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ALERT
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NINTH CIRCUIT

DOL Interpretation of Tip Credit Regulation With Respect to Employees Who Perform Untipped Tasks Related to Tipped Tasks Not Entitled to Deference and is Erroneous

The FLSA allows employers whose employees receive more than $30 per month in tips to take a tip credit towards reaching the federal minimum wage from the tips the employees receive. In 2016 DOL issued an interpretation of a regulation dealing with employees who have "dual jobs," *i.e.*, DOL decided that where employees perform both tipped and non-tipped tasks the employer can take the tip credit only with respect to tipped tasks and tasks related to the tipped tasks, provided the latter take up to no more than 20 percent of the employees' time. Effectively, this required the employer to account for the minutes employees spent in their various tasks.

The plaintiffs were former servers and bartenders. The employer took a tip credit with respect to all of the hours they worked even though more than 20 percent of their time was spent on tasks related to the tasks for which they received tips, but for which they did not actually receive tips. The plaintiffs claimed a violation of the DOL tip regulation. The district court granted summary judgment to the employer ruling that the employees didn't perform dual jobs within the meaning of the regulation and the DOL's interpretation of its own regulation was invalid. The district court ruled that the plaintiffs could not state a claim unless they could show their average hourly wage, including tips, was below the federal minimum.

Writing for the majority, Judge Ikuta held that DOL's interpretation was not entitled to *Auer* deference because it was inconsistent with the FLSA and the DOL's own regulations. The majority held the dual jobs regulation applied only to people who perform different jobs, not different activities within the same job. In doing so the majority created a direct conflict with the Eighth Circuit. That court had held the DOL's interpretation was permissible because the underlying regulation was ambiguous. Several district courts had followed the Eighth Circuit.

The majority vacated the dismissal to allow the plaintiffs to amend their complaint. All three judges agreed the district court erred by ruling that they plaintiffs could prevail only if their average wage fell below the federal minimum. That rule applies only where the employer pays the employee more than minimum wage, which is not true under a tip credit situation.

Judge Paez would have followed the Eighth Circuit's analysis and deferred to the DOL. He reasoned that the agency's interpretation of its own regulation was not plainly erroneous or inconsistent with the regulation.

Marsh v. J. Alexander's LLC, --- F.3d --- (9th Cir. 9/6/2017) (Ikuta, Paez, Faber (S.D.W.V))

Washington Law Creates Protected Property Right in School Principal's Salary but Employee Received All Process He Was Due

The District employed Roybal as a principal. The Superintendent of the District reassigned him to work as an assistant principal. He received a poor performance evaluation for the year 2012-13, and believing that the evaluation was inaccurate and did not comply with state law, he requested that the District correct the evaluation. When the District declined, he retained an attorney. After the attorney sent the District a letter, Roybal was

again reassigned but this time he was demoted to work as a teacher with a substantial reduction in pay. The District stated that it was reassigning Roybal because he had "[n]ot successfully demonstrated the qualities and skills necessary for an administrative position in the District."

Roybal sued Toppenish in Washington state court, bringing two claims under 42 U.S.C. § 1983: (1) that Toppenish reduced his salary without due process and (2) retaliated against him for speaking to an attorney, as well as various state law claims. After the case was removed to federal court, both sides brought cross motions for summary judgment. The Court denied the District's motion concluding that they violated due process as a matter of law, that genuine issues of material fact existed whether they violated Roybal's First Amendment rights, and that the Superintendent was not entitled to qualified immunity. The district court granted summary judgment to Roybal on his due process claim. The District pursued an interlocutory appeal on the issue of qualified immunity related to the due process claim.

The Ninth Circuit reversed the due process ruling on the merits. The Court agreed with the district court that RCW 28A.405.230 created a constitutionally protected property interest in the salary that Roybal received as a principal. RCW 28A.405.230 prohibits a district from transferring principals with three or more years of consecutive service to lower paying positions. Washington law allows a deviation from the statute only upon a showing of probable cause. Such a restriction, limiting the grounds on which salary may be reduced, creates a reasonable expectation that principals will continue to receive their salary, and therefore, a protected property right.

Nevertheless, the Court ruled that the due process required was established by federal law and not the more expansive process due under state law. Under federal law, employees need only receive notice and an opportunity for a hearing before being deprived of their property interest. The Court ruled that Roybal had received all the process that was due under federal law. The Court declined to reach the First Amendment issues via an interlocutory appeal.

Roybal v. Toppenish School Dist. 871 F.3d 927 (9th Cir. 9/21/2017) (Hawkins, McKeown, Rothstein (W.D. Wash.))

False Claims Act Claims Not Within Scope of Arbitration Agreement

Welch alleged that her former employer violated the federal and Nevada False Claims Acts by presenting fraudulent Medicaid claims. The United States and Nevada declined to intervene in the case and her employer moved to compel arbitration under the Federal Arbitration Act. The panel held that this lawsuit was not arbitrable because the plain text of the arbitration agreement that she signed when she applied for employment with My Left Foot did not encompass this False Claims Act case.

The Court applied state law to the interpretation of the arbitration agreement. The Court found that despite the language of the agreement that it covered disputes which "arise out of" or "relate to" a contractual or employment relationship, the agreement did not cover arbitration for FCA claims. The Court explained "this FCA suit has no direct connection with Welch's employment because even if Welch 'had never been employed by defendants, assuming other conditions were met, she would still be able to bring a suit against them for presenting false claims to the government.'"

The general presumption in favor of arbitration applies only when the text of the agreement allows for an interpretation in favor or arbitration. Moreover, though the FCA grants the relator the right to bring a FCA claim on the government's behalf, an interest in the outcome of the lawsuit, and

the right to conduct the action when the government declines to intervene, precedent compels the conclusion that the underlying fraud claims asserted in a FCA case belong to the government and not to the relator.

United States, ex rel. v. Mary Kay Welch v. My Left Foot Children's Therapy LLC, 871 F.3d 791 (9th Cir. 9/11/2017) (Fisher, Schroeder, N. Smith)

Employer Prevails on Same Action Defense as a Matter of Law Regarding Plaintiff's Claim that her Existing Retaliation Lawsuit Caused City Not to Rehire Her

Plaintiff was the Finance Director of the City of Coos Bay, Oregon. She was fired in 2008 allegedly for shoplifting at Wal-Mart. She claimed the real reason was whistleblowing. She filed claims under the First Amendment and Oregon law. While the case was pending in 2011, the Finance Director position became vacant and the plaintiff applied. The City rejected her application because she had previously been terminated for cause.

The jury found in favor of the plaintiff in the first case and awarded her economic, compensatory and punitive damages. The plaintiff then brought a second case claiming that her first lawsuit caused the City to refuse to re-employ her. The district court ruled that her new case was barred by both claim and issue preclusion.

The appellate court agreed with the plaintiff that under federal law claim preclusion did not apply to events post-dating the filing of the complaint. The court ruled issue preclusion applied to the plaintiff's claim for economic damages because she had asked for future economic damages in the first lawsuit. By contrast, the plaintiff's claims for compensatory and punitive damages related to her non-selection were distinct from those she requested in the termination case.

Reaching the merits, the panel ruled that a jury reasonably could have found that the original lawsuit was a substantial factor in her non-selection. The non-selection occurred in the middle of the original case. But the panel held the employer was entitled to prevail as a matter of law on its same action defense because she had been terminated for cause previously. Curiously, the panel held that: "It does not appear unreasonable for the City to reject her application on the basis of the record that existed at the time, even if the purported reason for the termination was later found to be pretextual." The panel recognized that the plaintiff had better credentials than the person the City hired. But the panel ruled that City would have still not hired the plaintiff even if she had not brought a lawsuit about her unlawful termination.

Howard v. City of Coos Bay, --- F.3d --- (9th Cir. 9/25/17) (O'Scannlain, Fisher, Friedland)

$3.3 Million Verdict in Section 1981 Case with Minor Adverse Actions Not Grossly Excessive

Three police officers sued their employer, the City of Westminster, and the current and former Police Chiefs alleging race discrimination and retaliation in violation of California law (FEHA) and 42 U.S.C. Section 1981. All three officers alleged that they applied for a variety of special assignments needed for promotions which were given to Caucasian officers with much less experience and training. One of the officers alleged that he was repeatedly called racial names. All officers alleged retaliation which consisted of unfavorable log entries and reprimands. The jury awarded the officers a total of $3,341,000 in general and punitive damages.

On appeal, the Court ruled that California law, like Washington law, should not be read to bar public employees from bringing section 1981 claims. The Court denied remittitur because the amount of punitive damages awarded in this case is not "grossly excessive" to the point of

arbitrariness in violation of the Due Process Clause of the Fourteenth Amendment. There was a single digit ratio between the compensatory and punitive damages.
Flores v. City Westminister, 873 F.3d 739 (9th Cir. 10/11/2017) (Farris, Callahan, Owens)

WASHINGTON SUPREME COURT

Two-Year Statute of Limitations Applies to Breach of Unfair Labor Practice Claims Filed in Court

Plaintiffs were terminated from Seattle Public Schools. Their union filed grievances on their behalf. Their non-attorney union representation recommended that the union settle the grievances in exchange for monetary payments. The plaintiffs were represented by attorneys on civil claims. However, the union soon agreed to settle the grievances in exchange for monetary payments to the plaintiffs. The plaintiffs didn't learn about the union's decision for three weeks. The union attorney had sent a letter following the settlement that seemed to say there was no settlement yet.

Seven months later the plaintiffs filed suit in Superior Court against both Seattle Public Schools, for discrimination and breach of the collective bargaining agreement, and the union for the unfair labor practice of breach of the duty of fair representation, negligent and unauthorized practice of law and violation of the consumer protection act. The union moved for summary judgment arguing that all of plaintiffs' claims were subsumed within the duty of fair representation and barred by the six-month statute of limitations. The Superior Court granted summary judgment to the union. Division I affirmed. The Supreme Court granted review.

Writing for a unanimous court, Justice Madsen agreed with the union that any claim arising out of the union's representation of its members was subsumed in the claim for breach of the duty of fair representation. This included the malpractice claims against the union's attorneys and the claims against the union representative regarding his advice about and actions in settling the union grievance. The union owned the grievance not the individual plaintiffs.

Writing for a majority of six, Justice Madsen held that the six-month statute of limitations set forth in RCW 41.56.160(1) for unfair labor practice claims applies only to claims filed with the Public Employee Relations Commission ("PERC"). The majority disagreed that policy reasons supported extending this statute of limitations to court actions. Moreover, PERC did not have jurisdiction over the type of duty of fair representation claim because plaintiffs did not allege invidious discrimination.

The Court held the two-year statute catchall of limitations applied to unfair labor practice claims filed in court.

Concurring, Justice Fairhurst would have limited the holding to cases where PERC would not assert jurisdiction over the plaintiffs' claims rather than all unfair labor practice claims. Justices McCloud and Johnson would have applied the six-month statute of limitations. The dissent argued PERC did have jurisdiction over the claims at issue because they alleged bad-faith.

Killian v. International Union of Operating Engrs., Local 609-A, -- Wn.2d ---, 403 P.3d 58 (10/12/17)

Plaintiff Need Not Prove Replacement by Person Outside Protected Class to Establish Prima Facie Case; Ambiguous Handbook Presents a Jury Question on For-Cause Discipline

Mikkelsen was a part-time manager of accounting for the PUD for 27 years. Upon the termination of the General Manager, she was promoted to

Interim General Manager, helped organize the search for a permanent replacement, and retained an executive search firm. The search firm selected Mr. Ward as the new General Manager. Mr. Ward and Mikkelsen did not get along, and she didn't approve of his management style. Mikkelsen claimed that Ward's conduct was due to gender bias, and he often talked over her in meetings, and regularly disregarded her input, which didn't happen with men. She alleged that she was excluded from communications and meetings and he referred to female employees as "girls," "ladies," and "gals." She also claimed that Ward would regularly rearrange his genitals when he was around her or sitting in front of her but not when around men.

Ward concluded that Mikkelsen went behind his back and was "out to get him." Ward terminated her employment "without cause." The stated reason for termination was that "it just wasn't working out." Ward accused Mikkelsen of disrupting the workplace and undermining his authority. Mikkelsen was 57 years old. Ward replaced her with a 51-year old woman.

Mikkelsen filed suit alleging that age and gender discrimination were substantial factors in the decision-making process in violation of the RCW 49.60 ("WLAD"). She also alleged a violation of the employee handbook. The employer was granted summary judgment and Mikkelsen appealed.

In an opinion written by Justice Fairhurst, the Court unanimously reversed. The Court ruled that to satisfy a prima facie case, a plaintiff does not have to prove that she was replaced by someone outside the protected class. The attributes of the replacement, however, may be relevant to the second and third steps of *McDonnell Douglas*. The Court ruled that the second step of *McDonnell Douglas* was satisfied by the employer's explanation that "it's not working out." This is a legitimate and non-discriminatory reason.

Under the final step of the *McDonnell Douglas* test, the employee needs only to present evidence sufficient to create a genuine issue of material fact whether "discrimination was a substantial factor in an adverse employment action, not the only motivating factor." The Court found that plaintiff had satisfied that standard for the gender discrimination claim but not for the age discrimination claim. Ward's reference to long term employees as "old and stale" was in and of itself insufficient to support the claim of age discrimination.

The Court also ruled that although the corrective action policy granted the district broad discretion to implement any disciplinary action in any situation, and a disclaimer, when read as a whole, the policy was ambiguous whether it established a for-cause standard for discharge. Nothing in the policy said discipline could be imposed without cause. There was also an Employee Rights paragraph in the handbook. Whether the policy constituted a promise for specific treatment was a question of fact sufficient to survive summary judgment. Ambiguous discipline policies create an issue of fact as to whether the employer made a binding promise to follow certain discipline procedures.

Mikkelsen v. Public Utility District No. 1 of Kittitas County, ___Wn.2d ___, 404 P.3d 464 (10/19/2017)

Court Grants Review on Whether General Corporate Knowledge of Protected Activity is Sufficient Where There is No Proof Supervisors Who Took Adverse Action Knew

The Washington Supreme Court has granted review in *Cornwell v. Microsoft* (Div. I 6/5/17) (unpublished). The Court of Appeals affirmed the Superior Court's dismissal of a retaliation claim because the plaintiff failed to show that the Microsoft employee who terminated her knew of her protected conduct. The plaintiff relied on the

"general corporate knowledge" principle. Here, individuals in Microsoft's legal department and HR knew about the plaintiff's protected activity.

WASHINGTON COURT OF APPEALS

Division III Judge Creates Havoc in Wrongful Discharge Law by Fundamentally Misconstruing the Overriding Justification Affirmative Defense; Court Recognizes Potential Cause of Action for Employer's Failure to Provide Access to Employee Personnel File

In 2008 Gonzaga University hired David Martin as the assistant director of its fitness center. Prior to his hire numerous university students had sustained injuries due to bare concrete walls behind the basketball hoops at the center. Despite this, the University decided not to install pads. After Martin's hire, students continued to sustain injuries. Martin repeatedly requested the University install pads to improve student safety. A supervisor directed Martin to bring the issue up only once a year at the budget meeting.

In 2011 Martin received below average performance reviews based on his interpersonal skills, professional development and leadership responsibilities. A supervisor repeatedly counseled Martin about his refusal to follow protocol and his interpersonal skills. Martin wrote a protocol suggesting the University use funds related to the fitness swimming pool to fund the installation of pads in the basketball court. Martin sent the protocol to a high-level manager. The manager told Martin he should meet with a direct supervisor about the protocol. Martin insisted on meeting with the high-level manager.

Martin's supervisors scheduled a meeting with him to deliver a letter of expectation. Martin refused to release his protocol to another supervisor. He left the meeting. The University then placed him on administrative leave and told him not to contact anyone but Human Resources. Martin then requested a meeting with the University President about his padding proposal. He was told to follow the chain of command. Martin wrote an email again requesting a meeting with the President. The President again denied the meeting request.

The next day a student received a serious head injury from running into the bare concrete wall at the fitness center. The University fired Martin the following day. Soon after Martin's termination, the University installed pads in the fitness center. Martin later requested a copy of his personnel file. He received that but may not have receive his employee relations file.

Martin filed claims for wrongful termination and failure to provide his complete personnel file. The Superior Court granted the University summary judgment on both claims. Division III affirmed the granted of summary judgment on the wrongful termination claim but reversed on the personnel file claim.

The court issued three opinions, each signed by only one member of the panel. Judge Fearing wrote the lead opinion. Although Judge Fearing acknowledged Martin was bringing a claim under one of the four traditional *Thompson* categories—retaliation for reporting employer misconduct—Judge Fearing failed to adhere to the Supreme Court's directive in *Rose* that courts should not apply Professor Henry Perritt's four-part framework to such a claim.

At oral argument the University conceded the promotion of student safety constitutes a clear public policy. The University claimed that Martin advocated his own selfish interests rather than the public interest. Judge Fearing rejected this argument because "the law does not preclude recovery under the tort of wrongful discharge when the employee sought to further his own welfare in addition to the public welfare."

Correctly applying the analysis set forth in *Rose*, *Rickman* and *Becker*, Judge Fearing reasoned that "[t]erminating or otherwise punishing an employee who shares concerns about unsafe conditions directly jeopardizes the public policy interest in ensuring safety."

Alone among the panel, Judge Fearing would have held that a reasonable jury could have found that Martin's protected activities were a substantial factor in his termination. Indeed, Judge Fearing recognized that "the man likely most responsible for the firing of Martin conceded a reason was advocating student safety."

However, Judge Fearing concluded "Martin fails to present evidence to support the fourth element of the claim, that element being the absence of an overriding justification." Here the overriding justification was "insubordination." Judge Fearing devoted "pages to define and demarcate the element" in a very long opinion that had little support in established law. Recognizing this, Judge Fearing suggested the Supreme Court grant review.

Judge Fearing began by questioning the well-established proposition that absence of justification is an affirmative defense that the employer must prove. He found uncertainly only by confusing the *McDonnell-Douglas* burden shifting regime in statutory discrimination cases with the method for proving wrongful discharge cases.

Judge Fearing then decided that the University could take advantage of the overriding justification of "insubordination" in court even if "the individuals terminating Martin's employment knew about, but cared nothing about, the insubordination of Martin and only wished to retaliate against Martin because of raising safety concerns." In other words, in Judge Fearing's opinion it did not matter "whether insubordination motivated the firing."

Judge Fearing analogized his new rule to the after-acquired evidence doctrine. In the after-acquired evidence situation, the employer did not know at the time about the misconduct that would have justified the employee's termination for lawful reasons. Even though under Judge Fearing's rule the employer knows about the employee's misconduct at the time of discharge, he saw "no reason to distinguish between the two factual scenarios for purposes of employer liability."

Judge Fearing then reasoned there was overriding justification because Martin's persistently and self-interestedly promoted himself, repeatedly disobeyed directives from his supervisor to follow the chain of command, disobeyed a directive to contact no one other than HR while he was on leave, showed lack of interpersonal and professional communication skills, wrote abrasive communications, and neglected his job responsibilities. The employer's interests outweighed Martin's protected conduct even though in the abstract student safety might supersede the University's interest in an obedient employee. Judge Fearing held the balance was for the court.

In sum, Judge Fearing concluded that even "if Gonzaga University officials sought to retaliate against David Martin for raising of safety concerns, the undisputed facts confirm that an overriding justification validated the dismissal from employment."

Judge Fearing suggested that RCW 49.12.240 might provide a right of action for employees who do not receive their complete personnel files within a reasonable time of a request, although he declined to reach the issue. Instead, he decided there was a genuine dispute whether the University had produced Martin's entire file.

Judge Pennell would have affirmed the dismissal of Martin's wrongful discharge claim on the basis that there was insufficient evidence for a jury to find that Martin had raised safety concerns or that the University had retaliated against him for

protected activity. She agreed with Judge Fearing that material issues precluded summary judgment on the personnel file claim.

Judge Korsmo agreed with "both the lead and concurring opinions that summary judgment was properly granted to the Gonzaga University. The university did establish that Mr. Martin was terminated due to insubordination, and he also failed to establish that gymnasium safety was the cause of termination." He would have held that the legislature did not create a judicial cause of action in enacting RCW 49.12.240. He would have held only L&I can enforce this requirement.

Martin v. Gonzaga Univ., --- Wn. App. --, -- P.3d – (Div. III 9/7/2017) (Fearing, Pennell, Kormso)

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