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ALERT

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**FEDERAL - U.S. Supreme Court**

***U.S. Supreme Court to Decide Whether Charge Filing Period In Disparate Impact Case Runs from Time Allegedly Discriminatory Exam Results Published or When Hiring Began.***

The issue in this case is whether a charge of disparate impact discrimination arising out of a selection exam must be filed within 300 days of the publication of the results of the exam or within 300 days of hiring decisions based on the exam. The Seventh Circuit ruled that the charge must be filed within 300 days of the publication of the results of the exam. The Ninth Circuit had previously reached a contrary result and held that the filing period ran from when the employer began to hire off the allegedly discriminatory eligibility list.

*Lewis v. Chicago* (cert. granted Sep. 30, 2009).

**FEDERAL - Ninth Circuit**

***Subjective qualifications not part of prima facie case.***

Tiffany Anne Nicholson alleged that her former employer, Cape Air, discriminated against her on account of her sex when it suspended her from flying the two-pilot ATR 42 airplane. The district court granted Cape Air's motion for summary judgment, finding that Nicholson could not establish a prima facie case of discrimination, nor that Cape Air's explanation for its disciplinary action was a pretext for discrimination. Plaintiff appealed the grant of summary judgment to the employer. The Ninth Circuit reversed.

Plaintiff was one of eight pilots selected to launch Cape Air's new service, providing flights between Guam and the neighboring Micronesian islands. She was the only woman selected. The pilots' group also included Chuck White, a captain with whom Nicholson had previously had a year-long sexual relationship. The service was overseen by Russell Price. Price and Nicholson had been the subject of rumors that traveled throughout Cape Air, suggesting that they were sexually involved.

All eight pilots received additional training in the new aircraft, which included instruction in both the operation of the ATR 42 and crew resource management ("CRM"). Plaintiff was rated excellent, while two male pilots failed their check rides in the simulator. They were retrained to proficiency and passed on their second attempt.

After the flights commenced, Plaintiff's supervisors reported that her CRM skills were inadequate. Before an opportunity for observation, Plaintiff was removed from the cockpit by her former boyfriend, White, who stated that the tension in the cockpit made it unsafe to fly. White acknowledged at his deposition that he had concerns about flying with Nicholson because of their prior sexual relationship, and further admitted that he had been unsure whether his negative interactions with Nicholson were related to their prior relationship. Thereafter, Plaintiff's flight interactions were observed by Price, who was rumored to have a sexual relationship with Plaintiff. He rated her interactions deficient. Plaintiff then received a disciplinary action form which asserted her inability to communicate and lack of cooperation. As a result, Plaintiff was only allowed to fly single pilot planes, with her status to fly ATR 42s to be reviewed in six

months. Plaintiff apparently did not accept this discipline, and continued to bid on ATR 42 flights for which she was no longer eligible. Cape Air considered her to have abandoned her position with Cape Air, and she was terminated.

Plaintiff alleged, *inter alia*, that the complaints about her CRM skills leading to her discipline and the decision to remove her from the ATR 42 program resulted from her being the only woman in the program; she was not provided the same retraining opportunity provided to the male pilots who failed portions of their training; that White admitted that the prior sexual relationship affected his working relationship with her; Price was aware of his rumored relationship with Plaintiff shortly before the incidents leading to her discipline; and that White suggested to her that nothing would have happened to her had she not rebuffed his efforts to rekindle their relationship.

The Ninth Circuit applied the familiar *McDonnell Douglas* shifting burden model. It ruled that her alleged lack of CRM skills was a subjective criterion, and therefore could not be used as part of the prima facie case. In ruling that she was treated differently than similar situated pilots who were given retraining, the Court ruled that "although CRM skills are different from the other skills required of pilots, any distinction between CRM skills and technical piloting skills is not material for purposes of determining whether the male pilots were 'similarly situated' to Nicholson."

The Ninth Circuit described the third step of the shifting burden model as follows: "At the third step of the *McDonnell Douglas* scheme, 'the plaintiff must show that the articulated reason is pretextual either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."

> To avoid summary judgment at this step, however, the plaintiff must only demonstrate that there is a genuine dispute of material fact regarding pretext. The amount of evidence required to do so is minimal. "We have held that very little evidence is necessary to raise a genuine issue of fact regarding an employer's motive; any indication of discriminatory motive may suffice to raise a question that can only be resolved by a fact-finder. When the evidence, direct or circumstantial, consists of more than the *McDonnell Douglas* presumption, a factual question will almost always exist with respect to any claim of a nondiscriminatory reason." *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1124 (9th Cir. 2004).
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> In employment discrimination cases brought under the *McDonnell Douglas* framework, "[w]e require very little evidence to survive summary judgment precisely because the ultimate question is one that can only be resolved through a searching inquiry — one that is most appropriately conducted by the factfinder, upon a full record." *Sischo-Nownejad v. Merced Comty College Dist.*, 934 F.2d 1104, 1111 (9th Cir. 1991) (internal quotation marks omitted).

The Court found that the minimal evidence required had been produced by Plaintiff and reversed summary judgment.

*Nicholson v. Hyannis Air Service, Inc.*, --- F.3d --- (9th Cir. Sep. 8, 2009) (Reinhardt, Brunetti, Thomas).

***District Court Must Determine Whether Arbitration Agreement is Unconscionable even Where Agreement Says its Validity is a Question for the Arbitrator.***

The plaintiff filed a race discrimination suit in federal court. The employer moved to dismiss based on a pre-hiring mandatory arbitration provision. The employee argued that district court had to decide whether the agreement was unconscionable. The employer argued that issue was for the arbitrator because a provision of the agreement said it was for the arbitrator to determine whether the agreement was void or voidable.

The district court agreed with the employer but the Ninth Circuit reversed. The majority concluded that this was a straightforward challenge to solely the validity of the arbitration provision of the employment, which is an issue for the court to decide. The majority said that because the issue is whether the employee voluntarily agreed to arbitration at all, the court must resolve that threshold issue rather than the arbitrator. The majority found that cases involving arbitration agreements between sophisticated commercial enterprises did not apply in the employer-employee context, where there is usually unequal bargaining power. The panel remanded the case for a full determination whether the agreement was both procedurally and substantively unconscionable under Nevada law. Judge Hall dissented on the basis that the plain language of the agreement delegated to the arbitrator the issue of whether it was void or voidable.

*Jackson v. Rent-a-Center West. Inc.*, --- F.3d --- (9th Cir. Sep. 9, 2009) (Thomas, Hall, T.G. Nelson).

***Reasonable Belief of Discrimination Can Be Based Upon Conduct Not Reported.***

The EEOC brought suit alleging discrimination on the basis of national origin and religion, and retaliation in violation of Title VII. Prior to jury deliberation, the defendant moved for a directed verdict under Fed. R. Civ. P. 50(a), which was denied. The jury found for Plaintiff on the retaliation claim and awarded damages of $5,000 for emotional distress, $135,000 for lost earnings, and $250,000 in punitive damages. Post-trial the defendant renewed its motion under Fed. R. Civ. P. 50(b). The defendant also moved for remittitur. The EEOC moved for equitable relief including back pay with prejudgment interest and reinstatement or front pay. The Court denied the defendant's motion under Rule 50(b), but did grant remittitur to $200,000. The trial court granted the EEOC's motion in part, awarding $36,552 in back pay and $5,156 in prejudgment interest. The Court denied front pay or reinstatement. On appeal the Ninth Circuit affirmed. The case is fact intensive.

Plaintiff is a Muslim of Moroccan national origin. He was hired on a temporary basis and promoted to full time by Villeneuve. Shortly thereafter, Villeneuve overheard Plaintiff speaking with a customer in a foreign language and asked where Plaintiff was from, what language he was speaking and what was his religion. Thereafter, Villeneuve promoted Plaintiff to a Team Lead position. Villeneuve promoted Plaintiff again to the position of Inbound Sales Manager. After the last promotion, Plaintiff complained to HR about the conversation that had occurred with Villeneuve, which had occurred six months earlier. The HR representative denied any complaint. On a different occasion, Villeneuve allegedly stated to another employee, "The Muslims need to die. The bastard Muslims need to die." Plaintiff did not complain about this remark, and there is no corroboration.

The new supervisor, Franklin, was hired for unrelated reasons to replace Villeneuve. Franklin initiated a reorganization. Plaintiff's position was one many eliminated, and he was given the opportunity to interview for another.

He didn't get the job. Thereafter, Franklin allegedly asked Plaintiff about photos on his desk, and learned that Plaintiff was Moroccan and Muslim. In response, Franklin allegedly stated "You know, you're lucky that I like you." Plaintiff states that he again complained to HR, who denied it.

Franklin, Villeneuve, and HR then interviewed numerous employees for still another position. Plaintiff didn't get the job. Ultimately, he was terminated by a panel of the three management officials and offered a severance agreement.

The Ninth Circuit ruled that a Rule 50(b) motion was only as good as the Rule 50(a) motion, and new issues or arguments could not be added. As to those issues properly raised in a Rule 50(a) motion, the post trial standard is whether "substantial evidence" supports the verdict. As to issues, not properly raised, the standard is whether *any* evidence supports the verdict. Because the Defendant did not raise all of its issues sufficiently in a Rule 50(a) motion, the Ninth Circuit limited its analysis on appeal.

The Court concluded that when Plaintiff complained a reasonable person could have concluded that he was being subjected to discrimination. In making that judgment, the Court included instances of discriminatory remarks about which Plaintiff did not complain. "[I]f a person has been subjected to more than one comment, and if those comments, taken together, would be considered by a reasonable person to violate Title VII, that person need not complain specifically about all of the comments to which he or she has been subjected. Unreported comments, in other words, are relevant to the inquiry concerning the reasonableness of the belief that a violation has occurred."

The Defendant argued that retaliation was not possible since there was no evidence that either Franklin or Villeneuve was aware that Plaintiff had complained. The Court ruled that there was substantial evidence that the HR manager "had ample opportunities to inform Franklin of [Plaintiff's] complaint and had, in fact, done so." Judge Noonan dissented.

*EEOC v. Go Daddy Software, Inc.*, -- F.3d --- (9th Cir. Sep. 10, 2009) (W. Fletcher, Noonan, Tashima).

***Employee Did Not Violate Computer Fraud and Abuse Act When He/She Exceeds the Employer's Authorization.***

LVRC Holdings, LLC (LVRC) filed suit in federal district court against its former employee, Christopher Brekka, his wife, and related businesses alleging that Brekka violated the Computer Fraud and Abuse Act (CFAA), 18 U.S.C. § 1030, by accessing LVRC's computer "without authorization," both while Brekka was employed and after he left the company. The district court granted summary judgment in favor of the defendants, and they appealed.

Plaintiff was hired to oversee a number of marketing aspects of it residential treatment facility, which included conducting internet marketing programs and interacting with the company's internet access consultant. Plaintiff was assigned a company computer.

Plaintiff emailed to his personal computer documents he obtained or created in connection with his work. These documents included a financial statement for the company, LVRC's marketing budget, admission reports for patients at Fountain Ridge, notes he took from a meeting with another Nevada mental health provider, and a master admissions report, which included the names of past and current patients. After receiving authorization, he logged onto the company website and downloaded statistical information gathered by the website consultant.

In September 2003, the Plaintiff stopped working for the Defendant. He left his company

computer at work without deleting any information. The employer brought an action in federal court, alleging that Plaintiff violated the CFAA when he emailed company documents to himself in September 2003 and when he continued to access the website after he left.

The CFAA prohibits a number of different computer crimes, the majority of which involve accessing computers without authorization or in excess of authorization, and then taking specified forbidden actions, ranging from obtaining information to damaging a computer or computer data. *See* 18 U.S.C. § 1030(a)(1)-(7) (2004). The statute also creates a cause of action in favor of persons injured by such crimes.

After listing the elements of the claim, the Court concluded that, under the terms of the statute, authorization to use a computer does not cease when an employee uses a computer contrary to the employer's interest. Under the terms of the statute, *"when an employer authorizes an employee to use a company computer subject to certain limitations, the employee remains authorized to use the computer even if the employee violates those limitations."* (Emphasis added). "[W]e hold that a person uses a computer 'without authorization' . . . when the person has not received permission to use the computer for any purpose (such as when a hacker accesses someone's computer without any permission), or when the employer has rescinded permission to access the computer and the defendant uses the computer anyway."

The Court also concluded that there was not enough evidence upon which a reasonable jury could find that Plaintiff violated the CFAA after he left the company.

*LVRC Holdings, LLC v. Brekka*, ---F.3d-- (9th Cir. Sep. 15, 2009) (Ikuta, McKeown, Selna (C.D. Cal.)).

***Oregon Public Defender's Office Is Not a Program Receiving Federal Assistance Within Meaning of Rehabilitation Act.***

Plaintiff was employed as a legal assistant for the OPDS and its predecessor agency, the Oregon Public Defender Office, from 1999 until May 2003. She alleged that she was a disabled individual with post-traumatic stress disorder, anxiety disorder, depression and agoraphobia. She claimed that defendants, State of Oregon and two of her supervisors, failed to provide her with reasonable accommodation, terminated her because of an actual or perceived disability and terminated her in retaliation for asserting her federally protected rights to be free from discrimination on the basis of disability. She alleged violations of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and the FMLA.

The district court granted defendants' motion for summary judgment on Sharer's Section 504 claim, concluding that she failed to meet her burden of establishing that OPDS was a "program or activity receiving federal financial assistance." The court also granted summary judgment on her FMLA claim. The Ninth Circuit affirmed.

Section 504 provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under *any program or activity receiving Federal financial assistance*." 29 U.S.C. § 794(a) (emphasis added). Whether a particular state entity is a program or activity receiving federal financial assistance within the meaning of Section 504, though itself "a question of federal law[,] . . . can be answered only after considering the provisions of state law that define the agency's character." After examining in detail the state constitutional and statutory scheme, the Court determined that OPDS is not a program or

activity receiving federal financial assistance within the meaning of the Rehabilitation Act.

Without discussion, the Court dismissed Plaintiff's FMLA claim, describing it as "without merit."

*Sharer v. Oregon*,--- F.3d --- (9th Cir. Sep. 21, 2009) (Fisher, Goodwin, O'Scannlain).

***Physical Capacity Evaluation Administered to Employee Returning from Medical Leave is a Medical Examination under the ADA.***

The plaintiff took medical leave for knee-surgery and was out for 15 months. The employer's policies required returning employees to participate in a physical capacity evaluation. The employer contracted with a third party-provider to administer the evaluation. The provider determined that the employee's restrictions prohibited her from even participating in the evaluation due to the job's lifting requirements. The plaintiff told the employer that the job analysis the contractor was using was inaccurate. The employee's doctor then removed the restrictions and the employee took the evaluation. The contractor concluded that the plaintiff could not perform the required lifting functions of the job, the very ones the plaintiff claimed were not accurate. The employer then terminated the plaintiff. The plaintiff sued under the ADA claiming the evaluation was improper and that she had been discriminated against on the basis of actual or perceived disability.

The district court concluded that evaluation was not a "medical exam" under the ADA. The Ninth Circuit reversed, 2-1. The majority noted that the ADA medical examination provision applies to all employees, whether they are disabled or not. The ADA regulations exclude physical agility tests from the definition of medical examinations if the tests are given across the board. The regulations provide seven factors for deciding whether an evaluation is a medical examination. The majority held that the evaluation given to the plaintiff was not a physical capacity test but rather a medical examination under the ADA.

Judge O'Scannlain dissented. He concluded the evaluation was, in whole or in relevant part, a physical agility test. He viewed the evaluation as a battery of tests. He concluded that the plaintiff could not show that the parts of the evaluation that were arguably a medical examination had caused the employer to terminate her employment. He viewed the termination as "merely incident to an allegedly technical violation" of the ADA.

*Indegard v. Georgia-Pacific Corp.*, --- F.3d ---, (9th Cir. Sep. 28, 2009) (Goodwin, O'Scannlain, Fisher).

**WASHINGTON - Court Of Appeals**

***Employee May be Fired for Using Medical Marijuana In Accordance with State Law.***

The plaintiff in this case used had an authorization to use medical marijuana in accordance with Washington Medical Use of Marijuana Act ("MUMA"). She told her employer about her usage prior to undergoing a mandatory pre-hiring drug test, which she failed solely because of her at-home use of medical marijuana. The employer allowed to the employee to begin her job as a customer service representative while it decided what action to take. After ten days, the employer fired the employee due to her drug test results. The employee filed suit under the MUMA and also made a claim for wrongful termination in violation of public policy. She argued that the express language of MUMA required employers to accommodate the at home use medical marijuana by not having blanket policies against employing people who use the substance in accordance with state law.

The Superior Court granted summary judgment to the employer and Division II affirmed. Division II held that MUMA provide only a defense to criminal prosecution for the medical use of marijuana and did not impose any duty on private employers.

*Roe v. TeleTech Customer Care Mgt.*, --- Wn. App. --, --- P.3d --- (Sep. 15, 2009) (Quinn-Brintnall, Houghton, Hunt).

***Class Counsel of Putative Class Must be Informed and Allowed to Contest Dismissal of Class Action as a Result of Settlement between Named Plaintiff and Employer.***

The plaintiffs in this case were the named plaintiffs in a wage and hour class action. Before certification of the class, the employer by-passed plaintiffs' counsel and settled the claims of the named plaintiffs for $2,000. The named plaintiffs terminated their counsel, who filed a notice of his intent to withdraw. Before the notice of withdrawal became effective, the plaintiffs and the employer filed a stipulation and order of dismissal but did not serve it on their former counsel. The court dismissed the action without giving notice to class counsel. When he found out about the dismissal, class counsel moved unsuccessfully to vacate it and allow the putative class to intervene in the case.

Division III reversed the denial of the motion to vacate and ordered the Superior Court to consider the motion to intervene. Division III ruled that because class counsel's Notice of Intent to Withdraw had not become effective, he should have been served before judgment was entered. The failure to serve counsel required vacation of the judgment under CR 60. Division III then adopted Ninth Circuit law on Rule 23, and held that the trial court must consider the interests of the putative class before approving dismissal in a situation where the named plaintiffs have settled their claims with the employer in order to assure the settlement is not collusive.

*Jones v. Home Health Care of WA*, --- Wn. App.---, --- P.3d --- (Sep. 29, 2009) (Kulik, Schultheis, Brown).

***Victories and Defeats***

Michael C. Subit and Jillian M. Culter represent the plaintiff in *Roe v. TeleTech*.

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