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

NINTH CIRCUIT

Service Member Entitled to Bonus for Position He was Selected to Train for before Deployment

Plaintiff was an Air Force reserve officer who worked as a pilot. He qualified to begin training on a different aircraft. He was then activated for three and one-half years. Upon return, he trained for and eventually upgraded to a higher position on the different air craft. While he was on deployment, his union had negotiated a bonus to be paid once the parties entered into a new collective bargaining agreement. The employer paid the employee the lower bonus associated with his original position. He filed suit claiming he should have received the higher signing bonus for pilots of the second aircraft. After a bench trial, the district court found in favor of the employee. The Ninth Circuit affirmed.

Under USERRA's "escalator principle," an employer must return a deployed employee to the position he would have been employed in with reasonable certainty if his employment had not been interrupted. The appellate court disagreed with the employer's argument that these principles do not apply to cases alleging an employee has been discriminated against because of his service. Given the pilot passed the training for the different aircraft upon his return, it was reasonable to assume he would have passed the training much earlier if he had not been deployed. The court further ruled that the contract ratification bonus qualified as a "signing bonus" under USERRA.

Huhmann v. Federal Express Corp., 874 F.3d 1102 (9th Cir. 11/2/2017) (Bea, Hurwitz, Motz (D. Md.)).

Judge May "Gross-Up" Backpay Award in Title VII Cases to Make Up for Adverse Tax Consequences for Receipt of Economic Damages in a Lump Sum

Clemens sued Qwest for race discrimination and retaliation in violation of Title VII, 42 U.S.C. §§ 2000e, *et seq*. After removal from state to federal court, the parties consented to a jury trial before a magistrate judge. The jury found for Clemens on his retaliation claim and awarded him over $157,000 for lost wages and benefits, over $275,000 for emotional distress, and $100,000 in punitive damages. The district court reduced the latter two awards to $300,000 to comply with Title VII's cap on compensatory and punitive damages. *See* 42 U.S.C. § 1981a(b)(3)(D).

Magistrate Judge Donohue also granted Clemens's motions for attorney's fees and, in part, an interest award. However, he denied the employee's request for a "tax consequence adjustment" or "gross-up" to compensate for increased income tax liability resulting from his receipt of his back-pay award in one lump sum. Plaintiff appealed the denial of the gross-up.

The Court of Appeals reversed. The Court explained that back-pay awards are taxable, and a lump-sum award will sometimes push a plaintiff into a higher tax bracket than he would have occupied had he received his pay incrementally over several years. Joining the Third, Seventh, and Tenth Circuits, the Court ruled that the decision to award a gross-up—and the appropriate amount of any such gross-up—is left to the sound discretion of the district court. The Court explained that such an award is not to be presumed and that circumstances may justify denial. The Court remanded to determine whether to award a tax gross-up and the amount of such an award, if any.

Clemens v. Centurylink, Inc., 874 F.3d 1113 (9th Cir. 11/3/2017) (Owens, Wardlaw, Clifton).

The Workweek is the Relevant Unit under the FLSA for Determining Compliance

The issue in this case was whether the workweek or each individual hour within the workweek is the relevant unit for determining compliance with the minimum wage and overtime requirements of the FLSA. Judge Coughenour initially ruled in favor of the per hour approach but on reconsideration ruled that the workweek was the appropriate measure. He then certified the issue for interlocutory appeal. The Ninth Circuit ruled the workweek approach was correct.

The court ruled that neither the statutory text nor the statutory context resolved the question at issue. Nor did the purpose of the FLSA resolve the issue. The court therefore looked to the views of the U.S. Department of Labor. Since 1938, the agency has used the workweek measure but never promulgated a regulation so stating. Four circuits had embraced a per-workweek construction of the statute. Congress had not suggested any dissatisfaction and there were good reasons for uniformity. The Ninth Circuit had endorsed the workweek approach in dicta.

Douglas v. Xerox Business Serv., LLC, 875 F.3d 884 (9th Cir. 11/15/17) (McKeown, Murphy (10th Cir.), Nguyen).

"Government Action Bar" to Qui Tam Suit Applies Even Where Government is No Longer Active Participant in Original Action

On December 31, 2009, Brian Sant filed an FCA *qui tam* action against Biotronik, a medical device supplier. The United States intervened in Sant's case and informed the court that it had reached a settlement agreement with Biotronik and Sant on claims related to certain "covered conduct."

On October 14, 2014, Bennett filed the *qui tam* complaint at issue in this appeal on behalf of the United States and included detail about the "uncovered conduct" described in the *Sant v. Biotronik* complaint. The United States and California both declined to intervene in Bennett's case. The claim was dismissed pursuant to 31 U.S.C. § 3730(e)(3), which provides "[i]n no event may a person bring an action under [the FCA] which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party." The relator appealed.

The Court of Appeals held that the government-action bar applies even when the government is no longer an active participant in an ongoing *qui tam* lawsuit. The Court reasoned that "[t]he Government remains a party to suits even after those suits have been settled."

Judge Siler dissented on grounds that the government-action bar does not preclude a relator who is an original source from proceeding on claims that were not resolved before the government was dismissed as a party in a prior suit. The government had filed an amicus brief agreeing with this position.

United States of America, ex rel. Bennett v. Biotronik, Inc., 876 F.3d 1011 (9th Cir. 12/1/2017) (Bea, Tallman, Siler (6th Cir.)).

Cosmetology School Students are not Employees under the FLSA

The plaintiffs were students at cosmetology and hair design schools in California and Nevada. They argued that because much of their course of study consisted of performing menial and unsupervised work, they were entitled to compensation. The district court ruled in favor of the school on the ground that the plaintiffs rather than the school were the primary beneficiaries of their own labor in that it advanced their training. The Ninth Circuit affirmed.

The Ninth Circuit had previously used a four-part economic reality test to decide whether the plaintiffs were employees under the FLSA. The U.S. Department of Labor had adopted a six-part test. In 2015, the Second Circuit rejected the DOL test as inconsistent with Supreme Court law and created a seven-part test that focused on whether the employer or putative employee was the

primary beneficiary of the labor performed.

The Ninth Circuit endorsed the Second Circuit approach. Applying that test, the court ruled that the plaintiffs were not employees under the FLSA. The court claimed it would have reached the same result under the DOL test. The panel then ruled that the plaintiffs were not employees under either Nevada or California law. They hypothesized the California Supreme Court would follow the Second Circuit rather than the Department of Labor test.

The court also upheld the district court's decision to strike the summary judgment declarations of students who were not listed on the witness list.

Benjamin v. B&H Education, Inc., 877 F.3d 1139 (9th Cir. 12/19/2017) (Schroder, Tallman, Whaley (E.D. Wash.)).

Jury Instructions Conflating Disparate Treatment and Reasonable Accommodation Harmless Error; District Court Properly Reduced Fee Award Based on Degree of Success

Dunlap was employed by the defendant as a shipping clerk. Dunlap was diagnosed with bilateral lateral epicondylitis in both elbows. For two years, Dunlap worked full-time for Liberty, with restrictions. One month after her workers compensation claim was closed as disabling she was terminated from employment. Her request for reinstatement was denied. She then filed suit under the ADA and Oregon state law. The jury found in favor of plaintiff on her disability claim under the ADA and Oregon law, but for the defendant on her "regarded as" claim and her failure to reinstate claim. The jury awarded $70,000 in non-economic damages, and the district court awarded $13,200 in back pay. Plaintiff moved for $235,038 in attorney fees, and the court granted the motion for fees but reduced the amount by 50%. The defendant appealed the verdict and the plaintiff cross-appealed the award of attorney fees.

The defendant claimed that the district court committed instructional error by conflating the elements of the disparate treatment and failure-to-accommodate claims. Plaintiff claimed that the error was not preserved or, in the alternative, the error was harmless. The court ruled that the claimed instructional error was preserved, and the district court erroneously conflated the claims of disparate treatment and failure to accommodate. But because the jury would have probably reached the same result anyway, the error was harmless. The court explained that the defendant was aware of plaintiff's physical limitations and her need for accommodation, and that such awareness triggered a duty to accommodate. "As a result, we do not accept Liberty's contention that the jury was deprived of the 'opportunity to decide the foundational issue of whether [Dunlap] triggered a duty to accommodate.'"

The defendant also claimed that the court erred by failing to grant its renewed motion for judgment as a matter of law (JMOL) because Dunlap failed to meet her burden to prove that a reasonable accommodation existed that would have enabled her to perform the essential functions of her shipping clerk position. The Court of Appeals rejected this argument: "Because the evidence reflected that Liberty had prior notice of Dunlap's limitations, refused to consider or implement her proposed accommodations, and failed to articulate any undue hardship, the district court correctly denied Liberty's renewed motion for JMOL."

On the issue of attorney fees, the district court reduced the attorney fees by 50% considering the degree of success achieved by the prevailing party; plaintiff only succeeded on one out of five unrelated claims and asked for between $100k and $150k, but received only $70k. The Court of Appeals deferred to the district court's discretion.

Dunlap v. Liberty Natural Products, Inc., 878 F.3d 794 (9th Cir. 12/28/2017) (Rawlinson, Gould, Burns (S.D. Cal.)).

WASHINGTON SUPREME COURT

The WLAD Prohibits Prospective Employers from Discriminating against Applicants Who Have Engaged in Protected Conduct with a Different Employer

The plaintiff had worked for a school district. He was terminated. A hearing officer reinstated him. He filed claims of discrimination and retaliation in federal district court that were ultimately settled. He resigned as part of the settlement. He then applied to be a teacher with a different school district. It was undisputed that the hiring officials knew about his prior protected activity. The school district refused to hire him. He sued raising both federal and state retaliation claims.

The district court granted the school district's motion to dismiss the federal claims on the basis that his protected activity was with a different employer. The district court refused to dismiss the WLAD claim on this basis. The plaintiff prevailed at trial. The school district moved to set aside the verdict. The district court certified whether state law provided a cause of action.

In a unanimous opinion by Justice Yu, the Supreme Court ruled in favor of the employee. The Justices held that the plain terms of RCW 49.60.210(1) provided for such a claim. Nothing in the statute restricted the protected activity to be with respect to the defendant employer. It did not matter that the WLAD does not mention "applicants." Nor did it matter that the adverse actions listed in .210(1) could only be taken with respect to current employees because the statute does not permit employers to "otherwise discriminate."

The court reasoned that if "prospective employers are allowed to engage in retaliatory refusals to hire, a reasonable employee might well be dissuaded from opposing discriminatory practices for fear of being unofficially 'blacklisted' by prospected future employers." The court held that the scope of the WLAD retaliation provision was broader than the workers' compensation anti-retaliation provision, RCW 51.48.025, which a court of appeals had held does not apply to former employees.

The WLAD's mandate of liberal construction eliminated any doubt as to the proper construction. "[I]t would make little sense to hold that the legislature intentionally undercut its own purposes in enacting the WLAD by adopting an antiretaliation provision that allows employers to compile an official 'do not hire' list of individuals who have previously opposed discrimination against themselves and others."

WELA filed an amicus in support of the plaintiff.

Zhu v. North Central Educational Serv. Dist.-ESD 171, -- Wn.2d --, 404 P.3d 504 (11/9/2017).

WASHINGTON COURT OF APPEALS

Employees of Sole Proprietorship Cannot be Combined with Employees of Commonly Managed Corporate Entities to Satisfy WLAD Eight-Employee Threshold

The defendant in this case was a sole proprietorship with no more than seven employees. He also owned an LLC. The plaintiff worked for the sole proprietorship. Her doctor placed her on physical restrictions. She was terminated shortly thereafter. She sued under the WLAD claiming failure to accommodate. The employer argued that it did not meet the eight-employee statutory minimum. The superior court disagreed. The employer moved for discretionary review.

The court of appeals reversed. A Human Rights Commission rule allows "corporations and other artificial persons that are in common ownership" to be treated as a single employer where they have common management. The court of appeals ruled that a sole proprietorship was neither a corporation nor an artificial person. It reasoned that a sole proprietorship was the same as the natural person who owned it. Therefore, even if there were common ownership, the regulation by its terms did not apply.

Mikolajczak v. Mann, --- Wn. App. ---, 406 P.3d 670 (Div. III 12/7/2017) (Pennell, Korsmo, Siddoway).

Attorney Cannot Enforce "Just Cause" Employment Agreement with Client; Compelled Disclosures Do Not Qualify as Protected Activity for Wrongful Discharge Claim

The Plaintiff is an attorney who signed a five-year "employment agreement" with the King County Department of Corrections labor union. The contract required "just cause" for termination. In March 2016, the King County Ombudsman's Office (Ombudsman) contacted Karstetter about a whistleblower complaint. Karstetter claims the Guild Vice President told Karstetter to cooperate with the Ombudsman. Karstetter then complied by producing requested documents. On April 27, 2016, the Guild summarily fired Karstetter. Karstetter alleges that the Guild fired him "ostensibly for disclosure of information to the Ombudsman and for disloyalty." The Guild claims that it fired Karstetter because of strong evidence that he disclosed Guild client confidences. The record is unclear whether the client confidences allegedly disclosed were contained in the public record disclosures and/or whether there existed a legal basis for refusing to produce the requested records.

Karstetter filed suit alleging a wide variety of claims. Most claims were dismissed pursuant to CR 12(b)(6) except for breach of contract and wrongful discharge. The Guild filed a Motion for Discretionary Review for failure to dismiss the remaining claims, and the motion was granted.

The Court of Appeals ruled that the "just cause" provision in the contract violated the Rules of Professional Conduct. RPC 1.16(a) provides that a lawyer shall "withdraw from the representation of a client if . . . (3) the lawyer is discharged." Comment 4 to this rule states, "A client has the right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services." The Court of Appeals ruled that '[n]either the rule nor the comment excludes in-house counsel from the rule's application." The court ruled that contract provision directly conflicts with the RPC that a client may fire a lawyer for any reason at any time, and rejected Karstetter's argument that the adoption of an employer/employee relationship altered the analysis. The court distinguished California law which held that an attorney employed as in-house counsel could bring a contract claim against a client-employer for breach of a "good cause" termination provision.

As for wrongful discharge, the Court of Appeals first listed the four elements required for proving a wrongful discharge claim recognized by the *Perritt* treatise. The court stated that to prove the jeopardy element an employee "must also show 'how the threat of discharge will discourage others from engaging in desirable conduct' and *'that other means of promoting the public policy are inadequate.'*" (Emphasis added.) The court also recognized the four traditional categories of wrongful discharge cases: (1) where the discharge was a result of refusing to commit an illegal act; (2) where the discharge resulted due to the employee performing a public duty or obligation; (3) where the termination resulted because the employee exercised a legal right or privilege; and (4) where the discharge was premised on employee "whistleblowing" activity.

Karstetter alleged that he was terminated because, pursuant to the King County Code, he was compelled to produce certain documentation under threat of Superior Court action for compelled compliance. The Court of Appeals dismissed the claim because he was a not a whistleblower but merely provided information in a whistleblower investigation. The court failed to explain why Karstetter was not performing a public duty or obligation or exercising a legal right of privilege. Recognizing a split of authority from other jurisdictions, the court declined to reach the issue of whether an attorney-employee may bring a wrongful discharge claim against his client-employer.

EDITORS' NOTE: The Supreme Court has ruled that strict adequacy was not required under the jeopardy element. No longer does the existence of other nonexclusive statutory remedies preclude a plaintiff from recovery. *Rose*

v. Anderson Hay & Grain Co., 184 Wn.2d at 274, 358 P.3d 1139 (2015). Moreover, the *Perritt* formulation and its jeopardy element are inapplicable to cases which fall within one of the four categories of traditional wrongful discharge cases. *Id.*

Karstetter v. King County Corrections Guild, --- Wn. App. ---, 407 P.3d 387 (Div. I 12/26/2017) (Leach, Cox, Becker).

COMMENT

Fee Petitions and So-Called "Block Billing": How Much Detail is Required of Counsel's Time Records?

When a prevailing employee or other party suing under a fee-shifting statute applies for an award of attorney's fees, he or she typically uses what is known as the "lodestar" method of calculating a reasonable fee.[1] The first step is to establish the number of hours reasonably expended and the reasonable rates applicable to those hours.[2] To establish the number of hours reasonably expended, the plaintiff must provide "reasonable documentation of the work performed."[3]

A question is sometimes raised about the level of detail required in counsel's documentation of work performed. Some federal courts have disapproved of and penalized counsel for so-called "block-billing," which generally refers to the practice of entering "the total daily time spent working on a case, rather than itemizing the time expended on specific tasks."[4] Some federal courts have penalized this practice by reducing the overall lodestar, or the hours found to have been "block billed," by a certain percentage.[5] On the other hand, courts recognize that so long as the records provide "sufficient information for the Court to assess the nature of the work done," block billing is not objectionable.[6] Indeed, requiring too much detail in counsel's billing would produce the perverse result of longer and higher bills.

Washington courts have rejected challenges based on alleged block billing;[7] only one state appellate decision has actually disapproved of block billing, and it was a very unusual case that presented unique problems regarding the fee award.[8] Arguably, any blanket rule against so-called block-billing would conflict with the "minimum level of detail" required by Washington courts since *Bowers*.[9] Such documentation "need not be exhaustive or in minute detail, but must inform the court" of the number of hours worked, the type of work performed, and "the category of attorney who performed the work (i.e., senior partner, associate, etc.)."[10] The best practice is to keep

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[1] *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983).

[2] *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 341, 54 P.3d 665 (2002) (citing *Bowers*, 100 Wn.2d at 597, 598).

[3] *See, Bowers*, 100 Wn.2d at 597; *Fisons*, 122 Wn. 2d at 335 ("Attorneys seeking fees must provide reasonable documentation of work performed to calculate the number of hours").

[4] *Welch v. Met. Life Ins. Co.*, 480 F.3d 942, 945 n.2 (9th Cir. 2007).

[5] *See, e.g., MKB Constructors v. Am. Zurich Ins. Co.*, 83 F. Supp. 3d 1078, 1087-88 (W.D. Wash. 2015) (citing cases).

[6] *Campbell v. Catholic Cmty. Servs.*, 2012 U.S. Dist. LEXIS 190096, *14-15 (W.D. Wash. Aug. 8, 2012).

[7] *See, e.g., Collins v. Clark County Fire Dist. No. 5*, 155 Wn. App. 48, 102-03, 231 P.3d 1211 (2010).

[8] *See Berryman v. Metcalf*, 177 Wn. App. 644, 664, 312 P.3d 745, 757 (2013). *Berryman* was a $36,000 auto accident arbitration that resulted in a $291,000 fee award, including a double multiplier, after a trial de novo. The trial court made no specific findings in support of the fees awarded, and the Court of Appeals remanded for particularized findings. *Id.* at 656-58. It noted that the fees were disproportionate to the award, a consideration it acknowledged is not always germane, such as in civil rights or employment cases. *See id.* at 660. And the court's mention of "block billing" was not to expressly disapprove of it but to note that it made resolving other objections, such as excessive billing for certain types of tasks, more difficult. *Id.* at 663-64.

[9] *See 224 Westlake*, 169 Wn. App. at 735; *id.* at 740 ("The determination of a fee award should not become an unduly burdensome proceeding for the court or the parties…. Documentation 'need not be exhaustive or in minute detail….'").

[10] *Bowers*, 100 Wn. 2d at 597. The documentation should also include the dates that the work was performed. *See 224 Westlake, LLC v. Engstrom Properties, LLC*, 169 Wn. App. 700, 736, 281 P.3d 693 (2012).

reasonably detailed records of tasks performed by each attorney, separating clearly distinct tasks that involve large blocks of time into different entries where feasible.—*Daniel Johnson*

VICTORIES AND DEFEATS

Alex Higgins, Rebecca Ary, and Daniel Johnson represented the employee in *Clemens*.

Dan Johnson, Toby Marshall, and Marc Cote represented the employees in *Douglas*.

Judith Lonnquist represented the plaintiff in *Karstetter*.

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