WELA *ALERT*

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WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION
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NEW WELA WEBSITE

We will be launching the website soon with a brief bank, jury instructions, and other features available to all members. Fundraising is essential to make the website viable over the long term. Please contact Vice-Chair Vicky Vreeland at (206) 676-7528 or vvreeland@gth-law.com to contribute financially.

CASE UPDATES

FEDERAL - Ninth Circuit

Employee Can Sue Under ADA For Post-Settlement Retaliation

After he was fired, Plaintiff Stephan Pardi – a licensed respiratory care practitioner – prevailed in a union arbitration on grievances relating to claims of disability discrimination and harassment by his employer, Kaiser Permanente. Shortly thereafter, Kaiser reported Pardi to the applicable California state regulatory body – the Respiratory Care Board (RCB) for entering false times on patients' charts – which Kaiser admitted it did not regularly do when it found alleged violations of other employees. Thereafter, Kaiser, Pardi, and the Union signed a severance agreement under which Kaiser paid Pardi money and agreed to accept his resignation in exchange for a release of claims. Several months later, the RCB requested information from Kaiser about its allegations against Pardi. Kaiser did not inform the RCB that it changed Pardi's termination to a resignation and it produced complaints that were not part of its investigation leading to termination of Pardi's employment. The RCB then suspended Pardi's certification and required him to undergo a psychiatric evaluation before renewing it. Additionally, Kaiser ignored requests from a potential employer and from Pardi's attorney to verify his employment leading the employer not to consider Pardi for a position. The Ninth Circuit reversed summary judgment for the employer ruling that a trial was necessary to determine whether Kaiser's post-settlement conduct breached the settlement agreement and constituted retaliation against Pardi in violation of the ADA. Finding that the Supremacy Clause prevented state law from impairing a federal claim under the ADA, the Court rejected Kaiser's claims that a state "litigation privilege" protected its communications with the RCB. The Court affirmed dismissal of Pardi's intentional infliction of emotional distress and intentional interference with Prospective Economic Advantage for lack of evidence. *Pardi v. Kaiser Permanente Hospital, Inc.*, No. 02-16447 (Nov. 15, 2004; Wallace, McKeown, Moskowitz sitting by desig. from S.D. Cal.).

WASHINGTON - Supreme Court

State Can't be Sued for Meal and Rest Break Violations Occurring Before 2003

The question in this rest and meal break class action was whether the State of Washington constituted an "employer" under RCW 49.12 prior to 2003. In 2003, the State enacted legislation (in response to the very lawsuit at

issue in this case) saying that prior to the date of the bills' enactment, the State was not covered (but would be in the future). Before the 2003 amendment, the text of RCW 49.12 pretty clearly had excluded the State from the statutory provision that supported the rest and meal break regulations, but the regulations themselves seemed to include the State. Prior Washington case law had assumed the State was included. Without relying on the 2003 amendment, the Supreme Court unanimously held that prior to 2003, the State was not an employer for the purposes of RCW 49.12. *McGinnis v. Washington*, 99 P.3d 1240 (Oct. 28, 2004).

Continued At-Will Employment Not Consideration for Mid-Term Non-Compete

Five years after he was hired, Anthony Labriola's employer asked him to sign a non-compete without offering any additional benefits. The Court held that "a non-compete entered into after employment has commenced is validly formed when there is independent consideration at the time the agreement is reached." Such independent consideration might consist of a promotion, bonus, a fixed term of employment or "perhaps" access to protected information. The Court erred, however, by distinguishing rather than disapproving a prior Division II case holding that there is consideration if an employee signs the non-compete after hire but before beginning work. Legally, it makes no difference when the employee signs the non-compete if there is no independent consideration. The majority further suggested that continued employment and/or continued training could constitute consideration in some cases, just not this one. Justice Madsen would have gone further and held that continued at-will employment is never sufficient consideration. Justice Madsen also would have invalidated the non-compete as substantively unreasonable. The concurrence contains some excellent language on why non-competes should be limited. The most important aspect of the majority opinion may end up being its holding that a prevailing employee is entitled to attorneys' fees if the employee merely partially invalidates a non-compete. The majority opinion has some good language regarding mitigation as well. *Labriola v. Pollard Group*, No. 74002-0 (Nov. 10, 2004).

WASHINGTON - Court of Appeals

Employer Liable for Ineffective Remedial Action; Fee Multiplier Doesn't Depend on Proportionality

Plaintiff Perry won a sexual harassment verdict issued by Superior Court Judge Dean Lum (no jury) against her employer, Costco, because her male co-worker Smith made repeated sexual comments, exposed himself, threatened to sexually assault her while he was "feeling crazy," and because the employer failed to prevent continued harassment of her and other female workers. A Costco manager interviewed other women Perry identified as victims of Smith's harassment and recommended Smith be fired. A Costco vice president disagreed concluding that Costco could not confirm Perry's claims. Costco transferred Smith to another shift and required him to attend three hours of sensitivity training and sign a Contract for Continued Employment, which conditioned his employment on completion of the training. After making repeated unsuccessful requests for a transfer to another location because of discomfort with her intermittent contact with Smith, Perry completed paperwork to transfer herself. And Costco did not offer Perry any counseling. Smith then began shopping at Perry's new location where he glared at her. When she complained, Costco management told her there was nothing Costco could do to keep Smith out of the store. Affirming the verdict that Costco's remedial action was ineffective, the Court of Appeals quoted favorable Ninth Circuit precedent: "Effectiveness will be measured by the twin purposes of ending the current harassment and deterring future harassment--by the same offender or others. If

1) no remedy is undertaken, or 2) the remedy attempted is ineffectual, liability will attach." The Court held that Costco's failure to take "affirmative steps to assist Perry in addressing her issues arising from the sexual harassment" such as offering her counseling and the requested transfer contributed to its liability. Finally, the Court found that the trial court abused its discretion when it declined Perry's request for a lodestar multiplier of 25% for her attorney fees because "a multiplier would result in an attorney's fees award that would be disproportionate to Plaintiff's damage award." The award was for $145,694.30 in damages, $148,945.00 in tax relief, and $213,262.12 in attorney fees, costs, and expenses. The Court reversed and remanded for a determination on the multiplier. *Perry v. Costco Wholesale, Inc*., No. 52454-2-I (Oct. 18, 2004, Cox, Coleman, Ellington).

ANNOUNCEMENTS

OFFICE SPACE: Frank Freed Subit & Thomas LLP have an office to rent. Call Cliff Freed if you are interested. (206) 682-6711.

VICTORIES AND DEFEATS

Please let us know what happens in your cases, good and bad, so we can all benefit.

DON'T FORGET ABOUT AMICUS HELP

Please remember that the WELA Amicus Committee, chaired by Jeff Needle, is available to consider submission of amicus briefs. The committee tries to keep informed about important issues on appeal, but needs members to help spot those cases in which WELA may want to have a say.

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.

PROGRAM COMMITTEE SOLICITS IDEAS

Vicky Vreeland and Susan Mindenbergs co-chair the programs committee. The committee plans the short programs WELA now regularly sponsors. Vicky and Susan welcome your suggestions for topics of interest.

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