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ALERT

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U.S. SUPREME COURT

Justices Will Decide Two Issues Regarding FAA Exemption for Transportation Workers

In an FLSA collective action, the Court granted certiorari to decide (1) whether a dispute over applicability of the Federal Arbitration Act's exemption for transportation workers is an arbitrability issue that must be resolved in arbitration pursuant to a valid delegation clause rather than by the court; and (2) whether the FAA's exemption for transportation workers, which applies on its face only to "contracts of employment," is applicable to independent contractor agreements.

New Prime, Inc. v. Oliveira, --- S. Ct. --- (2/26/2018)

Does the ADEA 20 Employee Minimum Apply to Public Employers? Court Will Tell Us

The Court granted review of whether, under the Age Discrimination in Employment Act, the same 20-employee minimum that applies to private employers also applies to political subdivisions of a state, as the U.S. Courts of Appeals for the 6th, 7th, 8th and 10th Circuits have held, or whether the ADEA applies instead to all state political subdivisions of any size, as the U.S. Court of Appeals for the 9th Circuit held in this case.

Mount Lemmon Fire District v. Guido, --- S. Ct. --- (2/26/2018)

NINTH CIRCUIT

University President Entitled to Qualified Immunity on Former Employee's Claim for Deprivation of Liberty Interest without Due Process

Plaintiff worked as the executive director for a public radio station and related foundation, both affiliated with a state university. He reported to the university president. The university president became concerned with how the foundation was spending its money. An audit determined that there was an inherent conflict of interest in having the same person serve in both capacities. The plaintiff then asked the foundation board to sever its ties with the university.

The university responded by having its lawyers send a letter to the plaintiff and foundation board of directors suggesting their actions might not be covered by directors and officers' insurance. The situation remained at a stalemate until the university informed the plaintiff his contract would not be renewed for the following term.

The plaintiff sued the university for a variety of claims including deprivation of a liberty interest without due process of law. The district court granted summary judgment on all claims but the deprivation of liberty claim. The university president appealed. The Ninth Circuit reversed.

The panel held both that the attorney letter did not contain stigmatizing information and that the university president was entitled to qualified immunity. The letter talked about the legal standards for a bad faith exclusion from insurance coverage but did not impute bad faith to the plaintiff. Furthermore, no case had held that language suggesting a possible breach of fiduciary duty constitutes stigma for a deprivation of liberty interest.

Kramer v. Cullinan, 878 F.3d 1156 (9th Cir. 1/3/2018) (Rawlinson, Tashima, Gould)

Termination of Officer Based on Off-Duty Extramarital Affair with Another Officer Violated Employee's Constitutional Right to Privacy

On January 4, 2012, Janelle Perez was hired by Chief Daniel Hahn to serve as a police officer in the Roseville Police Department. A few months into her probationary term, Perez and a fellow officer, Officer Shad Begley ("Begley") began a romantic relationship. Both Perez and Begley were separated from, although still married to, other individuals.

On June 6, 2012, Begley's wife filed a citizen complaint in which she alleged that Perez and her husband were having an affair and that they were engaging in inappropriate sexual conduct while on duty. This letter prompted the Department to initiate an Internal Affairs ("IA") investigation headed by Lieutenant Bergstrom. In his report, Bergstrom stated that there was no evidence of on-duty sexual contact between Perez and Begley, but that the two "made a number of calls and texts when one or both was on duty," which "potentially" violated Department policy. Nevertheless, Roseville police officials found that Plaintiff and Begley's conduct violated Department policies related to "Unsatisfactory Work Performance" and "Conduct Unbecoming."

At the conclusion of a hearing on the charges, Perez was informed without any explanation that she was being released from probation. The notice contained no reasons for her discharge, and the Chief declined to give a reason.

Perez sued the City of Roseville, and individual officials alleging Section 1983 claims for violation of her rights to privacy and freedom of association and her right to due process, as well as sex discrimination under Title VII and California law. Summary judgment was granted to all Defendants and Plaintiff appealed.

The Ninth Circuit held that "[w]e have long recognized that officers and employees of a police department enjoy a 'right of privacy in private, off-duty sexual behavior.'" The Constitution is violated when a public employee is terminated at least in part on the basis of protected conduct, such as her private, off-duty sexual activity. "A department can violate its employees' rights to privacy and intimate association either by impermissibly investigating their private sexual conduct or by taking adverse employment action on the basis of such private conduct."

> As a society, we must remain solicitous of the constitutional liberties of public employees, as of any citizens, to the greatest degree possible, and should be careful not to allow the State to use its authority as an employer to encroach excessively or unnecessarily upon the areas of private life, such as family relationships, procreation, and sexual conduct, where an individual's dignitary interest in autonomy is at its apex.

The Court concluded that a genuine issue of material fact exists as to whether Perez was fired at least in part because of her extramarital affair. The Court rejected the individual officials' assertion of qualified immunity but recognized a split with the Fifth and Tenth Circuits.

The Court found that there was evidence to support Plaintiff's deprivation of liberty without due process claim because stigmatizing information about her was published in connection with her termination. Where only a few weeks separate publication of a defamatory statement from an employee's termination, a temporal nexus test is satisfied. Nevertheless, the Court found that the individual officers were entitled to qualified immunity on the due process claim because the law of this circuit did not clearly establish that a letter published nineteen days

prior to an employee's termination could bear a sufficient nexus to the employment decision to give rise to a right to a name-clearing hearing.

The Court also affirmed dismissal of Plaintiff's gender discrimination claims on the ground that the gravamen of her claim was that she was discharged for having an extra marital affair with another officer, which was not a gender-based discrimination claim.

Perez v. City of Roseville, 882 F.3d 843 (9th Cir. 2/9/2018) (Reinhardt, Tashima, Molloy (D. Mont.))

WASHINGTON SUPREME COURT

Public Employer Policy of Prohibiting Religious Speech on Workplace Listserve and Electronic Bulletin Board Violates the First Amendment

The plaintiff was a captain in a municipal fire department. He and several other employees formed a Christian Fellowship. He created a listserve of about 45 firefighters whom he thought would be interested in the Fellowship's activities. The plaintiff distributed the emails over the employer's email system.

While the employer had a written policy limiting the email system to firefighter business, in practice personal use of the email system was permitted as long as it was linked to department business in some way. There was also an electronic bulletin board that reached all employees. There was no policy that limited the bulletin board and employees used it for personal business.

The plaintiff posted information about the Fellowship's activities to both the listserve and the electronic bulletin board. His supervisors ordered him to stop posting communications about the Fellowship and use his personal email. The plaintiff refused and was ultimately terminated.

He first filed a civil service appeal arguing that his termination violated his constitutional rights of free speech and religion. The Commission ruled that there was no constitutional violation because the fire department excluded all religious speech and did not favor one religion. The plaintiff did not appeal the civil service ruling, which became final. He then filed suit in state court claiming violation of his right to free speech only.

The Superior Court granted the fire department's motion for summary judgment on the ground of collateral estoppel. The Superior Court agreed there was no constitutional violation because the department prohibited all religious speech. Division III affirmed 2-1. The majority agreed with the Superior Court on the collateral estoppel issue. The concurrence reasoned that had the fire department allowed the plaintiff to continue to post his emails, there would have been an Establishment Clause violation. The dissent would have held that collateral estoppel did not apply and that the policy, as applied, was unconstitutional.

The Supreme Court reversed. Justice Wiggins wrote for a majority of five. Justice Yu wrote for four justices.

The Court was unanimous on the collateral estoppel issue. The Court held that the issues in the Civil Service Commission and in the civil action were not identical. The Court reasoned the issue the Commission decided was whether the plaintiff was terminated for cause within the meaning of RCW 41.08.090. The statute prohibits dismissal for political or religious reasons but does not address free speech. Second, the essence of the plaintiff's claim was that he was dismissed for disobeying an unconstitutional order. Third, the Commission misperceived the plaintiff's legal claims by focusing on whether other employees were allowed to post religious views.

In rejecting the collateral estoppel argument, the Court also considered the fact that civil service

commissions do not have the institutional competence to decide constitutional questions. While the Commission did not decide the constitutional issue the plaintiff raised in court, the Justices suggested it would not have mattered if the Commission had done so. The Justices also noted the disparity between the remedies available in court and in the civil service process in denying collateral estoppel. Finally, public policy does not support giving agencies the ability to have the final word on constitutional questions.

The majority concluded that material facts related to the constitutional question were undisputed and evidenced an unwritten policy that prohibited religious speech on the listserve and the bulletin board. The majority characterized the listserve and bulletin board as nonpublic fora. The majority held that the plaintiff spoke as a citizen rather than within the scope of his duties as fire captain and that his emails addressed matters of public concern.

The majority held that while the written policy restricting the email system to fire department business was reasonable, the application of the policy to preclude religious speech where other non-business-related speech was permitted was illegal viewpoint discrimination. The Justices rejected the reasoning of the court of appeals concurrence that allowing the posting of the emails constituted an Establishment Clause violation. Here, the public never saw the postings.

WELA had submitted an amicus brief asking the Court to consider the potential of supervisor proselytizing to result in religious favoritism or harassment. The majority gave short shrift to those concerns saying those issues were not implicated by the case at issue, which involved a blanket policy against religious discussion. The majority noted that no employee had complained of harassment, a point that WELA argued was not dispositive to whether an employer has an affirmative obligation to prevent discrimination. The plaintiff had sent at least one email questioning the ability of believers and non-believer firefighters to associate. The majority dismissed that concern by stating there was no evidence that the emails had upset anyone.

The majority remanded the case for a determination whether the employer could prove the same action defense available under First Amendment law to defeat liability for violating the plaintiff's constitutional rights. The majority strongly suggested that defense would not be available on the facts and the only issue would be damages.

Justice Yu would have remanded for a factual determination of the question whether the fire department had an unwritten policy of discriminating against religious viewpoints. These four Justices thus dissented on the scope of the remand. Justice Yu also disagreed with majority's dismissal of the legitimacy of the concerns about allowing a supervisor to use government resources to promulgate his personal religious beliefs.

Sprague v. Spokane Valley Fire Dep't, --- Wn.2d ---, 409 P.3d 160 (1/25/2018)

WASHINGTON COURT OF APPEALS

Arbitrator's Ruling Collaterally Estops Employee's Civil Suit

Billings worked for the Town of Steilacoom Public Safety Department. On May 8, 2012, Steilacoom demoted Billings from the rank of Sergeant to Public Safety Officer (PSO). Following several internal affairs investigations, the Police Chief concluded Billings violated numerous policies and demonstrated a pattern of poor performance. He recommended terminating Billings and the Mayor agreed. At the time the investigation concluded, Billings was off work due to a hand injury. Steilacoom waited until Billings's doctor released him to return to duty before moving forward with the termination. On

September 25, 2012, Steilacoom terminated Billings's employment.

On October 2, Billings, assisted by the Steilacoom Officers' Association (SOA), filed a grievance opposing his demotion and termination. After Steilacoom denied the grievance, the SOA requested arbitration pursuant to the applicable Collective Bargaining Agreement (CBA). The arbitrator concluded that just cause did not support Billings's demotion, but just cause supported Billings's termination based on unsatisfactory performance, insubordination, departures from the truth, failure to perform, unbecoming conduct, unsatisfactory performance, and leaving his duty post.

Billings filed a complaint against Steilacoom, and the Chief and Mayor as employees of Steilacoom, alleging (1) retaliation in violation of 42 U.S.C. § 1983; (2) discrimination and retaliation because of Billings's disability, lawful union activities, and/or medical leave; (3) negligence and/or intentional infliction of emotional distress; (4) violation of Title 41 and/or 49 RCW; (5) negligent retention and supervision of those who retaliated against Billings; and (6) wrongful termination in violation of established public policy. The defendants asserted numerous affirmative defenses including res judicata and collateral estoppel. The trial court granted the Defendants' motion for summary judgment and Billings appealed.

The Court of Appeals ruled that Billings's claims under the WLAD were collaterally estopped. The Court of Appeals reasoned that "[t]he arbitrator concluded that just cause existed for Billings's termination. Therefore, a 'legitimate, nondiscriminatory explanation' for his termination has already been litigated. This issue is identical to an issue that is the crux of this cause of action."

In reference to the public policy claim, the court applied the Perritt framework even though the case fell within one of the four traditional categories of wrongful discharge cases. The court ruled that the arbitrator's finding of just cause for his dismissal precluded a finding of causation and overriding justification in favor of the employee.

Billings alleged he made complaints about hiring decisions and employment; that the Chief yelled profanities at him in front of peers and subordinates; filed a complaint alleging improper governmental action by the Chief; filed a formal complaint against the Chief alleging retaliation; and that he filed three other grievances alleging the Chief was violating policies. The Court affirmed the dismissal of Billings's Section 1983 claim because he failed to raise issues of public concern.

A Petition for Review is pending.

Billings v. Town of Steilacoom, 2 Wn. App. 2d 1, 409 P.2d 1123 (Div. II 9/26/2017, published 1/17/2018) (Melnick, Bjorgen, Sutton)

Collective Bargaining Agreement Did Not Encompass Employee's State Law Wage Claims so no Grounds to Compel Arbitration

Plaintiff worked for QFC. He filed a class action claiming the employer's policy of rounding employees' clock-in time to nearest quarter hour unlawfully deprived them of wages due under Washington law. QFC claimed that the claims were subject to arbitration under the relevant collective bargaining agreement ("CBA"), even though there was no mention of the rounding policy in the CBA. The Superior Court denied QFC's motion to compel arbitration.

Division I affirmed. The court first held that the claims at issue were statutory wage claims under both Washington and Oregon laws. The issue was not whether the rounding policy existed as a matter of fact but whether the policies had the impact of undercompensating the employees. "[I]ntentionally manipulating a facially neutral

rounding policy used to compute wages owed, resulting in underpayment, runs afoul of Washington's and Oregon's wage and hour statutes."

The employer argued that a CBA provision stating "All claims for back wages or overtime not paid must be presented through the Union to the Employer" amounted to a waiver of the right to file such claims in court. The panel held that this language was not a clear and unmistakable waiver of the right to a judicial forum.

Cox v. Kroger Co., --- Wn. App. ---, 409 P.3d 1191 (Div. I 2/5/2018) (Verellen, Spearman, Schindler)

VICTORIES AND DEFEATS

Donald Heyrich represents the employees in *Cox*.

COMMENT

Determining if Washington Law Applies Across State Borders

By Joshua Volvovic

As the global economy evolves, employees cross state lines more and more often. When those employees sue their employers, which law applies? Washington courts apply the *most significant relationship test*.[12] In the absence of an effective choice of law by the parties, the laws of the state having the most significant relationship with the contract govern the validity and effect of that contract.[3]

In applying that test, there are a series of factors to weigh to determine the applicable law:

a. Place of contracting;
b. Place of negotiation of the contract;
c. The place of performance;
d. Location of subject matter of the contract; and
e. The domicile, residence, nationality, place of incorporation, and place of business of the parties.

The courts' approach is *not* to count contacts, but rather to consider which factors are most significant. Below is an example:

a.) *Place of contracting*: If contracting took place in Washington State, the court may weigh that factor in favor of Washington law applying. Yet, in *Potlatch v. Kennedy*, the court stated, "standing alone, the state of contracting may be relatively insignificant…"[4]

b.) *Place of negotiation*: When parties don't meet but conduct their negotiations from separate states by mail or telephone, this prong "is of less importance as there is no single place of negotiation/agreement."[5]

c.) *Place of performance*: The *Baffin* court found that this factor weighed more heavily. Since the contract was for "rendition of services," the court found that the *location* where the contract required performance, or a major portion of them to be performed, was a significant factor in determining which state's law applied.[6]

d.) *Location of subject matter*: Like place of performance, this factor must be evaluated as to which state's laws most strongly impact the contract or issues in dispute.

e.) *Domicile etc.:* At times courts have found this to be a neutral factor.

Although a particular factor may appear compelling, exceptions do apply. The *Nelson v. Kaanapali Properties* court held that "expectation interest of the parties" might determine what law applies.[7] Washington law may also apply if the court finds that another state's law in relation to

the transaction will harm a party substantially. The *Bostain v. Food Express* court found that Washington-based employees must be compensated in accordance with RCW 49.46.005 for overtime hours, irrespective of whether some hours were worked outside of the state's borders.[8]

Finally, if a situation is evenly balanced, courts will evaluate "the interests and public policies of the concerned states, to determine which state has the greater interest in determination of the particular issue."

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[1] *Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 580, 555 P.2d 997 (1976).
[2] RESTATEMENT OF LAW (SECOND) § 188 (1971).
[3] *Potlatch No. 1 Fed. Credit Union v. Kennedy*, 76 Wn.2d 806, 810, 459 P.2d 32, 35 (1969); *See also*, RESTATEMENT (SECOND), CONFLICTS OF LAW S 188. (Comment e. Proposed Official Draft, 1968).
[4] *Id.*
[5] *Baffin Land Corp. v. Monticello Motor Inn, Inc.*, 70 Wn.2d 893, 902, 425 P.2d 623, 628 (1967).
[6] *Nelson v. Kaanapali Properties*, 19 Wn. App. 893, 578 P.2d 1319 (1978) (quoting from Restatement §196).
[7] *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 711, 153 P.3d 846 (2007).
[8] *Zenaida-Garcia v. Recovery Sys. Tech., Inc.*, 128 Wn. App. 256, 263-64 115 P.3d 1017 (2005).