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

Remand to District Court Necessary to Determine Whether Relator was Original Source

The relator, Solis, alleged that his former employers violated state laws and the False Claims Act (FCA) by promoting dangerous off-label uses of the drug Integrilin and by paying physicians kickbacks to prescribe Integrilin and the drug Avelox. Following a three-year investigation, the United States and all twenty-four states named in Solis's initial complaint chose not to intervene. The district court dismissed Solis's FCA claims under Federal Rule of Civil Procedure 12(b)(1), finding them foreclosed by the FCA's so-called public disclosure bar. Solis appealed. The Ninth Circuit reversed and remanded.

The FCA deprives federal courts of subject matter jurisdiction over FCA suits when the alleged fraud has already been publicly disclosed, unless the relator is deemed an original source. *See* 31 U.S.C. § 3730(e)(4) (2006) (amended 2010). This public disclosure bar is triggered if three conditions are met: "(1) the disclosure at issue occurred through one of the channels specified in the statute; (2) the disclosure was 'public'; and (3) the relator's action is 'based upon' the allegations or transactions publicly disclosed." The Court found that the relators' allegations had been previously disclosed in an early complaint.

Nevertheless, the relator can still establish subject matter jurisdiction if he can show that he qualifies as an "original source." 31 U.S.C. § 3730(e)(4). *Previously*, there existed a three-part test to determine if a relator is an original source: (1) he must have "direct and independent knowledge" of the information on which his allegations are based; (2) he must have "voluntarily provided the information to the Government before filing" his FCA action; and (3) he "must have had a hand in the public disclosure of allegations that are a part of [his] suit." Intervening case law, however, rejected the third part of the test. Applying only the first two parts of the test, the Court remanded to allow the District Court, in the first instance, to determine whether the first two parts of the test had been satisfied.

In reference only to the drug Avelox, the Court concluded there was clear error in the finding that Avelox was publicly disclosed. The Court remanded with instructions to allow the relator to amend the complaint to plead this claim with sufficient particularity.

United States, Ex Rel., Frank Solis v. Millennium Pharmaceuticals, Inc., 885 F.3d 623 (9th Cir. 3/15/2018) (Wallace, Callahan, Nguyen)

Plaintiffs' Counsel Sanctioned Because Expert Witness Did Not Appear for Deposition

Plaintiffs brought a wage and hour class action. The employer sought to depose the economist and statistician who had filed declarations in support of class certification. Plaintiffs objected to the subpoena and neither the witness nor plaintiffs' counsel appeared. The magistrate judge ordered the deposition to proceed on a date certain. Neither the witness nor plaintiffs' counsel appeared. The magistrate judge imposed sanctions of $15,000, which plaintiffs' counsel did not pay. The magistrate judge held the plaintiffs' counsel in contempt.

The Ninth Circuit affirmed. The court assumed but did not decide that a subpoena was required to depose a party's expert witness. The court held Rule 37 permits a court to compel the deposition of an expert witness. The party will avoid sanctions if it attempts to secure the deposition, but the nonparty witness is recalcitrant. The only sanction available against the witness is contempt of subpoena under Rule 45.

Sali v. Corona Regional Med. Ctr., 889 F.3d 623 (9th Cir. 3/19/2018) (Nguyen, Kleinfeld, Ikuta)

Salary History is Not a Defense to an Equal Pay Act Violation

The defendant public employer had a policy that set initial salary by taking the employee's prior salary and adding 5%. The plaintiff learned she was being paid less than a male colleague. She filed suit under the federal Equal Pay Act ("EPA"), Title VII and California law. The county moved for summary judgment on the EPA claim arguing that the plaintiff's salary was a permissible "factor other than sex" under the statute. The district court denied summary judgment but allowed the county to appeal. Relying on Ninth Circuit precedent, a panel ruled the employer should have been granted summary judgment. The case then went en banc. All 11 judges agreed that the employer was not entitled to summary judgment, but there were four rationales.

Writing for six, Judge Reinhardt held that employers can (almost) never justify a wage differential based on prior salary, even in combination with other factors. To hold otherwise would allow the wage gap to continue forever. He described the continuing gender pay gap 55 years after the enactment of the EPA as "an embarrassing reality of our economy."

The court reaffirmed that the EPA is a strict liability statute. There is no need for the plaintiff to show discriminatory intent or prove pretext. The county admitted the plaintiff had shown a prima facie case of an EPA violation and the only defense it had was that her prior salary qualified as "any other factor other than sex." The majority held that defense was limited to "legitimate, job related factors such as a prospective employee's experience, educational background, ability, or prior job performance." The majority then held that prior salary is not job related. Therefore, the employer as a matter of law had no defense.

The majority reasoned that at the time of the passage of the EPA, the job market was so infected with sex discrimination that Congress could not have intended past salary to be a defense to an Equal Pay Act claim. The majority refused to decide, however, "whether or under what circumstances, past salary may play a role in the course of an individualized salary negotiation."

The majority disagreed that the catchall exception permitted employers to rely upon any facially neutral factor. The other three exceptions are seniority, merit, and productivity. Because the three explicit exceptions all relate to legitimate, job related reasons, the majority held the catchall was also so limited. The majority implied the word "similar" after the word "other." The majority read the legislative history to allow employers to use legitimate, job-related means of setting pay. The catchall "does not encompass reasons that are simply good for business."

The majority held that prior salary "does not fit within the catchall exception because it is not a legitimate measure of work experience, ability, performance, or any other job-related quality." Any relationship it has is attenuated. "Rather than use a second-surrogate that likely masks continuing inequities, the employer must instead point directly to the underlying factors for which prior salary is a rough proxy…." In sum, past salary "may not be used in initial wage setting, alone or in conjunction with less invidious factors."

Judges McKeown and Murgia agreed with most of the majority opinion and in particular that past salary can reflect historical sex discrimination. They agreed that past salary alone is not a defense to unequal pay for equal work. But they would have held that an employer does not violate the EPA by considering prior salary along

with other factors in setting initial wages. They noted their position was consistent with the EEOC's interpretation and most other circuits. They argued that past salary may accurately gauge the employee's skill effort, responsibility, education, training and past performance. Judge McKeown expressed concern that the majority's holding would make it a violation of the EPA for past salary to be included in negotiations and hurt some women.

Judges Callahan and Tallman disagreed that prior salaries are not job related and inherently reflect wage discrepancies based on gender. They also would have allowed employers to consider prior salary along with other factors. They disagreed that the catchall exception is limited to job-related qualities. They also claimed their approach was consistent with the EEOC and other circuits.

Judge Watford would have held that the employer can reply on past salary only where it proves that past salary is not tainted by sex discrimination or discriminatory pay differentials attributable to prevailing market forces. He recognized that "in most instances that would be exceedingly difficult to do." "It remains highly likely that a women's pay will reflect, at least in part, some form of sex discrimination."

Rizo v. Yovino, 887 F.3d 453 (9th Cir. 4/9/2018) (en banc)

Ninety Day Period Runs from When the Charging Party is Given the Right to Sue by the EEOC Rather than from 180 Days after the EEOC Charge is Filed.

Plaintiff filed an EEOC charge alleging sex harassment and retaliation. She received a right to sue letter. She filed a second charge of retaliation and received an immediate right to sue letter. She later filed suit in federal district court. The district court ruled her claims were untimely. On appeal, the Ninth Circuit held 90-day period to file a lawsuit could be deemed to run from 180 days after the plaintiff filed the EEOC charge or from when the plaintiff received a right to sue letter. The district court erred by choosing the former based on an earlier Ninth Circuit case suggesting the period runs from whichever event occurs first. The panel ruled the earlier case was dicta because it misread the case it relied on. The panel held that while a plaintiff may file suit when the EEOC has failed to act on a charge within 180 days regardless of whether a right to sue letter has issued, the plaintiff is not required to do so. Only the receipt of a right to sue letter starts the 90-day clock.

Scott v. Gino Morena Enterp., 888 F.3d 1101 (9th Cir. 4/27/2018) (Callahan, Nguyen, Battalion (D. Neb.)).

WASHINGTON SUPREME COURT

Superior Court Erred by Not Certifying Meal and Rest Break Class Action

Nurses employed by Our Lady of Lourdes Hospital ("Hospital") worked in nine different departments. The Hospital's time keeping system automatically deducted 30 minutes compensation for a meal break but allowed nurses to account for a missed meal period by cancelling the automatic deduction. The Hospital would then pay for the 30 minutes of wages for the meal break not taken. The time system did not permit nurses to track missed rest breaks. Nor did the system permit nurses working 12-hour shifts—a category that included the majority of nurses at the Hospital—to track missed second meal periods. In 2012, the nurses filed an individual and class action for unpaid wages, asserting that they regularly missed breaks without compensation due to the Hospital's failure to ensure they could take breaks and record missed breaks.

In 2015, the nurses amended their complaint and renewed their class certification motion to

include all registered nurses who worked at least one hourly shift at the Hospital from June 2009 through March 2013 and, alternatively, to certify subclasses of these same nurses by department or shift hours. The trial court denied the motion, ruling that the nurses failed to satisfy the predominance and superiority requirements of CR 23(b)(3). The court was concerned that the differences between shift length and nurse type created manageability issues.

The nurses appealed the denial of certification. The Court of Appeals affirmed, basing its decision solely on the superiority prong. Although the trial court had not expressly resolved conflicts in the evidence, the Court of Appeals decided to review the facts in a light most favorable to the Hospital. The Supreme Court granted review and unanimously reversed.

The Supreme Court reaffirmed that "Washington courts liberally interpret CR 23 because the 'rule avoids multiplicity of litigation, saves members of the class the cost and trouble of filing individual suits [,] and . . . also frees the defendant from the harassment of identical future litigation. Accordingly, courts should err in favor of certifying a class because the class is always subject to the trial court's later modification or decertification." A trial court's decision to grant class certification is reviewed for manifest abuse of discretion."

The Court recognized that the trial court denied certification because it found that class issues did not predominate over individual issues. In particular, what happens shift to shift, nurse to nurse, and nurse type to nurse type, were individual questions which would control the litigation and make the class unmanageable. The Supreme Court ruled, however, that the trial court failed to make factual findings or to identify the evidence upon which it relied. "Because the trial court failed to support its CR 23 analysis with sufficient factual findings and adequate reference to the CR 23 criteria, we review the trial court's decision without affording it the traditional degree of deference."

The Court found that the declaration of witnesses revealed that "the dominant and overriding issue common to all putative class members is whether Lourdes failed to ensure nurses could take breaks and record missed breaks." The Court ruled that factors such as nurse type and shift are relevant to damages but are not relevant to determining the Hospital's liability regarding its obligation to comply with WAC 296-126-092. Moreover, plaintiffs' damages need not be proven on an individual basis but can be proven on a class-wide basis using representative testimony. "[T]he predominance requirement is not defeated merely because individual factual or legal issues exist; . . . `[a] single common issue may be the overriding one in the litigation, despite the fact that the suit also entails numerous remaining individual questions."

The Court also found that the trial court abused its discretion by ruling that the nurses failed to satisfy the superiority requirement. "The superiority requirement focuses on a comparison of available alternatives and a determination that a class action is superior to, not just as good as, other available methods." Here, the existence of more than 40 members of the class renders a class action superior to resolution by individual lawsuits. Moreover, the fact that individual issues might take some time to resolve does not make the class action unmanageable.

Relying upon *Tyson Foods, Inc. v. Bouaphakeo*, ___ U.S. ___, 136 S. Ct. 1036, 194 L. Ed. 2d 124 (2016), the Court ruled that differences between the different types of nurses could be resolved through representative testimony and trial bifurcation to manage individual issues regarding damages. "The nurses have an interest in litigating their claims together because each nurse's claim arises from a common nucleus of operative facts and relies on the same evidence. [F]orcing numerous plaintiffs to litigate the

alleged pattern or practice . . . in repeated individual trials runs counter to the very purpose of a class action." The Court emphatically rejected the suggestion that claims under $5,000 should be litigated in small claims court. "Concentrating these claims into one forum and certifying this class is likely the only way that the nurses' rights will be vindicated because individual nurses may be reluctant to sue their employers."

Blythe Chandler and Toby Marshall filed an amicus brief for WELA in support of the employees.

Chavez v. Our Lady of Lourdes Hospital at Pasco, __ Wn.2d. ___, 415 P.3d 224 (4/19/2018)

Court May Clarify Wrongful Discharge Tort, Personnel File Statute

The Court granted review to determine the application of the Perritt formulation to a claim of wrongful discharge in violation of public policy, and in particular the overriding justification element. The Court granted a cross petition raising the application of claim seeking the production of a personnel file pursuant to RCW 49.12.250. Jeffrey Needle and Mike Subit filed an ACM on behalf of WELA.

Martin v. Gonzaga Univ., --- Wn.2d --- (3/7/18).

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.