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ALERT

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## CASE UPDATES

### FEDERAL - Ninth Circuit

***Comparative Evidence of How Union Treated Two Male and one Female Employees Sufficient to Prove Sex Discrimination.***

The plaintiff was an eight and one half year employee at a food store and a union member. The collective bargaining agreement provided that just cause was required for dismissal. She was terminated for two alleged incidents of profanity to co-workers. She had no prior history of discipline. The union failed to file a grievance after the first incident. After she was fired following the second incident, the union filed a grievance. The union's attorney concluded that the company would win the grievance before an arbitrator because no grievance was filed on the first incident. The union did not take the second grievance any further. The plaintiff then sued the union for sex discrimination and breach of the duty of fair representation. She argued that the union pursued men's grievances more zealously than women's. In a bench trial, the district court ruled in her favor and the Ninth Circuit affirmed. The court ruled that the Union's failure to file a grievance after the first incident was an arbitrary action and a breach of its duty. The court affirmed the sex discrimination finding against the union based on comparative evidence of how the grievances of two male and one other female employees were handled. The court ruled that this was sufficient evidence of comparative (rather than statistical) evidence of discrimination because the employees were similarly situated in all material respects to the plaintiff. *Beck v. UFCW Local 99*, 506 F.3d 874 (9th Cir. 2007).

***Government Employee Rights Act of 1991 Barred by 11th Amendment.***

This case involved Margaret Ward, who was appointed director of the Governor's Office by the incoming Governor of Alaska, and Lynda Jones, a special assistant. Four years later they were terminated allegedly for supporting his election rival. Ward and Jones alleged the termination was because of gender discrimination and opposing gender discrimination. The EEOC proceeded with the case under the Government Employee Rights Act of 1991 ("GERA"), which wiped out the existing Title VII exemption for members of an elected officials' staff. The Governor argued 11th Amendment immunity based on a 2002 Supreme Court case holding that the Amendment applied to federal agency adjudications of private complaints against states. The EEOC disagreed. The Ninth Circuit ruled in favor of the Governor. The majority held there were insufficient legislative findings in 1991 to vitiate 11th Amendment immunity and that the original 1972 findings to justify extension of Title VII under the 14th Amendment to the states were stale by 1991. Judge Paez dissented. He reasoned that because GERA was an amendment to a statute that had validly waived 11th Amendment immunity, Congress clearly intended to vitiate 11th Amendment immunity and made sufficient findings to do so. *Alaska v. EEOC*, 508 F.3d 476 (9th Cir. 2007) (Noonan, Wallace; Paez).

***Court Issues Revised Opinion in Dukes v. Wal-Mart.***

The Ninth Circuit substantially revamped its opinion in *Dukes v. Wal-Mar*t, the largest class action ever certified. While the result is the same - class-certification upheld by a 2-1 vote - there are some significant modifications to the earlier opinion. The appellate court made clear that the trial court must consider all evidence relating to Rule 23 even if that evidence overlaps with merits evidence. It also held that people who were no longer employees at the time the complaint was filed cannot be part of a class certified under Rule 23(b)(2). The court retreated from its earlier holding that *Daubert* never applies to expert testimony at the class-certification stage. The panel ruled that Wal-Mart did not make a proper *Daubert* challenge to the expert testimony submitted because it simply attacked the expert's conclusions about its culture of bias. Judge Kleinfeld again dissented. *Dukes v. Wal-Mart*, No. 04-16688 (Dec. 11, 2007; Pregerson; Hawkins; Kleinfeld).

***Public Employee's Complaints that His Supervisor is Corrupt is Speech Protected by the First Amendment.***

Ken Marable, a chief engineer for the Washington State Ferries (WSF), reported that WSF management were running corrupt schemes including claiming inappropriate overtime and "pay padding" that wasted public resources and was a threat to public safety. He claimed that his complaints led the Washington State Auditor to initiate an investigation. Thereafter, WSF charged Marable with insubordination and misconduct. After a *Loudermill* hearing presided over by one of his allegedly corrupt supervisors, WSF suspended Marable without pay for a week and barred him from being Chief Engineer for a year. Marable sued under 42 U.S.C. §1983 alleging the WSF and his superiors violated his free speech rights under the First Amendment. The district court dismissed his claim on summary judgment holding that his communications were "on-the-job speech rather than speech as a citizen," fell within his job duties, and were not adequately of "public concern" so were not protected. Reversing, the Court declared: "At the outset, we think it worth noting that an employee's charge of high level corruption in a government agency has all the hallmarks that we normally associate with constitutionally protected speech." And, reporting corruption was "not in any way a part of [Marable's] official duties," the Ninth Circuit ruled, rejecting the WSF's attempt to rely on a WSF training manual catch-all that the chief engineer "[k]now and enforce all applicable federal and state rules and regulations." *Marable v. Nitchman*, No. 06-35940 (Dec. 26, 2007, B. Fletcher, Kleinfeld, Gould).

***En Banc Ruling Adopts New Standards for Business Necessity Defense Under ADA.***

UPS categorically excluded individuals from package car driver positions if they could not pass a U.S. DOT hearing standard that does not by its terms apply to package cars. The drivers filed a class action suit under the ADA. After a bench trial, the district court ruled in favor of the plaintiffs and entered an injunction. UPS appealed the injunction interlocutorily. A three-judge panel of the Ninth Circuit affirmed, ruling that the UPS policy was facially discriminatory and rejecting UPS's argument that the employees had the burden of proving they could drive safely as part of showing they were "qualified" for the positions in question, which is the employer's burden to show an ADA business necessity defense. *En banc*, the Ninth Circuit reversed and remanded, holding that the district court used the wrong standards and failed to make a necessary finding. The district court found that class representatives met the prerequisites to apply for the driving positions, specifically that they are "safe" drivers, rejecting UPS's argument that the plaintiffs also had to prove they are safe drivers even though hearing impaired -- on the ground that this would impose on the plaintiffs the burden of disproving the employer's business

necessity defense. The *en banc* panel concurred, explaining: "Because UPS has linked hearing with safe driving, UPS bears the burden to prove that nexus…The employees, however, bear the ultimate burden to show that they are qualified to perform the essential function of safely driving a package car," not their personal cars. Concluding that the district court did not make this finding, the panel reversed and remanded for the employees to prove that they are "qualified individuals." The Court also remanded for the district court to re-analyze reasonable accommodation under a new standard, overruling the Circuit's prior holding in *Morton v. United Parcel Service, Inc.*, 272 F.3d 1249 (9th Cir. 2001), which had adapted "the Title VII and ADEA BFOQ safety standard in the ADA context." To show business necessity, an employer "bears the burden of showing that the qualification standard is (1) 'job-related,' (2) 'consistent with business necessity,' and (3) that 'performance cannot be accomplished by reasonable accommodation.'" To show the qualification is job-related, the employer must show that it "fairly and accurately measures the individual's actual ability to perform the essential functions of the job" and where the standard is a blanket exclusion of a protected class it must have "a predictive or significant correlation between the qualification and performance of the job's essential functions." For business necessity, the employer must show that the qualification "substantially promote[s]" business needs, a standard that "is quite high," not satisfied by "mere expediency." Finally, "the employer must demonstrate either that no reasonable accommodation currently available would cure the performance deficiency or that such accommodation poses an 'undue hardship.'" Holding that the district court had improperly applied the modified BFOQ analysis of *Morton*, the Ninth Circuit reversed and remanded the issue. Judge Berzon concurred in much of the opinion but complained that the majority opinion failed to give adequate guidance to the district court on how the plaintiffs can satisfy their ultimate burden that they can drive package cars safely. She would not remand on the "qualified individual" point, concluding that the plaintiffs should only have to meet the eligibility requirements before UPS must prove its defense. *Bates v. UPS*, No. 04-17295 (Dec. 28, 2007, *en banc* opinion by McKeown; partial concurrence/dissent by Berzon)

***42 U.S.C. § 1981 Does Not Provide a Cause of Action Against States.***

Helen Pittman sued her employer, the Employment Department of the State of Oregon, in state court under section 1981 for race discrimination, and its director under section 1983. The State removed the case to federal court. The district court held that by its removal the State waived sovereign immunity but nevertheless the court granted summary judgment for the State holding that section 1981 does not create a claim against a state. The Ninth Circuit affirmed. In *Jett v. Dallas Independent School District*, 491 U.S. 701 (1989), the Supreme Court had concluded that "the prohibition on discrimination by a state or its officials contained in § 1981 can be enforced against state action only by means of §1983." Two years later, Congress amended section 1981 by adding subsection (c) prohibiting discrimination "under color of State law." Pittman argued that the amendment implied a private cause of action against states. The Ninth Circuit had previously held that the amendment overruled *Jett* to create a cause of action against municipalities and state actors, explaining: "[T]here was already a remedy for violations of §1981 by municipalities under §1983…however, 'there is no alternative enforcement mechanism in the revised §1981 itself,'" so "implying a cause of action against municipalities under §1981 'imposes no substantive change on federal civil rights law,' because such actions were already possible under §1983." Although the Court acknowledged that neither the statute nor the Ninth Circuit's prior holding supported distinguishing between municipalities and states, they should nevertheless be treated differently because unlike recognizing a cause of action against municipalities, "recognizing a cause of

action against state actors under §1981, would, in fact, expand the remedies available under that statute beyond those available under §1983." Even though the State of Oregon had waived sovereign immunity in this case, the Ninth Circuit held that allowing a cause of action under section 1981 would "allow actions in state court…at least when the state does not invoke sovereign immunity" which must be supported by a clear statement of Congressional intent not found in the statute or its legislative history. *Pittman v. State of Oregon*, No. 05-35900 (Dec. 5, 2007, Fisher, Berzon, Barzilay of Court of Internat'l Trade sitting by design.)

***Sheriff's Dep't Did Not Violate Constitution by Punishing Deputies for Refusing to Give Statements for Internal Criminal Investigation into Their Conduct.***

Plaintiffs, four L.A. County Sheriff's deputies, were instructed to wait at the police station at the end of their shift to be interviewed by internal affairs officers as part of a criminal investigation into excessive force allegations. After about 3½ hours of waiting, the deputies were asked questions but declined to answer them on advice of counsel. The deputies were reassigned from patrol to station duties pending completion of the investigation. A year later, the district attorney compelled statements but did not ask that they waive their constitutional right to immunity for their statements in a criminal proceeding. Within days, the deputies were cleared of wrongdoing. They were never criminally charged, and their duties were restored. The deputies brought section 1983 claims against their superiors challenging their initial detention to answer questions and their punishment for failing to give non-privileged statements. They alleged unreasonable seizure under the Fourth Amendment for being told to wait in the office to be interviewed, violation of Fifth Amendment due process for having to choose between their right against self-incrimination and their employment, and that Fourteenth Amendment substantive due process was violated. The trial court granted summary judgment for the defendants on all claims. On a 2-1 vote, the Ninth Circuit affirmed. The Court of Appeals explained: "When determining whether a superior law enforcement officer 'seized' a subordinate, we must glean from the circumstances whether the subordinate's decision to heed his superior's order to remain at a designated location stemmed from a fear if he tried to leave, of physical detention, or merely adverse employment consequences." Weighing several facts, the Court held it was the latter. An employer "may not seize its employees and detain them against their will without probable cause." Nevertheless, "the Fourth Amendment does not protect against the threat of demotions or job loss" and "we hold that a law enforcement agency has the authority as an employer to direct its officers to remain on duty and to answer questions from supervisory officers as part of a criminal investigation into the subordinates' alleged misconduct." Rejecting the self-incrimination claim, the Ninth Circuit relied on its finding that "the deputies were not compelled to answer the investigator's questions or to waive their immunity from self-incrimination" and that no self-incriminating statement was ever used against them in a criminal proceeding—*sine qua non* for a claim. Finally, the majority dispatched the substantive due process claim with little discussion, concluding that the transfer from patrol to station duties did not meet constitutional standards to establish a claim. In a lengthy dissent, Judge Kozinski saw the evidence very differently, concluding there may have been an illegal seizure because there was no probable cause and it was a disputed fact whether a reasonable person would have believed she was free to go. And, he recognized the Fifth Amendment claim as one for retaliation, on which a jury could find liability because "defendants played cat and mouse with plaintiffs for 12 months, forcing plaintiffs to guess whether any statements they gave could be used to prosecute them," improperly putting economic pressure on them to give up their right against self-incrimination. *Aguilera v. Baca*, No. 05-56617 (Dec. 27, 2007, Kozinski, Kleinfeld, Tallman)

**WASHINGTON - Supreme Court**

***Driving Time to and from Work for Service Technicians is Compensable under MWA; Prejudgment Interest Rate on MWA Judgment is 12%.***

Plaintiffs, a class of 69 installation and service technicians of home security systems, sued their employer, Brink's, under the Minimum Wage Act (MWA), RCW 49.46, for failing to pay wages for time spent driving company trucks from their homes to the first jobsite, and back home from the last jobsite (collectively "drive time"). Brink's paid the technicians for drive time only if the site was located more than 45 minutes from both their homes and the Brink's office, and then only for drive time in excess of 45 minutes. The trial court granted summary judgment to the plaintiffs, awarding back pay, pre- and post-judgment interest at 12%, attorney's fees, and costs. The Washington Supreme Court affirmed in all respects. It held that under WAC 296-126-002(8), the technicians were "on duty" at a "prescribed work place" under the MWA because Brink's controls the use of their trucks, and requires technicians to wear seat belts, obey traffic laws, not park haphazardly, lock their vehicles at all times, and never carry alcohol or passengers, or engage in personal activities like errands. Further, they receive their assignments at home and must spend time writing them down and mapping the route in advance. They are "on duty" while they drive, and are subject to being rerouted to other jobs. And, while driving, technicians are at "a prescribed work place" because driving the trucks is an "integral part of the work performed." Trucks carry the necessary tools and equipment for installation and service, per company policy technicians must fill out paperwork in the truck (or a customer's home), and must keep their truck "clean, organized, safe, and serviced." Moreover, technicians report to the company office only once a week for a meeting and to refill supplies. Apparently a jury trial was held on damages at which plaintiffs presented expert testimony calculating drive times with the software program. "Because the jury did not have to rely on 'opinion or discretion" to determine damages, the claim was liquidated so pre-judgment interest was proper. The Court also held that violations of the MWA are contractual, not tortious, in nature so the 12% interest rate of RCW 10.52.020(1) is applicable, and affirmed without discussion the attorney fees and costs, and awarded fees on appeal to plaintiffs. *Stevens v. Brink's Home Sec., Inc.*, 169 P.3d 473 (2007)

***Supreme Court Upholds State Pregnancy Discrimination Regulation but Sua Sponte Creates Same Action Defense in Washington.***

Ms. Hegwine applied for a clerk position with Fibre. The job description mentioned nothing about lifting requirements. There was no written job description. During the interview, the Company told her there was a 25 lb-lifting requirement. She was offered the position contingent on passing a physical. The doctor's intake questionnaire asked whether she was pregnant, which she was. That doctor required her to get a medical release from her own doctor. Ms. Hegwine's doctor said she could lift between 20 and 30 lbs. She reported to work but the Company refused to let her begin her job duties. Ms. Hegwine's doctor raised her lifting restrictions to 40 lbs. The Company then decided that the position required the ability to lift 60 lbs and withdrew its offer of employment. The plaintiff filed suit for pregnancy discrimination. The superior court applied a disability discrimination analysis and ruled in favor of the Company. The court of appeals reversed and ruled for the plaintiff as a matter of law. The Supreme Court affirmed in an opinion by Justice Johnson that establishes much good law but silently overrules *MacKay v. Acorn Custom Cabinetry*, 127 Wn.2d 302, 898 P.2d 284 (1995), in a throw-away sentence.

The Court upheld the WACs defining pregnancy discrimination as a form of sex discrimination. The majority held that HRC regulations are

"interpretative regulations" to be given great weight by the Court so long as they do not conflict with the statute. The Court rejected the employer's argument that a disability accommodation analysis applied. The Court further held an employer can refuse to hire a pregnant woman only based on a valid BFOQ or business necessity. The Court correctly ruled the employer must show a BFOQ. Unfortunately, the Court relied on its earlier decision in *Kastanis v. Education Employee Credit Union*, 122 Wn.2d 483, 859 P.2d 26, 865 P.2d 507 (1993) to rule that the employee must show lack of business necessity. *Kastanis* was based on an already legislatively overturned U.S. Supreme Court case. Under federal law, business necessity is an affirmative defense that arises only after the plaintiff proves discrimination. The *Hegwine* Court ruled the employer must produce evidence of business necessity at the second step of the *McDonnell Douglas - Burdine* framework once the plaintiff presents a *prima facie* case and the plaintiff then must show that the claim of business necessity is pretexual. The Court ruled that the plaintiff had shown pretext. It also ruled that Fibre had failed to prove a BFOQ.

The Court also ruled that Fibre *per se* violated the WLAD when its doctor inquired about whether Hegwine was pregnant as part of its pre-employment process. In doing so, the Court found that there was direct evidence of this violation. Citing a court of appeals' opinion that followed federal law, the Court ruled that Fibre could avoid liability only if it showed it would have taken the same action anyway. By allowing an employer to prove a "same action" defense, the Supreme Court silently overruled *MacKay*, which had held that such a defense was unavailable under Washington law. In a concurrence joined by Justices Charles Johnson and Fairhurst, Justice Madsen asserted that the Court should have treated the HRC WACs at issue as binding substantive law issued under the authority of the WLAD to make such regulations rather than merely interpretative regulations. Hegwine v. Longview Fibre Co, 172 P.3d 688 (2007)

***Victories & Defeats***

In *Hegwine*, the Supreme Court followed some, but unfortunately not all, of the legal analysis set forth in a WELA amicus brief authored by Mike Subit & Jeff Needle.

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