WELA
WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION
A NELA AFFILIATE
936 NORTH 34TH ST. SUITE 300
SEATTLE, WA 98103
www.welalaw.org
ALERT
Editors: Mike Subit / Jeffrey Needle

U.S. SUPREME COURT

When MSPB Dismisses a "Mixed Case" on Jurisdictional Grounds, Proper Forum for Judicial Review is District Court Not Federal Circuit

The Merit Service Protection Board ("MSPB") has jurisdiction to review certain serious personnel actions against federal employees. If the employee's case involves only federal civil service claims, the Federal Circuit reviews the MSPB's decision. If the case involves only discrimination claims, the local federal district court is the proper reviewing court. If the case involves both civil service and discrimination claims, then it is known as a "mixed case." Prior case law had established that the district court is the proper reviewing court where the MSPB dismisses an employee's case either on the merits or on procedural grounds.

The issue in this case was where an employee must appeal if the MSPB dismisses a mixed case on jurisdictional grounds. The MSPB dismissed the case because a prior settlement deprived the Board of jurisdiction. The MSPB told the employee to appeal to the Federal Circuit. The employee instead appealed to the D.C. Circuit. That court held that the Federal Circuit and not a district court was the proper forum for review of the jurisdictional dismissal. The Supreme Court granted review.

Writing for seven, Justice Ginsburg held the district court was the proper place for review of the Board's action. The majority held it made no sense to require federal employees to split their appeals of jurisdictional dismissals by the MSPB between the Federal Circuit for civil service claims and the district court for discrimination claims. The majority held that jurisdictional dismissals should be treated the same as procedural dismissals.

Justices Gorsuch and Thomas dissented.

Perry v. MSPB, 137 S. Ct. 1995 (6/23/2017)

Court Will Rule on Whether Dodd-Frank Protects Internal Complaints

The Supreme Court granted certiorari on the following question:

> Whether the anti-retaliation provision for "whistleblowers" in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 extends to individuals who have not reported alleged misconduct to the Securities and Exchange Commission and thus fall outside the act's definition of "whistleblower?"

The circuits are split. The accepted case ruled that the Act applies to internal complaints. 850 F.3d 1045 (9th Cir. 2017).

Digital Realty Trust, Inc. v. Somers, 137 S. Ct. ---- (6/26/2017)

NINTH CIRCUIT

District Court Abused Its Discretion by Not Enforcing EEOC Subpoena

In *EEOC v. McLane Co.*, 137 S. Ct. 1159 (2017), the U.S. Supreme Court held that the Ninth Circuit had erred by reviewing a district court's decision whether to enforce an EEOC subpoena de novo rather than for an abuse of discretion. On remand, the Ninth Circuit held that the

district court had abused its discretion by refusing to enforce a subpoena requesting the personally identifying information of employees who took the same test the plaintiff alleged was discriminatory. The court held that the EEOC could subpoena "virtually any material that might cast light on the allegations against the employer." Information that facilitated the EEOC's attempt to contact co-workers who took the same test easily met this standard. The EEOC does not need to show it "needs" particular information from an employer; just that it is relevant.

EEOC v. McLane Co., 857 F.3d 813 (9th Cir. 5/24/2017) (Watford, Wallace, M. Smith)

As a Political Subdivision, Fire District Need Not Satisfy ADEA 20 Employee Threshold

John Guido and Dennis Rankin were both hired in 2000 by Mount Lemmon Fire District, a political subdivision of the State of Arizona. Guido and Rankin served as full-time firefighter Captains. They were the two oldest full-time employees at the Fire District when they were terminated on June 15, 2009. They subsequently filed charges of age discrimination against the Fire District with the Equal Employment Opportunity Commission ("EEOC"), which issued separate favorable rulings for each, finding reasonable cause to believe the Fire District violated the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 ("ADEA"). They then filed this suit for age discrimination against the Fire District in April 2013. The district court granted the Fire District's motion for summary judgment, concluding that it was not an "employer" within the meaning of the ADEA because it did not employ twenty employees as required by the statute. The Ninth Circuit reversed.

The Court acknowledged that the ADEA applies only to an "employer" under 29 U.S.C. § 6330(b). In order to qualify as an "employer," a "person" must be engaged in commerce and have at least twenty "employees." But the statute also defines a political subdivision of the state as an employer, which is not a "person" within the meaning of the statute. The parties disagreed about whether the twenty employee minimum applies to political subdivisions. Disagreeing with the Seventh Circuit, the Court ruled that there exists three distinct categories of "employer" within the meaning of the statute, and that the numerical limitation did not apply to political subdivisions.

The Court found that the language of the statute was unambiguous and declined to consider its legislative history. In *dicta* the Court concluded that the statute's legislative history did not support a contrary ruling.

Guido v. Mount Lemmon Fire Dist., (9th Cir. 6/19/2017) (O'Scannlain, Gould, M. Smith)

Employer's Attorney is a Proper Defendant in FLSA Retaliation Action

When Arias went to work for his employer he did not complete a Form I-9 regarding his employment eligibility in the United States. In 2006, he sued his employer in California state court alleging *inter alia* failure to provide overtime pay and rest and meal periods. Ten weeks before the state court trial, the employer's attorney, Anthony Raimondo, set in motion a plan which enlisted the services of U.S. Immigration and Customs Enforcement ("ICE") to take Arias into custody at a scheduled deposition, and then to remove him from the United States. A second part of Raimondo's plan was to block Arias's California Rural Legal Assistance attorney from representing him. This double barrel plan was captured in email messages back and forth between Raimondo, the employer, and ICE's forensic auditor. Shortly before trial, the Plaintiff settled his case against the employer based upon his fear that he would be deported because of Raimondo's

communications with ICE.

Arias sued his former employer and Raimondo alleging retaliation in violation of section 215(a)(3) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq*. Raimondo's sole legal defense was that because he was never Arias's actual employer, he cannot be held liable under the FLSA for retaliation against someone who was never his employee. Arias' former employer settled early in the litigation. The District Court dismissed the claim against Raimondo under Fed. R. Civ. P. 12(b)(6). The Plaintiff appealed and the Ninth Circuit reversed.

Section 215(a)(3), an anti-retaliation provision, makes it unlawful "for any person . . . to discharge or in any other manner discriminate against any employee because such employee has filed any complaint . . . under or related to this chapter." The FLSA defines the term "person" to include a "legal representative." § 203(a). Section 216(b) in turn creates a private right of action against any "employer" who violates section 215(a)(3); and the FLSA defines "employer" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee." *Id*. §§ 203(d), 216(b).

The Court found that there existed two sections of the statute, one creating a cause of action for workplace violations, and the other creating a cause of action for retaliation, and these two sections were entirely different: "different as chalk is from cheese." The former relies upon the "economic realities" test for the definition of "employer," and the latter is designed to enable workers to avail themselves of their statutory rights without retaliation. The District Court erred in applying the "economic realities" test for the purpose of the retaliation section of the statute. "In our case, the difference in reach between FLSA's substantive economic provisions and its anti-retaliation provision is unmistakable. The wage and hours provisions focus on de facto employers, but the anti-retaliation provision refers to 'any person' who retaliates."

> The FLSA is "remedial and humanitarian in purpose. We are not here dealing with mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit off others. . . . Such a statute must not be interpreted or applied in a narrow, grudging manner."

The Court concluded that Raimondo could be liable within the meaning of the retaliation provision of the FLSA.

Arias v. Raimondo, 860 F.3d 1185 (9th Cir. 6/22/2017) (Trott, Wardlaw, Gould)

ADA Authorizes Award of Nominal Damages as Form of Equitable Relief for Violations of Section 12203(b)

Bayer worked for Neiman Marcus. He filed three EEOC charges each alleging a distinct violation of the ADA. After he filed his first charge alleging failure to accommodate, the company adopted a mandatory arbitration program. Bayer refused to sign the arbitration agreement because it would interfere with his rights to pursue his pending ADA charge. He filed a second EEOC charge alleging that Neiman Marcus's insistence he sign an arbitration agreement interfered with his ADA rights. Bayer and the company ultimately settled the underlying reasonable accommodation dispute. The company terminated Bayer eight months later. He filed a third EEOC charge claiming retaliatory termination. The EEOC found reasonable cause on the ADA interference claim but did not issue a right-to-sue letter.

Bayer then received a right-to-sue letter on his third charge. He filed a retaliatory discharge suit in federal court. Neiman Marcus moved to compel arbitration but the district court ruled he had never consented to the arbitration clause. The company appealed that ruling to the Ninth Circuit. In the meantime, the EEOC issued a right-to-sue letter on the second charge and Bayer filed a second lawsuit on the ADA interference allegation. In 2014 the Ninth Circuit affirmed the ruling denying arbitration in the retaliatory discharge case. Thereafter, the district judge hearing the ADA interference case held that the case was moot. The employee appealed.

The panel held that whether the ADA interference case was moot depended on whether the district court could still grant the employee any effective relief. The action alleged a violation of 42 U.S.C. § 12203(b), which prohibits interference with ADA rights. The Ninth Circuit had previously held that only equitable remedies were available for a violation of that provision. The court ruled that Bayer's requests for injunctive, monetary, and declaratory relief were moot. Moreover, the monetary relief Bayer requested was legal rather than equitable in nature.

The court agreed with Bayer that his request for nominal damages constituted live equitable relief rather than legal relief, thus preventing mootness. The court held that nominal damages were available for violations of 42 U.S.C. § 12203(b). The court reasoned that nominal damages were divorced from any compensatory purpose. They are available to vindicate the infringement of rights that did not cause any actual, provable injury. Courts of equity had the power to award nominal damages.

The panel ruled that the "unique circumstances of this case illustrate that complete justice may require a district court to award nominal damages as equitable relief." The company had erroneously attempted to enforce the arbitration in the context of the retaliatory discharge case four years after the EEOC had made a reasonable cause determination. Because equitable nominal damages were available, the district court erred in concluding the case was moot.

Bayer v. Neiman Marcus Group, Inc., 861 F.3d 853 (9th Cir. 6/26/2017) (Pratt (S.D. Iowa), Fletcher, Rawlinson)

WASHINGTON SUPREME COURT

Employee Proves Prima Facie Case of Meal Break Violation by Showing He or She Did Not Receive a Break When the Regulation Requires

Plaintiff Brady worked for an auto parts store. He filed a class action complaint alleging systematic denial of meal breaks in violation of WAC 296-126-092. That regulation requires a meal break to commence no later than five hours after (1) the start of the employee's shift or (2) the employee's previous meal break. The employer removed the case to federal court claiming potential damages exceeded $5 million.

Brady sought to certify the case as a class action. Judge Richard Jones denied the motion for class certification because he determined that WAC 296-126-092 required employers only to provide an opportunity for a meaningful meal break. The district court therefore ruled that proof of a meal break violation required consideration of the unique fact scenarios associated with each potential meal break violation defeating class certification.

The plaintiff unsuccessfully sought discretionary Ninth Circuit review of the class certification denial. Brady then asked the district court to certify the proper interpretation of the meal break regulation to the Washington Supreme Court. The district court certified two questions:

(1) Is an employer strictly liable under WAC 296-126-092?

(2) If an employer is not strictly liable under WAC 296-126-092, does the employer carry the burden to prove that his employer did not permit the employee an opportunity to take a meaningful break as required by WAC 296-126-092?

Writing for a unanimous court, Justice Madsen answered both questions in the negative. All parties agreed that an employer wasn't strictly liable under the WAC. They disagreed on the answer to the second question.

The plaintiff, supported by the Washington Department of Labor and Industries (which had authored WAC 296-126-092), WELA, and other amici, argued that *Pellino v. Brink's Inc.*, 143 Wn. App. 668, 267 P.3d 383 (2011), provided the correct legal standard. *Pellino* held that employers have an affirmative duty to ensure that employees take breaks.

The employer argued that the district court applied the correct standard, which was similar to what the California Supreme Court had adopted in *Brinker Restaurant Group v. Superior Court*, 53 Cal. 4th 1004, 273 P.3d 513, 139 Cal. Rptr. 3d 315 (2012). The Washington Supreme Court ruled that "[a]s between *Pellino* and *Brinker*, we find that the Washington case provides the better approach…because it provides greater protection for workers…." Citing *Pellino*, the Court held that WAC 296-126-092 "imposes a mandatory obligation on the employer to provide meal breaks and to ensure those breaks comply with the requirements of WAC 296-126-092."

The Court held that "an employee asserting a meal break violation under WAC 296-126-092 can meet his or her prima facie case by providing evidence that he or she did not receive a timely meal break. The employer may rebut this by showing that in fact no violation occurred or a valid waiver exists." Waiver is an affirmative defense as to which the employer has the burden of persuasion.

Brady v. AutoZone Stores, Inc., --- Wn.2d ---, 397 P.3d 120 (6/29/2017)

WASHINGTON COURT OF APPEALS

Federal Fishing Agreement Statute Did Not Alter At-Will Nature of Employment

Michael McPherson signed an employment at-will contract with the Fishing Company of Alaska in September 2015. The Fishing Company agreed to pay McPherson $200 per day as an assistant engineer on a Fishing Company vessel. The contract period was 90 days, but the Fishing Company fired McPherson after only 18 days. McPherson sued the Fishing Company alleging that 46 U.S.C. § 10601 requires a fishing agreement to include a "period of effectiveness," and he could not be fired without cause during that period. The superior court granted the employer's motion for summary judgment, and the Plaintiff appealed.

The Court of Appeals concluded that the statute relied upon by Plaintiff was unambiguous, and that federal courts have routinely held that the "period of effectiveness" referenced in the statue does not foreclose an employment at-will contract. Summary judgment in favor of the employer was affirmed.

McPherson v. Fishing Company of Alaska, --- Wn. App. ---, 397 P.3d 161 (5/30/2017) (Leach, J., Schindler, Verellen)

VICTORIES AND DEFEATS

Mike Subit and Christie Fix represent the plaintiff in *Brady*.

JOIN THE WELA LISTSERVE

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 at welalaworg@gmail.com. We will verify your WELA membership and sign you up.

WELA Alert Editors

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

Jeffrey Needle (206) 447-1560
jneedlel@wolfenet.com

2017 WELA Board of Directors

Beth Terrell (206) 816-6603
Board Chair bterrell@terrellmarshall.com

Terry Venneberg (253) 858-6601
Board Vice-Chair terry@washemploymentlaw.com
Website and Social Media Co-Chair

Larry Kuznetz (509) 455-4151
Secretary larry@pkp-law.com

Sean Phelan (206) 682-6711
Treasurer sphelan@frankfreed.com

Kathleen Phair Barnard (206) 285-2828
Immediate Past Chair barnard@workerlaw.com
CLE Co-Chair

Jeffrey Needle (206) 447-1560
Amicus Chair jneedlel@wolfenet.com
Legislative Co-Chair

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

Teri Healy (206) 220-6916
Website and Social Media Co-Chair teri.healy@eeoc.gov

Daniel F. Johnson (206) 652-8660
Communications Chair djohnson@bjtlegal.com

Hardeep S. Rekhi (206) 388-5887
Events Chair hardeep@rekhiwolk.com

Lindsay Halm (206) 622-8000
CLE Co-Chair halm@sbg-law.com

2017 Non-Board Officers

Andrea Schmitt (360) 943-6260
Legislative Co-Chair andreaschmitt@columbialegal.org

Denise Diskin (206) 324-8969
CLE Co-Chair denise@stellarlaw.com