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ALERT

18 WEST MERCER ST. SUITE 400
SEATTLE, WA 98119-3971
www.welaweb.org

Editors: Mike Subit / Jesse Wing

CASE UPDATES

Ninth Circuit

Casino Entitled to Sovereign Immunity as an Arm of Native American Tribe

Plaintiff Mark Allen was employed as a surveillance supervisor at a casino formed as a tribal entity by a compact between a federally recognized tribe and California. With his EEOC right-to-sue letter in hand, Allen sued the casino, a tribal member, and 300 John Doe defendants for terminating his employment in retaliation for his reporting rats in the restaurant and "for applying to 'the white man's court' for guardianship of three tribal children." The trial court dismissed Allen's pro se complaint finding the casino protected by sovereign immunity. Finding that the tribe's ownership and operation of the casino dispositive because it promoted "tribal economic development, self-sufficiency, and strong tribal governments," the Court affirmed that sovereign immunity extends to the casino. Likewise, the Court upheld the ruling that the casino did not waive its immunity by stating in Allen's employment application that he could be terminated "for any reason consistent with applicable state or federal law" or by stating in its orientation booklet that it would not discriminate based on categories protected by federal law. "These statements are not a 'clear' waiver of immunity," which is the standard. And the Court held that the Foreign Sovereign Immunities Act does not apply to tribes so waivers under the Act are not cognizable. The Ninth Circuit, however, reversed dismissal of Allen's section 1981 and 1985 claims against the individual defendants so he can amend his pro se pleadings "to assert these two claims intelligibly." *Allen v. Gold Country Casino*, No. 05-15332 (Sept. 29, 2006, Canby, Thompson, Hawkins).

Employee's Equitably Tolled Claims Relate Back to Complaint So Survive Despite Dismissal of All of Plaintiff's Original Claims as Untimely

After she timely filed her Title VII and ADEA claims, employee Alice O'Donnell's suit was dismissed without prejudice for failure to prosecute it during the pendency of an automatic stay entered when her employer filed bankruptcy. O'Donnell did not appeal the dismissal. After the stay was lifted, she filed a second complaint repeating her claims. Two years later she amended her second complaint to add an Equal Pay Act (EPA) claim based on the same facts. The trial court dismissed all her claims as time-barred. On appeal, the Ninth Circuit affirmed dismissal of her Title VII and ADEA claims because she did not file her second complaint within the 90-day period afforded by her EEOC right-to-sue letter and because she filed a separate action it did not "relate back" to her first complaint. The Court held that even assuming the doctrine of equitable tolling could be applied, the 90 days had run before the bankruptcy stay was issued so there was no time to toll. "[T]he timely filing of the complaint does not 'toll' or suspend the ninety-day limitations period." In contrast, the Court reversed dismissal of O'Donnell's EPA claims finding that they relate back to her second complaint and were timely filed because "the statute of limitations for those EPA claims was equitably tolled." Holding that the "defendants created the situation which impeded O'Donnell from pursuing her EPA claims," the Court concluded that "they cannot now claim to be prejudiced…." However, the Court noted that each discriminatory paycheck created a separate cause of action triggering a new limitations period so on remand O'Donnell can recover only for violations within the applicable limitations periods. *O'Donnell v.*

Vencor Inc., No. 05-15687 (Oct. 10, 2006, per curiam by Canby, Thompson, Hawkins).

Insurance Company Claim Adjusters Are Exempt Administrative Employees Under FLSA

This case was an FLSA collective action and multi-state law class action (including Washington) brought by 2,000 former and current claims adjusters of Farmers Insurance. Most claims adjusters worked out of their homes. The sole issue in the case was whether the adjusters were administrative employees exempt from the duty to be paid overtime. The district court held a three week bench trial. It held that the automobile claims adjusters were all non-exempt and that some employees in four other classes of adjusters were non-exempt, depending on the value of the claims they adjusted. The district court awarded $52.5 million in damages. The Company and the employees both appealed. The Ninth Circuit reversed and held that all of the adjusters were exempt. A recently promulgated DOL regulation holds that insurance adjusters are generally exempt and sets forth several relevant factors. That regulation was not in effect at the time of trial. The plaintiffs pretty clearly fell within the terms of the new regulation. The appellate court questionably held that the new DOL regulation did not represent a change in the law. The court did not reach the issue whether a different result would obtain under Washington law on the basis that the plaintiffs had waived that argument. *In re Farmers Insurance Exchange*, No. 05-35080 (10/26/06; Silverman; Gould, Rhoades (S.D. Cal.)).

UPS Fails to Satisfy Business Necessity Defense for Driver Hearing Standard

UPS categorically excluded individuals from package car driver positions if they could not pass a U.S. Department of Transportation hearing standard that does not by its terms apply to package cars. The drivers filed suit under the ADA. After a bench trial, the district court ruled in favor of the employees. UPS appealed. The Ninth Circuit affirmed. The court ruled that the UPS policy was facially discriminatory. The court rejected UPS' 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. As a matter of class action law, the court ruled that at least one named plaintiff had to have standing for the class to have standing. The panel defined "qualified" as meeting the basic job requirements for the position, but that qualified did not include proof of being able to drive safely. The court ruled that this argument would require the plaintiff to anticipate and negate the very safety analysis that the ADA's business necessity defense makes the employer's burden of proof. The court noted that by its terms the business necessity defense applies where a qualification standard screens out an individual with a disability, not a qualified individual with a disability. The court rejected the proposition that proof of discrimination under the ADA always requires proof of discrimination against a *qualified* individual with a disability. The court made clear that its analysis applied only when the issue is whether an employer may use an across the board qualification standard. The appeals court agreed with the district court that UPS's studies failed to prove either (1) substantially all deaf drivers present an unacceptably higher risk of accidents than non-deaf drivers or (2) there were no practical criteria for determining which deaf drivers present a heightened risk. Proof that a hearing driver is generally safer than a deaf driver was not sufficient to meet this defense because there very well could be some deaf drivers who are as safe or safer than some hearing drivers. The appeals court affirmed the district court's injunction against use of the DOT standard and requiring UPS to come up with a better test. *Bates v. UPS*, No. 04-17295 (10/10/06; Berzon, B. Fletcher, Gibson (8th Cir.)).

Washington Court of Appeals

Employee Entitled to His Attorney Fees under RCW 49.48.030 where Court Awarded Him Lost Wages Based on Promissory Estoppel

Relying on his employer's promise to rehire him to a position under a different retirement plan, state employee Robert Fraser retired. His employer hired someone else so plaintiff sued arguing promissory estoppel. After a bench trial, the superior court held that the employer promised only to rehire him to the at-will position he held before retiring but the position no longer existed after his retirement so the promise was unenforceable. Therefore, the employee had no expectation of future wages in the position but by retiring he had given up his right to revert to an available position. So, he was entitled to damages in the amount of "the difference between his monthly pension payment and the monthly salary for a classified position that was open when Fraser retired, projected out until he reached 65 years old." Having prevailed, plaintiff then requested his attorney fees under RCW 49.48.030. The trial court denied this request because Plaintiff had prevailed on a contract theory. Reversing, the Court of Appeals ruled that an award of fees does not depend on "the theory of recovery" and that the employee is entitled to his fees because he recovered "wages or salary owed" in a situation "analogous to a wrongful termination." *Fraser v. Edmonds Community College*, No. 57473-6-I (Nov. 27, 2006, Coleman, Becker, Schindler).

Organized Workplace Complaints By Supervisors Have No Legal Protection

Plaintiffs were groups of employees, mostly managers, who were fed up with the bad management of the Executive Director of the non-profit for which they worked. The managers of the group contacted the Board of Directors in writing about their concerns, in violation of a company rule. The Executive Director then fired two of the managers. The remaining plaintiffs wrote a second letter to the Board demanding the immediate removal of the Executive director and staged a walk-out. The Executive Director treated all of the employees as having resigned. They sued for wrongful termination, retaliation and negligent supervision. The superior court granted summary judgment to the employer and the court of appeals affirmed. Consistent with federal labor law, the court of appeals ruled that the original letter did not constitute concerted activity under RCW 49.32.020 because it was signed only by managers. The majority erroneously held that the letter was also unprotected because it failed to demand collective bargaining, was not about the terms and conditions of employment, and exceeded the demands in other cases. The court confused the general requirements for a public policy tort with the question whether the activity was concerted within the meaning of the statutes. Had it been sent by non-managers, the original letter should have qualified as concerted activity under section 7 of the NLRA, and under RCW 49.32.020. Judge Sweeney dissented. He believed the conduct at issue was concerted activity and that there were factual disputes whether all of the managers truly had managerial duties. *Briggs v. Nova Services*, No. 2414-8, (Div. III 11/14/06; Brown, Kulik, Sweeney).

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WELA *ALERT* EDITORS

Michael C. Subit (206) 682-6711
msubit@frankfreed.com

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

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Programs Co-Chair vvreeland@gth-law.com

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Programs Co-Chair susanmm@msn.com

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Immediate Past Chair lojal@aol.com