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ALERT

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CASE UPDATES

NINTH CIRCUIT

Tribal Member Hiring Preference in Employer Lease with Tribe Does Not Violate Title VII

The employer in this case was a coal mining operation on Native American reservations in Arizona. The lease between the company and the tribes required the company to give a hiring preference to tribal members. In 2001, the EEOC sued the employer claiming its implementation of the hiring preference violated Title VII. The case went on for years. The district court eventually granted the company's motion for summary judgment, ruling the hiring preference was a political classification not based on national origin.

The Ninth Circuit affirmed. The panel recognized that tribal hiring preference can constitute a hiring preference based on national origin in violation of Title VII. But outside of Title VII, Native American preferences are permissible political preferences based on the special relationship between the federal government and tribes. The Court held that a preference based tribal membership was not necessarily national origin discrimination. Relying on a 1974 U.S. Supreme Court decision, the panel held that Title VII does not invalidate all tribal hiring preferences. The Court recognized that the Supreme Court case did not involve a tribe-specific preference, but decided that made no difference.

In this case because the tribal preference was a direct result of the employer's lease with the tribe allowing it to conduct business on tribal lands, the preference was political and not a violation of Title VII. Such tribal hiring preferences promote the goals of federal policy towards tribal communities.

EEOC v. Peabody Western Coal Co., 768 F.3d 962 (9th Cir. 9/26/14) (Fletcher, Graber, Paez)

WASHINGTON SUPREME COURT

Plaintiff Need Not Disprove Employer's Reasons for Adverse Action and May Prove Pretext by Showing Discrimination was Substantial Factor; Stray Remarks Doctrine Abolished

Plaintiff was an English instructor at Clark College. In 2005 she applied for a tenure track position in the English Department. She was 55 years of age. Although she was fully qualified and one of the finalists, two applicants under the age of 40 were hired. She claimed age discrimination under the Washington Law Against Discrimination ("WLAD"). In support of the claim, she alleged 1) that the President of the College in 2006 stated in a "State of the College" address that there was a "glaring need" for younger talent within the college's faculty, 2) that he advocated for requiring "no experience" for the two positions, and 3) that only 44% of the tenure track faculty hires were within the protected class during the 2005-06 school year. Plaintiff also presented evidence that the President of the College acted disrespectfully during her job interview. The college maintained that the hiring decision was unrelated to age; that the hiring authority was over 40 years of age; and the other candidates were better qualified.

A motion for summary judgment in favor of the College was granted, and the Court of Appeals affirmed. The Court of Appeals ruled the substantial factor standard only applied where there existed "direct evidence," and there existed no such evidence in this case. In the absence of "direct evidence" the *McDonnell Douglas*

shifting burden standard should be applied. The Court of Appeals affirmed because Plaintiff failed to satisfy the pretext component of the *McDonnell Douglas* standard, which, as they defined it, required Plaintiff to disprove the employer's articulated reasons. The Court of Appeals rejected the comments made by the President of the College as a "stray remark." *Scrivener v. Clark College*, 176 Wn. App. 405, 309 P.3d 613 (2013). The Supreme Court granted review and reversed

The Supreme Court ruled that summary judgment in favor of "an employer is seldom appropriate in the WLAD cases because of the difficulty of proving a discriminatory motivation." The Court reaffirmed that at trial the WLAD plaintiff must ultimately prove that age was a "substantial factor" in an employer's adverse employment action, and that both the "determining factor" and "only factor" standard had been rejected.

Washington courts continue to follow the *McDonnell Douglas* standard in the absence of direct evidence. Because the Plaintiff had previously failed to argue that there existed "direct evidence," the Court applied the *McDonnell Douglas* shifting burden standard. The Court never addressed the federal law which allows Plaintiff to choose between the *McDonnell Douglas* standard and the more direct method of establishing "substantial factor." *See McGinest v. GTE Service Corp.*, 360 F.3d 1103, 1122 (9th Cir. 2004)("[W]hen responding to a summary judgment motion, the plaintiff is presented with a choice regarding how to establish his or her case. [Plaintiff] may proceed by using the *McDonnell Douglas* framework, or alternatively, may simply produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated [the employer]").

On the issue of pretext, the Court ruled that "[a]n employee may satisfy the pretext prong by offering sufficient evidence to create a genuine issue of material fact either (1) that the defendant's reason is pretextual or (2) that although the employer's stated reason is legitimate, discrimination nevertheless was a substantial factor motivating the employer." The Court emphasized that "[a]n employee does not *need* to disprove each of the employer's articulated reasons to satisfy the pretext burden of production. Our case law clearly establishes that it is the plaintiff's burden at trial to prove that discrimination was a substantial factor in an adverse employment action, not the only motivating factor. An employer may be motivated by multiple purposes, both legitimate and illegitimate, when making employment decisions and still be liable under the WLAD." (Emphasis original). The Court of Appeals erred when it required Plaintiff to disprove all of the employer's alleged reasons. Under the *McDonnell Douglas* standard, Plaintiff may satisfy the "substantial factor" standard as an alternative to disproving the employer's articulated reason. Significantly, the Court rejected the "stray remark" doctrine.

Scrivener v. Clark County, --- Wn.2d. ---, 334 P.3d 541 (9/18/14)

Washington May Exercise Personal Jurisdiction Over RCW 49.52 Claims Against Non-Resident CEO Who Knowingly Hired Employee to Work for Company in Washington

The plaintiff, a Washington resident, emailed the CEO of FixtureOne Corp. about a sales job. The Company and the CEO were based in Pennsylvania and had no Washington presence. The nature of the company's business allows its employees to live anywhere and do their jobs via internet and telephone. FixtureOne hired plaintiff as a sales representative. She worked from her home in Washington for 18 months. She left after the company failed to pay her commissions she believed were due her.

She filed suit against both the company and CEO in Washington under RCW 49.52. She never served the company so the suit proceeded against the CEO. The plaintiff moved for summary judgment on liability. The CEO moved for summary judgment based on lack of personal

jurisdiction. The trial granted the plaintiff's motion and denied the CEO's. The court of appeals reversed, holding there was no personal jurisdiction.

The Supreme Court reversed the court of appeals. Writing for a majority of eight, Justice Yu held Washington had personal jurisdiction over the CEO. The Court agreed with the CEO that the corporation's actions could not be imputed to him for minimum contacts. But at the same time the CEO's contacts were imputable to him even if they occurred within the scope of his employment. Here the CEO was also the person who hired the plaintiff. He set the plaintiff's salary, promoted her, gave her a raise and calculated her commissions. It made no difference that neither he nor the company targeted potential consumers in Washington.

The Court made clear it was not holding that Washington could exercise personal jurisdiction over every non-resident corporate officer. It did hold that it is "not unreasonable to require a company that knowingly employees a Washington resident to abide by this state's wage laws, nor is it unreasonable to require the individual responsible for payroll to answer for failing to comply with those laws."

On the merits, the Justices ruled the court had correctly entered summary judgment for the employee. It held that the CEO exercised ultimate control of the business's finances, but knowingly failed to pay the plaintiff.

Justice Owens dissented on the jurisdiction question based on *Walden v. Fiore,* 134 S. Ct. 1115 (2014), a case the majority found easily distinguishable.

Failla v. FixtureOne Corp., --- Wn.2d ---, --- P.3d ---- (10/2/14)

Bonus for Work Performed is Wages; Illegal Wage Rebate Requires Return to Entity that Controlled and Originated Payment; 49.52 Prohibits Fee Shifting to Employees

Plaintiff received discretionary bonuses for work performed, a portion of which were invested in a related company pursuant to Plaintiff's employment agreement. The employment agreement also provided that the prevailing party in any dispute under the contract should be awarded reasonable attorney fees. When Plaintiff was terminated before the investments in the related company were fully vested he lost that portion of his bonuses. The Plaintiff brought suit alleging that the failure to pay the full bonus violated the wage rebate act (WRA), RCW49.52.050. The trial court granted summary judgment in favor of the employer, but denied attorney fees.

The Court of Appeals affirmed summary judgment on the grounds that the bonuses were not wages and that even if they were bonuses he knowingly submitted to alleged violations of the WRA. The Court of Appeals also awarded reasonable attorney fees on the grounds that the employment agreement was central to the dispute. *LaCoursiere,* 172 Wn.App. 142, 289 P.3d 683 (2012). The Supreme Court granted review, and affirmed in part and reversed in part.

Significantly, the Supreme Court held that bonuses once paid for work performed are wages within the meaning of the WRA. "[O]nce CamWest paid LaCoursiere the bonus based on his work performance, that bonus became a wage that LaCoursiere was 'entitled to receive from his employer, and which the employer is obligated to pay.'" The Court further held, however, that the wages were not rebated. The Court reasoned that "wages are rebated only when they are returned to an entity that controlled and originated payment." Because the related company did not control or originate the payment of wages, the wages were not rebated within the meaning of the WRA.

The Supreme Court reversed the award of attorney fees because Plaintiff's claim was grounded exclusively on the WRA which authorizes attorney fees only to prevailing employees. "We have previously held that mandatory attorney fee shifting provisions in employment contracts are unconscionable where the legislature authorizes only prevailing employees to collect attorney fees." *Citing Brown v. MHN Gov't Servs., Inc.*, 178 Wn.2d 258, 274-75, 306 P.3d 948 (2013).

Justice Gonzales concurred in part and dissented in part. He dissented on the grounds that the record was insufficient to determine whether the investment company was truly separate from the employer, except insofar as it suggests that it was not separate. Although the issue was not discussed directly by the majority, he disagreed with Court of Appeals' conclusion that the Plaintiff "knowingly submitted" to any violation of the WRA. Justices Stephens, C. Johnson, and J. Johnson joined.

LaCoursiere v. CamWest Development, Inc., --- Wn.2d ---, --- P.3d --- (10/23/14)

WASHINGTON COURT OF APPEALS

No Wrongful Discharge Tort Where Commercial Motor Vehicle Safety Act Provides for Adequate Alternative Remedies Including Emotional Distress

Mr. Rose worked as a commercial truck driver from March 2006 through November 2009. He alleges his employer terminated him for refusing to complete his shift, which he claims would have forced him to exceed the maximum allowed hours-of-service under federal regulations and would have further required him to violate federal regulations by falsifying time sheets. His previous suit in federal court alleging a violation of the Commercial Motor Vehicle Safety Act (CMVSA) (49 U.S.C. ch. 311) was dismissed for failure to exhaust administrative remedies.

The employer filed a motion for summary judgment and argued that the CMVSA provides comprehensive remedies that serve to protect the specific public policy identified by Mr. Rose and even included punitive damages. Thus, an adequate alternative means of promoting the public policy existed, which, as a matter of law, foreclosed Mr. Rose's public policy cause of action. The trial court agreed and granted the employer's motion for summary judgment. The Court of Appeals affirmed. The Supreme Court granted review and remanded for reconsideration following *Piel*. On remand, the court of appeals reached the same result as it did the first time.

The only issue addressed on appeal concerned the "jeopardy" element of the public policy tort. In that regard, the Court ruled that "[p]rotecting the public is the policy that must be promoted, not protecting the employee's individual interests." Relying on *Cudney* and *Korslund*, the Court concluded that "the remedies that could have been available here under the CMVSA include reinstatement, compensatory damages, back pay with interest, litigation costs, witness fees, and attorney fees, . . . [and that these remedies] more than adequately protect the public interest in commercial motor vehicle safety."

The Court gave a narrow interpretation to *Piel v. City of Federal Way*, 177 Wn.2d 604, 306 P.3d 879 (2013), and distinguished it on the grounds that *Piel* relied upon a prior case holding that PERC remedies failed to fully address the broader public interests involved because it protected personal contractual rights solely. The Court found that *Piel* was limited to claims asserting PERC as the source of public policy. The court distinguished its recent decision in *Becker* by asserting there was no other means to promoting the public policy at issue.

Rose v. Anderson Hay and Grain Company, --- Wn. App. ---, 335 P.3d 440 (Div. III 9/25/2014) (Brown, Lawrence-Berry, Korsmo)

MEMBER CONTRIBUTION

When to Enjoin the Retaliatory Employer

By Bradley Medlin, Robblee, Detwiler & Black

Let us imagine a situation where your client has a dispute with his or her employer. Imagine that the client has been wrongfully terminated and seeks to recover against the former employer unpaid wages. Further suppose that the aggrieved client has made a demand for the employer to remedy the matter and initiated a complaint and/or testified before the NLRB. What happens when the overzealous employer files a retaliatory lawsuit alleging malicious prosecution, fraud, tortious interference, conspiracy, and/or abuse of process? Is your client without a remedy when the pugnacious employer goes to court? What are your options to remedy what is presumably a frenzied situation for your aggrieved client?

The NLRB should be your first stop. Rather than incur the costs of defending a purely retaliatory lawsuit, the NLRB can enjoin such actions at the outset. Take as an example, the NLRB's recent decision in *Federal Security Inc*., 359 NLRB No. 1 (2012). The petitioners, nineteen security guards, had filed an unfair labor practice ("ULP") related to their termination for opposing poor equipment and benefits issues. The nineteen employees provided affidavits to the NLRB in support of the ULP investigation. The employer believed that some of the employees provided false affidavits. It was angry at having to incur costs of opposing the ULP. In response, the employer filed a state court lawsuit for malicious prosecution, conspiracy, and abuse of process. The employees faced punitive damages, attorneys' fees, and costs.

The employees filed a new ULP alleging a retaliatory lawsuit by their former employer. The NLRB agreed with the employees and enforced an order to have the employer's suit dismissed and the employees reimbursed for defense costs. The NLRB reasoned that state court lawsuits related to the invocation of NLRB processes and complaints inherently violated the NLRA. The NLRB reasoned that it had authority to enjoin such state court actions based on Footnote 5 of *Bill Johnson's Rests. v. NLRB*, 461 U.S. 731 (1983). A lawsuit, which impinges upon NLRA rights, can be condemned as a ULP without regard to its merits or the employer's motive for filing. The employer in *Federal Security Inc.* had done this in the NLRB's estimation. By filing a state lawsuit based on the nineteen employees' complaint to the NLRB, the employer had sought to impede the administrative processes of the NLRA.

Not every state lawsuit against an employee is thusly precluded. Where the lawsuit relates to: (1) activity that is merely peripheral to the NLRA; (2) that touches on interests deeply rooted in "local feeling and responsibility;" or (3) where the injured party has no means of bringing the dispute before the NLRB, such lawsuits may be maintained. Examples include outrage claims, trespass, threats of violence, and destruction of property. Claims for malicious prosecution, abuse of process, and conspiracy, however, are entirely different.

When you face this fact scenario, your best option could be to start with the NLRB. This could save your client significant costs in defending what are likely purely retaliatory and frivolous claims. *See also J.A. Croson Company*, 359 NLRB No. 2 (2012).

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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.

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