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ALERT

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CASE UPDATES

NINTH CIRCUIT

Garcetti Does Not Apply to Academic Speech

The plaintiff was a tenured associate professor at WSU. He brought a First Amendment retaliation claim for distributing a pamphlet and chapters from an in progress book. Demers had written the pamphlet while he was on a school committee and related to separating the School of Communications from the College of Liberal Arts. He sent the pamphlet to the Administration but signed his name as publisher of a book company that he owned asking for donations. He had also sent the pamphlet to the broadcast and print media. He also sent in support of his application for a sabbatical chapters of a book critical of the Administration. The alleged retaliation consisted of negative performance reviews, subjecting him to internal audits, and entering a notice of discipline.

The district court dismissed under *Garcetti* on the grounds that that pamphlet and the chapters were distributed pursuant to his job duties. The district court also held the pamphlet did not address a matter of public concern.

The Ninth Circuit reversed and held that *Pickering* alone governed First Amendment claims by publicly employed teachers. The panel agreed with the district court that Demers's actions in submitting the pamphlet to the Administration and the media were pursuant to his official job duties as a WSU professor despite the fact that he signed it as a private publisher. The court held that *Garcetti* did not apply to academic speech.

The court refused to consider whether the book chapters were protected speech because the plaintiff did not include the chapters in the record. The court held the pamphlet did address a matter of broad public concern to the WSU community. The panel remanded to the district court whether the Administration had a sufficient interest in controlling the circulation of the pamphlet and whether the pamphlet had caused the adverse actions.

The panel upheld the district court's grant of qualified immunity because the Ninth Circuit had not previously considered *Garcetti*'s application to academic speech.

Demers v. Austin, -- F.3d --- (9th Cir. 9/4/13) (Fletcher, Fisher, Quist (W.D. Mich.))

Punitive Damages Award Reduced from $300,000 Title VII Cap to $125,000 in Case involving Nominal Damages

The jury found for plaintiff on her sexual harassment claim but awarded no compensatory damages, one dollar in nominal damages, and $868,750 in punitive damages. The district court ordered that the damages be reduced to $300,000, the statutory cap under Title VII. The Defendant appealed on numerous grounds including a claim that the punitive damages were not supported by the evidence and were excessive.

The appellate court reduced the punitive damages award from $300,000 to $125,000. The majority noted that punitive damages must bear a reasonable relationship to compensatory damages. The previously recognized highest ratio the court could find was 125,000 to 1 and the court held that was all due process would allow.

Judge Hurwitz dissented from the reduction of the award. He opined that the

statutory cap itself satisfies due process concerns, and rejected that standard is created by the highest ratio previously recognized. "This case is therefore analytically no different than if Title VII gave the trial court the power to impose a fine not to exceed $300,000 upon finding egregious conduct. A defendant receiving a fine within the statutory limits could hardly complain of a due process violation because of the absence of notice.

State of Arizona v. ASARCO, --- F.3d ---- (9th Cir. 10/24/2013) (O'Scannlain, Hurwitz and Singleton (D. Alaska))

On Second Thoughts, Concepcion Does Not Eliminate Unconscionability Challenges that Make the Arbitration Process Fairer

The plaintiff filed a class action wage and hour action under California law. The employer moved to compel arbitration based on its arbitration policy, which applicants acceded to upon submitting applications. The district court refused to enforce the arbitration agreement on the ground of unconscionability. The Ninth Circuit affirmed. It held that the agreement's provisions requiring the parties split the arbitrator's fees allowing the Company to effectively pick the arbitrator, and allowing it to unilaterally modify the policy were all unconscionable and that the agreement was invalid.

The most interesting part of the opinion was its discussion of *Mortensen v. Bresnan Communications LLC*, 722 F.3d 1151 (9th Cir. 2013), which held that *Concepcion* preempts unconscionability challenges to an arbitration agreement where the grounds used have a disproportionate impact on arbitration agreements. The panel held *Mortensen* can't mean that a legal rule that invalidates a provision of an arbitration agreement that is unique to arbitration, such as giving one party the power to select the arbitrator, is pre-empted. The panel reasoned "invalidation of this term is agnostic towards arbitration. It does not disfavor arbitration; it provides that the arbitration process must be fair."

The court went on to recognize: "If state law could not require some level of fairness in an arbitration agreement, there would be nothing to stop an employer from imposing an arbitration clause that, for example, made its own president the arbitrator of all claims brought by its employees. Federal law favoring arbitration is not a license to tilt the arbitration process in favor of the party with more bargaining power."

Chavarria v. Ralphs Grocery Co., --- F.3d --- (9th Cir. 10/28/2013) (Clifton, Tallman Callahan)

WASHINGTON SUPREME COURT

Majority of Justices Refuse to Decide Whether Exemplary Damages under RCW 49.52 are Completely Punitive or Partially Remedial

This case involved an arbitration agreement governed by California law. The Justices also rejected the employer's argument that *Concepcion* abolished all unconscionability challenges that interfere with the fundamental attributes of arbitration such as informality and speed. The Justices reaffirmed the power of courts to strike down arbitration agreements on the basis of generally applicable principles of unconscionability.

Presaging their decision in *Hill v. Garda* a month later, the Justices unanimously held that the agreements were unconscionable because they imposed a six-month statute of limitations, allowed the employer to choose the potential arbitrators, and had prevailing party fee provisions.

Four concurring Justices (Gonzalez, Stephens, Fairhurst, and McCloud).would have held the limitation on punitive damages was unconscionable for prohibiting the award of exemplary damages under RCW 49.52. The concurrence would have held those damages are punitive as a matter of Washington law. Justice James Johnson's majority opinion refused to decide whether such damages were punitive.

The majority held that "Washington law is similarly unclear with respect to where RCW 49.52.070 lies on the spectrum between purely remedial and purely punitive."

Classifying double damages under RCW 49.52 as "punitive" could have significant adverse consequences for employees in one context. The law is unclear whether punitive damages are recoverable against a defendant in bankruptcy.

Brown v. MHN Gov't Services, Inc., 178 Wn. 2d 258, 306 P.3d 948 (8/15/2013)

Court Strikes Down Arbitration Agreement that Limits Employee Remedies

Plaintiffs are a class of employees working for an armored car company and alleged that they were denied meal and rest breaks as required by the Washington Industrial Welfare Act, RCW 49.12, and the Minimum Wage Act, RCW 49.46. All employees are members of employee associations which are not labor unions in the traditional sense at least in part because they do not collect dues and have no resources. Although all employees are required to agree to a "labor agreement," little or no bargaining actually exists. The "labor agreement" contained a mandatory arbitration provision.

The employees filed a motion for class certification. Garda filed its opposition to the motion for class certification, and on the same date it also filed a motion to compel arbitration or for summary judgment. The class was certified and notice to members was sent. Thereafter, Garda's motion for summary judgment was denied, but the Court granted the motion to compel arbitration for the class that had already been certified. Garda appealed the decision to allow class arbitration, and the employees cross appealed the order to compel arbitration on a variety of grounds including that the arbitration provision was unconscionable.

The Court of Appeals affirmed the order to compel arbitration but reversed the trial court on the issue of class arbitration, holding that the arbitration must proceed on an individual basis. The court of appeals did not reach the employees' claim that the arbitration clause is unconscionable. The Washington State Supreme Court unanimously reversed the decision of the Court of Appeals.

The Supreme Court found that the provisions of the "labor agreement" which required arbitration were unconscionable. The Court ruled that "[u]nconscionability is a 'gateway dispute' that courts must resolve because a party cannot be required to fulfill a bargain that should be voided." The Court also ruled that the issue of whether or not to compel arbitration is immediately reviewable.

Justice Stephens reiterated its familiar jurisprudence that a term is substantively unconscionable where it is overly or monstrously harsh, is one-sided, shocks the conscience, or is exceedingly calloused. The Court may have made new law in holding that either substantive or procedural unconscionability is enough to void a contract under Washington law.

The Court ruled that the labor agreement's 14 day statute of limitations period was substantively unconscionable. The Court also ruled that a limit to the recovery of wages to two and/or four months was unconscionable because "it is one-sided in that it unfairly favors Garda by significantly curbing what an employee could recover against Garda compared to what the employee could recover under a statutory wage and hour claim." The labor agreement also provided that "[t]he Union and the Company shall each pay one-half (½) of the fee charged by the arbitrator, the cost of the hearing room, the reporter's fee, per diem, and the original copy of the transcript for the arbitrator." The Court found this provision to be unconscionable because the employees presented evidence about

the anticipated costs and that such fees would prohibit it from bringing their claims.

The Court found that severing the unconscionable provisions would "significantly alter[s] both the tone of the arbitration clause and the nature of the arbitration contemplated by the clause," and that they pervade the labor agreement. The Court therefore found the "labor agreement" unconscionable and unenforceable in its entirety.

The Court didn't reach the issue of class wide arbitration or waiver.

Hill v. Garda, __ Wn.2d ___, 308 P.3d 635 (9/12/2013)

College President's Statements the School had a "Glaring Need for Younger Talent" Deemed Stray Remark and Summary Judgment in Age Discrimination Hiring Case Affirmed

Plaintiff was a part time English teacher for Clark College, who signed annual contracts beginning in 1994. In 2005, the College sought applications for two tenure track positions, and received 156 applications including Plaintiff's, who was approximately 55 years old. The President of the College was the final decision maker. In his "State of the College" address in January 2006, in the midst of the hiring process for the two tenure track openings, the College President asserted that the College had a "glaring need" for "younger talent" under forty on the faculty. In a public forum discussing the posting for the two tenure track openings in the College's English Department, the President stated that he opposed having any minimum experience requirement for applicants for the positions. Although plaintiff was a finalist, the College hired two substantially younger applicants who plaintiff claimed had less experience. Plaintiff filed suit alleging age discrimination.

The College moved for summary judgment. The College presented statistical evidence and the declaration from those involved in the decision making process asserting that age played no part in the decision making process. Rather the College explained that it relied upon the "broader institutional picture, what was lacking in terms of skills and abilities within the English Department, and considered which candidates would contribute to student success and the institution as a whole." The plaintiff presented the evidence of comments made by the President of the College, statistical evidence, and the fact that those hired were substantially younger with less experience. Summary judgment was granted and plaintiff appealed. The Court of Appeals affirmed.

The Court of Appeals applied the familiar shifting burden analysis from *Hill v. BCTI Income Fund*, 144 Wn. 2d. 172, 181, 23 P.3d 440 (2001). In particular, the Court ruled that plaintiff had the burden of establishing a prima facie case, and then the burden of production shifts to the employer to articulate a legitimate reason for the adverse action. The burden then shifts back to the employee to prove that the articulated reason "was mere pretext for discrimination." The Court of Appeals ruled: "To show pretext, a plaintiff must show that the defendant's articulated reasons (1) had no basis in fact, (2) were not really motivating factors for its decision, (3) were not temporally connected to the adverse employment action, or (4) were not motivating factors in employment decisions for other employees in the same circumstances."

The parties agreed that plaintiff had established a prima facie case, and that the College had proffered legitimate reasons. The only remaining issue to be decided was "pretext." In that regard, the plaintiff argued that she need only demonstrate that age was a "substantial factor" in the decision making process. The Court rejected this argument, and ruled that the substantial factor standard "does not apply to the burden shifting scheme . . . ," and only applies to satisfying plaintiff's burden of persuasion at trial. According to the Court of Appeals, the "substantial factor" standard does

not apply at the summary judgment stage of the proceeding, and instead she must prove "pretext" as described above. The Court recognized a split with Division I of the Court of Appeals. *See Rice v. Offshore Sys., Inc.*, 167 Wn. App. 77, 272 P.3d 865, *review denied*, 174 Wn.2d 1016 (2012).

In support of pretext, plaintiff offered statistical evidence; that she was better qualified that those younger employees who received the position; and the comments of the College President. The Court found that the comments needed to be considered in the context that the President was seeking greater diversity: "[P]erhaps the most glaring need for increased diversity is in our need for younger talent. 74% of Clark College's workforce is over forty. And though I have a great affinity for people in this age group, employing people who bring different perspectives will only benefit our college and community." The Court described the comment as a "stray remark." Despite the offered justification of promoting diversity, the College continued to deny that age played any part in the decision making process.

Summary judgment was affirmed. A Petition for Review is pending.

Scrivener v. Clark County, ___ Wn. App.___, 309 P.3d 613 (Div. II 9/4/2013) (Johanson, Quinn-Brintnall, Dalton (Pro Tem.))

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