

## NINTH CIRCUIT

### ***Federal Labor Law Does Not Pre-Empt State Law Gender Based Hostile Work Environment Claim Because It Did Not Require Jury's Interpretation of the CBA***

Plaintiff worked for UPS at Boeing Field in Seattle. She was represented by a union. She frequently complained of discrimination and demeaning treatment based on gender. She filed numerous grievances. In 2009 she filed a discrimination charge with the Washington State Human Rights Commission alleging among other things that UPS had a pattern and practice of favoring male employees by offering them extra work. The term "extra work" is not defined in the CBA and appeared only in an addendum that applied to a different job classification.

Two years later, UPS fired the employee for dishonesty. She filed suit in state court for discrimination, hostile work environment retaliation and wrongful termination. UPS removed the case to federal court. Judge Jones granted partial summary judgment on some of the plaintiff's claims but allowed her gender-based and retaliation claims to go to trial. He initially rejected UPS's argument that federal law preempted the gender claims because they were inextricably intertwined with the CBA.

The jury found for UPS on the disparate treatment and retaliation claims. It returned a verdict for the plaintiff for \$500,000 on the hostile work environment claim. In ruling on UPS's Rule 50/59 motion, the district court ruled that the plaintiff's rebuttal testimony about "extra work" had implicated the CBA and intruded into preempted areas. Give this, the court deemed the damages grossly excessive. The court therefore ordered a new trial on the hostile work environment claim separate from the extra work

issue. The jury ruled for UPS at the second trial. The plaintiff appealed.

The Ninth Circuit reversed the grant of a new trial and reinstated the original hostile work environment verdict. Judge Berzon reiterated that Section 301 of the National Labor Relations/Labor Management Relations Act preempts state law claims only if (1) the right at issue is grounded in the CBA rather than state law and (2) whether the state law right is substantially dependent on the terms of the CBA. A state law claim depends on the CBA where the fact-finder must actually interpret the CBA, as opposed to just consult it. Preemption will not arise where there is a grievance/arbitration procedure to make the necessary interpretation of the CBA.

Here the panel ruled that nothing in the nature of the plaintiff's hostile work environment claim required interpretation of the CBA. Nothing in the court's jury instructions required interpretation of the CBA for the jury to find for the plaintiff. Her contention was not that UPS created a hostile work environment by violating any of her contractual rights. Her claim was that UPS's failure to assign her work as the CBA on its face provided showed its hostility to her based on gender. Moreover, here the parties had resolved any issue of the meaning of the CBA in the course of the plaintiff's numerous union grievances. No interpretation of the CBA was required on the part of the jury.

The court remanded the case for Judge Jones to reconsider whether the \$500,000 verdict was grossly excessive given there was no preemption of any of the plaintiff's hostile work environment claim.

*Matson v. UPS*, 840 F.3d 1126 (9<sup>th</sup> Cir. 11/4/16) (Berzon, Graber, Murgia).

## WASHINGTON COURT OF APPEALS

### ***While Proof of Replacement by Someone Outside Protected Class is Not Required Element of Prima Facie Case under RCW 49.60, it is a Relevant Fact on Summary Judgment***

Plaintiff was a part-time manager of accounting for the PUD for 27 years. Upon the termination of the General Manager, she was promoted to Interim General Manager, helped organize the search for a permanent replacement, and retained an executive search firm. The search firm selected Mr. Ward as the new General Manager. Mr. Ward and plaintiff did not get along, and she didn't approve of his management style. The personality disputes went from bad to worse, and plaintiff complained to a PUD commissioner. Plaintiff suggested a survey of employees, and, as requested by the Commissioner, drafted a survey and distributed it to the other Commissioners for their approval. When Ward learned of the survey he concluded that plaintiff went behind his back and was "out to get him." Ward terminated plaintiff's employment "without cause." Plaintiff was 57 years old. She was replaced in her position by a 51 year old woman.

Plaintiff filed suit alleging that age and gender discrimination were a substantial factor in the decision making process in violation of RCW 49.60 ("WLAD"). In support of the WLAD violation, Plaintiff claimed disparate treatment as compared to male employees and various alleged sexist comments and behaviors. Plaintiff also alleged negligent hiring, negligent retention, intentional infliction of emotional distress, and a violation of the defendant's employment policies.

All claims were dismissed at summary judgment. In reference to the WLAD claims, the trial court relied on the *McDonnell Douglas* shifting burden protocol. The trial court ruled that as part of the prima facie case plaintiff is required to show that

she was replaced by someone outside the protected group, or, in reference to age discrimination, by someone "significantly younger." Plaintiff appealed.

The Court of Appeals mostly relied upon federal law and concluded that as part of the prima facie case it wasn't necessary to show that plaintiff was replaced by someone outside the protected class. Nevertheless, such evidence is still relevant to the *McDonnell Douglas* analysis:

Where a discharged employee is replaced by someone within the protected class, it will not be overlooked in the *McDonnell Douglas* analysis. It is relevant evidence, helpful to the employer, that will bear on the step three determination of whether a plaintiff claiming discrimination has established that the employer's proffered reason was pretext or that discrimination was a substantially motivating factor in the employment decision.

The Court ruled that plaintiff had satisfied a prima facie case notwithstanding that she was not replaced by someone outside the protected class. The defendant then articulated legitimate business reasons for plaintiff's termination. The burden then shifted back to the plaintiff to demonstrate pretext or that age or gender was a substantial factor in the decision making process. As part of this third stage of the *McDonnell Douglas* shifting protocol, the Court relied *inter alia* upon the fact that plaintiff was replaced by a 51 year old woman "undercutting any inference that her sex or age were motivating factors in her termination." Her subjective belief "cannot be the basis for judicial relief." The Court found the allegedly sexist remarks and other proposed evidence to be "insufficient to permit a rational finder of fact to infer that the termination of her employment by Mr. Ward was more likely than not substantially motivated by discrimination."

In a published decision the Court affirmed summary judgment in reference to claims under the WLAD. Plaintiff's remaining claims were dismissed in an unpublished opinion.

*Mikkelsen v. Public Utility Dist. #1 of Kittitas County*, 195 Wn. App. 922, 380 P.3d 1260 (Div. III 9/13/16) (Siddoway, J., Korsmo, Lawrence-Berrey).

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