Lodis. Lodis produced no corroborating testimony in support of his complaints about age-related remarks.

Prior to trial, the court ruled that Lodis could only introduce evidence of age discrimination that he reported to management and which was the basis of his retaliation claim; that Lodis could not re-litigate the breach of fiduciary duty (which formed the basis of an after-acquired evidence defense) and which had been previously decided against Lodis in the second trial; and that the defense verdict on the age discrimination claim was

inadmissible. However, the trial court found that because Lodis repeatedly violated the ruling in reference to age discrimination he "opened the door," and the prior defense verdict on age discrimination was admitted into evidence subject to a limiting jury instruction. The court also allowed evidence of the defense verdict on the issue of a breach of fiduciary duty relevant to after-acquired evidence. The jury returned a defense verdict on the only remaining claim of retaliation. Lodis appealed again.

On appeal, Lodis argued that the court erred by not allowing him to introduce all evidence of age discrimination of which he was aware in order to support his "reasonable belief" of age discrimination. The court ruled that under ER 403 evidence of age discrimination unrelated to his opposition conduct had minimal relevance, and that the prejudicial affect outweighed the probative value. Under the circumstances, the trial court did not abuse its discretion.

The Court of Appeals affirmed that Lodis had "opened the door" by repeatedly introducing evidence of age discrimination contrary to the court's ruling in limine. It was therefore "prudent and even-handed" to allow the introduction of the prior verdict on age discrimination. Relying upon the law of the case, the court affirmed exclusion of evidence that Lodis did not breach a fiduciary duty owed to Corbis, and also affirmed the introduction of the jury's previous finding on that issue as it related to the affirmative defense of after-acquired evidence.

Lodis v. Corbis, ___ Wn. App. ___, --- P.3d --- (12/28/2015) (Dwyer, Trickey, Cox).

MEMBER VICTORIES AND DEFEATS

Judith Lonquist represented the employee in *Bright*.

Jack Sheridan represented the employee in *Lodis*.

JOIN THE WELA LISTSERVE

WELA members are entitled to participate in an Internet-based electronic discussion group, or “listserv,” 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
jneedle@wolfenet.com

2015 WELA BOARD OF DIRECTORS

Beth Terrell (206) 816-6603
Chair bterrell@tmdlegal.com

Terry Venneberg (253) 858-6601
Vice-Chair terry@washemploymentlaw.com
CLE Co-Chair

Larry Kuznetz (509) 455-4151
Secretary larry@pkp-law.com

Sean Phelan (206) 682-6711
Treasurer sphelan@frankfreed.com

Kathleen Phair Barnard (206) 285-2828
Immediate Past Chair barnard@workerlaw.com

Jeffrey Needle (206) 447-1560
Amicus Chair jneedle@wolfenet.com
Legislative Co-Chair

Jesse Wing (206) 622-1604
Legislative Co-Chair jessew@mhb.com

Teri Healy (206) 220-6916
CLE Co-Chair teri.healy@eoc.gov

Daniel F. Johnson (206) 652-8660
Communications Chair djohnson@bjtlegal.com

Hardeep S. Rekhi (206) 388-5887
Coalition Chair hsrekhi@rekhilawfirm.com

Lindsay Halm (206) 622-8000
At Large halm@sgb-law.com