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

Court to Decide Whether MSPB is Exclusive Remedy for Constitutional Claims Brought by Federal Employees.

A federal statute bars from employment men who knowingly did not register for selective service before the age of 26. The plaintiffs in this case were federal civil service employees discharged from employment when it was learned they had not registered. They challenged the ban on various constitutional grounds. The district court rejected the claims on the merits but the First Circuit held 2-1 that the federal courts lacked jurisdiction to hear the claims in the first place because the federal Civil Service Act provides an exclusive remedy through the Merit Systems Protection Board. The third judge on the panel would have held there was federal court jurisdiction for constitutional challenges by federal employees seeking equitable relief but would have rejected the claims on the merits.

Elgin v. Dep't of the Treasury (10/17/11)

WASHINGTON – Court of Appeals

Employer's Compensation System Upheld Under Retroactive Department of Labor & Industries "Safe-Harbor" Approval.

The plaintiff, who was a resident of Georgia, was employed as a long haul truck driver. He was compensated on a per-mile basis for miles driven, a flat rate for each load/unload performed, and a per diem substance rate. He drove an average of 60 to 70 hours per week, both in and out of Washington. He filed a class action lawsuit claiming that the defendant failed to pay time and a half under the Washington Minimum Wage Act (MWA).

By way of background, the Court reviewed that the Supreme Court has ruled that the MWA required overtime compensation for hours over 40 worked per week for interstate driving, including hours spent working outside of Washington. Under former WAC 296-128-012 (1989), L&I reviewed alternative rate of pay systems used by employers to determine whether the systems resulted in a driver receiving compensation reasonably equivalent to one and one-half times the base rate of pay for actual hours worked in excess of 40 hours per week. The defendant sought a determination from L&I that its mileage based pay structure for interstate truck drivers [was] reasonably equivalent to the hourly rate, including overtime, paid to its local drivers, and L&I approved the defendant's compensation system. After the litigation started, the defendant's resubmitted its pre-*Bostain* compensation system for review under a "safe harbor" provision under WAC 296-128-012(3).

The employer moved to dismiss Plaintiff's claim under CR 12(b)(6) or, alternatively, for summary judgment under CR 56. The employer argued that *Bostain* applied only to Washington resident-employees or, alternatively, even if *Bostain* applied to Plaintiff, their compensation system complied with the MWA under the safe harbor provision. The plaintiff argued that *Bostain* was not limited to Washington residents and that the court was not bound by L&I's inadmissible ex parte approval of the defendant's compensation system. The Superior Court granted summary judgment to the employer on

the basis of the "safe harbor provision." The Court of Appeals affirmed.

The Court found that L&I's approval was not an adjudicative procedure, and therefore was not an ex parte communication. In addition, L&I's approval of the defendant's compensation system was not a product of an L&I employee's subjective opinion that the employer was in compliance with the MWA. Rather, L&I "has the authority to supervise, administer, and enforce all laws pertaining to employment including wage and hour laws." The department may also determine if an alternative compensation scheme is reasonably equivalent to the hourly statutory overtime requirements. WAC 296-128-012(1)(c). Such determinations are within L&I's specialized expertise. "We hold that L&I's retroactive approval under the WAC 296-128-012(3) "safe harbor" provision is entitled to substantial weight and should be upheld as plausible construction of the statute, and not arbitrary, capricious, and contrary to the law.

Westberry v. Interstate Distributor Co., --- Wn. App. ---, --- P.3d ---, (Div. II 10/4/11; Quinn-Brintnall, Hunt, Penoyar)

Victories & Defeats

David Strobaugh, Steve Strong & Steve Festor represented the employee class in *Westberry.*

Book Review

By Susan Mindenbergs

Trial in Action: The Persuasive Power of Psychodrama
Published by Trial Guides, 2010

As I begin the push toward trial in a case brought by the director of an early college program for Native American high school students formerly employed by an well-known private university, I turn to "Trial in Action: The Persuasive Power of Psychodrama" for help in preparing for voir dire. How do I convey to a jury panel that this sophisticated and educated group of people actually fired a long-term faculty member because she is not "Native" enough to direct the program she designed and ran for years? This book is a guide to answering that question. Moreover the authors provide techniques and strategies for use at every phase of the trial from voir dire to closing arguments using psychodramatic methods.

Psychodrama is a tool that has been successfully used for decades in therapeutic settings. The authors, Joane Garcia-Colson, Fredilyn Sison, and Mary Peckham, demonstrate how psychodrama can be used as an effective tool for trial lawyers. They describe psychodrama as "a powerful method that not only brings out the humanity of people, but also the universal stories and truths that connect us all." This book gives the reader concrete examples of how to use psychodrama to better connect with jurors.

These three trial lawyers are also Certified Practitioners of Psychodrama. Their book is like a travel guide to trials. Each chapter is a roadmap of how best to tell your client's story. After giving some historical perspective of psychodrama, the authors lead us through the labyrinth of a trial weaving together the fabric of storytelling in a practical and understandable way. They debunk the mythology that we lawyers cannot be human beings at trial—in fact they encourage us to form a group with the jury, stay in the moment, and always listen, which is the key to storytelling. Although I have been involved for the past eight years learning and teaching trial skills using psychodrama methods, this book is the framework for using this method laid out in a practical and useful way.

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

Victoria L. Vreeland (206) 676-7528
Chair vvreeland@gth-law.com

Kathleen Phair Barnard (206) 285-2828
Vice-Chair barnard@workerlaw.com
Membership Chair

Steven Festor (206) 622-3536
Treasurer skfestor@bs-s.com

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

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

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

Beth Terrell (206) 816-6603
Programs & Social Events bterrell@tmdlegal.com

Steve Connor (206) 654-4011
Legislative Co-Chair steve@cslawfirm.net

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

Terry Venneberg (360) 377-3566
CLE Co-Chair tavlaw@qwest.net

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