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ALERT
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CASE UPDATES

U.S. SUPREME COURT

Court Will Decide Standard of Review for Enforcement of EEOC Subpoenas

The EEOC sought information concerning the company's use of the test and individuals who were required to take it. The employer refused to provide personally identifying information about the individuals required to take the test and the reason for termination for test-takers who were terminated. The district court refused to order the employer produce the disputed information. The Ninth Circuit reversed, noting the limited oversight Congress gave courts regarding EEOC subpoenas. As long as the EEOC follows proper procedures in a case it has authority to investigate, the standard is relevance and materiality.

McLane Co. v. EEOC, 137 S. Ct. ---- (9/29/16).

NINTH CIRCUIT

Employee May Pursue Breach of Duty of Fair Representation against Union that Refused to Enforce Her Bump-Back Rights after Reduction-In-Force

Plaintiff worked for a community hospital. She was working as a clerk when she was offered a promotion. Her union negotiated a side-deal that if she lost the promoted position, she would return to her original position. Several years later the employer eliminated the promoted position in a RIF and wanted to bump back. Her union claimed the side deal wasn't enforceable. She sued both the employer and the union under section 301 of the Labor Management Relations Act. The district court granted summary judgment to the union.

The Ninth Circuit reversed. As it had to, the court first analyzed whether the employer should have returned her to her original position. The court held that the bump-back side-deal was enforceable against the hospital. To prevail against the union, the plaintiff also had to show its decision not to pursue her grievance was arbitrary.

There was a genuine issue of fact whether the union had treated her grievance in a perfunctory manner such as to violate its duty of fair representation. The grievance panel never considered her rights seriously or separately from employees who didn't have a side-deal. The union also provided weak reasons for rejecting her grievance.

Rollins v. Community Hosp. & SEIU United Healthcare Workers West, 839 F.3d 1181 (9th Cir. 10/26/16) (Fletcher, Gould, Lemelle (E.D. La.))

WASHINGTON SUPREME COURT

Attorney-Client Privilege Does Not Extend to Communications between Corporation and Former Employee

The plaintiff suffered a brain injury during a high school football game. He filed a lawsuit against the school district three years later. School district counsel interviewed several former coaches and appeared on behalf of the coaches at their depositions. Plaintiff's counsel moved to disqualify counsel based on conflict of interest. The Superior Court denied that motion but required the former coaches to have separate counsel. Plaintiff's counsel then sought the communications between the school's attorney and the former coaches. The school moved for a protective order based on attorney-client

privilege, which the court denied. Discovery was stayed pending appeal.

On direct review, the Supreme Court affirmed the Superior Court, 5-4. Justice Stephens held that the attorney-client privilege does not shield communications between corporate counsel and former employees. The majority emphasized the narrowness of the privilege. The majority noted that Washington courts generally look to the factors in *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981) for guidance for whether the privilege should extend to a particular non-managerial employee. But the majority held that former employees are categorically different and the *Upjohn* factors don't apply.

The majority reasoned that when the employment relationship ends the former employee can no longer bind the corporation and the employee's duty of loyalty ends as well. An employer can't force a former employee to disclose information. It held that a former employee is no different from any other third-party fact witness who may be freely interviewed by either party. Even though former employees may have information about the matters in litigation and may have done things while employees that could expose the corporation to liability, that does not justify extension of the attorney-client privilege to them. A bright line rule was appropriate here.

The majority agreed with the Superior Court that the attorney-client privilege did protect communications between the corporate counsel and the former employees during the depositions. The plaintiff did not appeal the order denying disqualification and did not appeal the Superior Court's ruling regarding the communications during the depositions.

In dissent, Justice Wiggins would have applied the *Upjohn* factors to corporate communications with former employees. He admitted that *Upjohn* involved current employees, but concluded former employees have the same information of use to the corporation as current ones. The dissent would have protected communications with former employees that relate to the former employee's conduct or knowledge, or communications with defendant's counsel, during the employee's employment.

The dissent argued that lower-level former employees still have the capacity to bind the corporation legally (which is not true under the WA Rules of Evidence). The dissent recognized its endorsement of the attorney-client privilege to former employees was contrary to the *Restatement (Third) of the Law Governing Lawyers.* The dissent would have reversed the Superior Court except as to the communications during depositions.

Blythe Chandler and Jeff Needle submitted a WELA amicus brief supporting the majority's analysis.

Newman v. Highland School Dist. No. 203, --- Wn.2d ---, 381 P.3d 1188 (10/20/16).

Court Will Decide Whether Employer Has Duty To Ensure Meal and Rest Breaks Are Taken

In a putative meal break class action, the district court ruled that WAC 296-126-092 only requires employers provide a meaningful opportunity for breaks to employees who choose to take them. The district court then certified the issue to the Washington Supreme Court.

Brady v. AutoZone (certified 9/6/16)

WASHINGTON COURT OF APPEALS

Public Employee Has No Right to Send Religious Email Messages in Violation of Department Policy

Employee was a fire department captain. He began distributing newsletters through the fire department email system for his Christian

Firefighters Fellowship. His messages often included scriptural passages. He was told that the email system was for business purposes only but he ignored the directive. Eventually he was fired for insubordination.

He appealed to the civil service commission which upheld his termination. He then sued the department in court claiming his discharge violated the First Amendment. The Superior Court granted summary judgment on the basis of collateral estoppel and no First Amendment violation.

The court of appeals affirmed, 2-1. The majority found that the email system was a non-public forum. The majority found that business use only policy was reasonable, viewpoint neutral, and content neutral. The majority also found that collateral estoppel barred his claim that he was terminated for reasons other than insubordination.

Judge Lawrence-Berrey filed a concurring opinion to respond to the dissent. The concurrence found the department policy necessary to avoid an Establishment Clause violation.

Judge Fearing filed a 35-page dissent. He would have held the department had engaged in viewpoint discrimination because it allowed secular messages from the department's employee assistance program administrator on the same topic as the employee's religious messages.

Sprague v. Spokane Valley Fire Dep't, --- Wn. App. ---, 381 P.3d 1259 (Div. III 9/21/16) (Korsmo, Lawrence-Berrey, Fearing).

Court Does Not Abuse Its Discretion by Declining to Give Pretext Instruction

Twenty-four Muslim plaintiffs brought an action for religious and national discrimination. They claimed that only Muslim employees were disciplined for violating a workplace rule. Plaintiffs requested a jury instruction that the jury could find discrimination if it concluded that the employer's reasons for discrimination were pretextual. The Superior Court refused. The jury returned a defense verdict.

On appeal, the court ruled that a trial court has discretion whether to give a pretext instruction. The panel reviewed federal case law, which was split evenly between whether the instruction is mandatory or discretionary. Following the Ninth Circuit, the panel held the instruction is discretionary.

Farah v. Hertz Transporting Inc., -- Wn. App. --, --- P.3d --- (Div. I. 10/3/16) (Trickey, Verellen, Becker).

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