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ALERT

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## U.S. SUPREME COURT

### *Justices Uphold Class Action Waivers; Limit Scope of NLRA Section 7 Rights*

An employer and employee entered into a contract providing for individualized arbitration proceedings to resolve employment disputes between the parties. Each employee nonetheless sought to litigate Fair Labor Standards Act and related state law claims through class or collective actions in federal court. The employees argued that the Federal Arbitration Act does not apply if an arbitration agreement violates some other federal law and that, by requiring individualized proceedings, the agreements here violated the National Labor Relations Act which recognizes that class and collective actions are "concerted activities" protected by §7 of the NLRA, The Supreme Court disagreed, 5-4.

In an opinion by Justice Gorsuch, the Court ruled that when confronted with two Acts allegedly touching on the same topic, the Court must strive "to give effect to both." To prevail, the employees must show a "clear and manifest" congressional intention to displace one Act with another. There is a "stron[g] presum[ption]" that disfavors repeals by implication and that "Congress will specifically address" preexisting law before suspending the law's normal operations in a later statute. Section 7 of the NLRA focuses on the right to organize unions and bargain collectively. It does not mention class or collective action procedures or even hint at a clear and manifest wish to displace the Federal Arbitration Act.

*Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (5/21/2018)

## NINTH CIRCUIT

### *Evidence Submitted in Support of Class Certification Need Not be Admissible at Trial*

The district court denied certification of wage and hour class action alleging under California law failure to pay all hourly wages, to pay overtime, to provide meal and rest breaks, and to provide prompt final wages, and itemized wage statements. The district court ruled that predominance was not satisfied; typicality was not shown by admissible evidence, and neither the plaintiff nor their attorneys were adequate class representatives. The Ninth Circuit agreed to an interlocutory appeal.

The panel ruled that the district court committed legal error by requiring the plaintiffs to submit evidence of typicality through sworn testimony. The court held more generally that at class certification "a district court may not decline to consider evidence submitted in support of class certification solely on the basis that is inadmissible at trial." The court made clear class-certification is not a mini-trial because class certification orders may be altered or amended. On the other hand, the district court need not dispense with standards of admissibility entirely and should consider whether the "plaintiff's proof is, or will lead, to admissible evidence."

The court held that because one class representative was adequate, that was sufficient. The panel rejected the district court's disqualification of counsel because they had submitted formulaic declarations, failed to attend depositions, and failed to produce their own expert for deposition.

The panel reversed the predominance determinations because they were based on misinterpretations of California law.

*Sali v. Corona Regional Med. Ctr.*, 889 F.3d 623 (9th Cir. 5/3/2018) (Mendoza (E.D. Wash.), McKeown, Wardlaw)

***Employee Lacked Protectable Property Right in Probationary Employment***

Plaintiff began working for the Defendant in 1987, and in 2012 and was promoted to Steam Plant Maintenance Superior in a probationary capacity. Palm thereafter allegedly made several complaints to his immediate supervisor about noncompliance with state and federal health, safety, and labor laws. He was allegedly threatened with repercussions if he did not drop the issue. Before the end of his probationary period, Palm was given a choice to resign or be terminated from his probationary position. He resigned and resumed his former position. He thereafter filed suit under 42 U.S.C. § 1983. After several unsuccessful amendments to the complaint, he sought leave to amend again to claim that the Defendants violated his Fifth and Fourteenth Amendment Due Process Rights. The District Court denied the motion to amend on the grounds that he lacked a property interest in his position and the amendment would be futile. Plaintiff appealed and the Ninth Circuit affirmed.

The Court reiterated that "[i]t is well settled that the procedural due process protections of the Fourteenth Amendment apply only to deprivations of property interests, the existence and dimensions of which are defined by existing rules or understandings that stem from an independent source such as state law." "A [state] law establishes a property interest in employment if it restricts the grounds on which an employee may be discharged." "[A]n important factor in deciding the property interest question is to determine whether the applicable state law restricts the grounds on which an employee may be discharged such that even a probationary employee could have a reasonable expectation of continued employment."

After interpreting the City of Los Angeles' Charter and Personnel Rules the Court ruled that Palm lacked a protected property interest in his probationary employment as Steam Plant Maintenance Supervisor. The District Court's decision was affirmed.

*Palm v. Los Angeles Department of Water and Power*, 889 F.3d 1081 (9th Cir. 5/10/2018) (Callahan, J., Bea, Kelly (10th Cir.))

***Employee Has Burden at Trial to Prove Reasonable Accommodation was Available Where He Alleges Failure to Engage in the Interactive Process.***

The plaintiff worked as a trainmaster. He was diagnosed with sleep apnea. In 1999 his physician said he could not work in safe manner and went out on long-term disability. Five years later, the insurance company requested a sleep study to verify continuing eligibility. The plaintiff did not complete the study and lost his disability benefits in 2005. He fought the denial of disability benefits but did not seek to return to work.

Three years after the denial, the employer told the plaintiff that if he did not return to work within 60 days, his employment would end. The plaintiff wrote back asking for reinstatement of his disability benefits or a continued leave of absence. Within the 60-day period the plaintiff applied for a position that he did not have the seniority to obtain under the union contract. He asked for a waiver of the seniority requirements, which was denied. He was then terminated. After termination, he applied for another position but was denied.

The plaintiff initially filed suit in 2010. In 2013 the Ninth Circuit reversed the district court's grant of summary judgment because there was a genuine issue of fact whether he had asked for an accommodation. The employer's designated representative admitted during a 30(b)(6)

deposition that the plaintiff had requested an accommodation and the employer had not engaged in the interactive process.

The case went to trial. Judge Leighton denied the plaintiff's requested jury instruction that the employer was liable for failing to engage in the interactive process regardless if a reasonable accommodation had been available. The plaintiff argued that lack of reasonable accommodation was an affirmative defense that the employer had waived. The jury found in favor the employer. On appeal, the Ninth Circuit ruled the district court's jury instructions were proper.

The plaintiff relied on two Ninth Circuit cases that said that at summary judgment, if the employer failed to engage in the interactive process, the burden shifted to the employer to prove no reasonable accommodation was available. One of the cases, *Morton v. UPS, Inc.*, 272 F.3d 1249, 1256 (9th Cir. 2001), said the employer should "bear the burden of persuasion throughout the litigation" whether there was no possible reasonable accommodation." The panel, however, treated this language as dicta because *Morton* involved summary judgment rather than trial. (Ed. Note: The court's holding is contrary to basic civil procedure. It is well-established that the allocation of the burden of persuasion at trial determine the burden of persuasion on summary judgment).

The Ninth Circuit also ruled that the district court did not err by refusing to give a jury instruction that required the plaintiff to identify an accommodation that seems reasonable on its face; if so, then the employer had to show specific circumstances that demonstrate providing this accommodation was an unreasonable hardship. The panel recognized this is what the U.S. Supreme Court said in *Barnett v. U.S. Airways*, 535 U.S. 391, 401-02 (2002) regarding summary judgment. The panel, however, incorrectly analogized this to the *McDonnell-Douglas* shifting burdens of production, which do not apply at trial. Therefore, the panel ruled that the district court's denial of the plaintiff's proposed jury instruction was proper.

The appellate court also denied the plaintiff's motion for judgment as a matter of law based on the employer's 30(b)(6) admission that he had requested an accommodation and the employer had failed to engage in the interactive process. The panel agreed that a corporation should not generally be able to present a different theory of facts than it offered in its 30(b)(6) deposition. Normally, the rule is that a party can supplement or explain but not contradict its 30(b)(6) testimony. The court said that rule didn't apply to legal conclusions or interpretations of the facts. Even though the 30(b)(6) admissions here were of a factual nature, the court upheld the district court's decision not to treat them admissions as binding and let the jury consider all the evidence to decide these issues for themselves. The court dismissed the damaging deposition testimony as "answers to leading questions."

*Snapp v. BNSF Railway Co.*, 889 F.3d 1088 (9th Cir. 5/11/2018) (Melloy (8th Cir), Fernandez, Fletcher).

***Teacher Has No Title VII or Title IX Claims Against Employer Due to Student Harassment***

Plaintiff was a music school teacher who alleged that she was frequently harassed and degraded by students on the basis of her race (white) and her sex (female). In response to her complaints, the school administration imposed a variety of disciplinary measures against those students who were found to have misbehaved. The punishments ranged in severity based on both the nature of the misconduct and the student's past disciplinary history. Some students were given formal warnings or disciplinary counseling, others were placed in detention, and some were suspended from school for up to three days. Plaintiff claimed that she was unaware of these disciplinary measures.

During the same time, there existed many complaints against Plaintiff. The school's investigation concerning those complaints concluded that Campbell had intimidated and discriminated against students, physically

grabbed and verbally abused students, failed adequately to supervise students at school-sanctioned activities, and harassed a colleague. No action was taken against Plaintiff. Yet after allegedly yelling at a Vice Principal, she was given a memo which stated that she had "verbally ragged at" a security officer, and it directed Campbell not to "address adults or students on campus in a yelling or ragging manner." On that same day, Plaintiff claimed that she had been sexually harassed. An investigation determined that the allegation was unfounded, and that use of the term "ragged" was not derogatory.

Campbell's requests for a transfer were denied, but she was granted an unpaid leave of absence. Near the expiration of her leave, she was informed that she would be unable to teach music because there were insufficient students to take all her classes, and that she would be required to teach remedial math. Campbell refused to teach remedial math, and resigned claiming a hostile work environment, fear for her safety, and her desire not teach remedial math.

Plaintiff filed suit claiming disparate treatment, a hostile work environment on the basis of gender and race, and retaliation under Title VII of the Civil Rights Act of 1964 and sex discrimination under Title IX of the Education Amendments of 1972. Summary judgment was granted against her and she appealed.

In reference to disparate treatment, the Court applied the *McDonnell-Douglas* shifting burden framework, and concluded that Plaintiff was unable to satisfy two components of the prima facie case; adverse employment action, and that she was treated less favorably than similarly situated employees outside the protected class. Specifically, the Court ruled that, at least for the purpose of disparate treatment, the numerous allegations of adverse employment action lacked merit. The Court also ruled that general comparisons were insufficient and that Plaintiff failed to show that she was treated less favorably in "specific situations." To satisfy this element, Campbell must identify employees outside her race and sex who were similarly situated to her "in all material respects" but who were given preferential treatment; they must "have similar jobs and display similar conduct."

In reference to the hostile work environment claim, the Court ruled that the school's only obligation was to take corrective action which was *reasonably calculated* to end the harassment. The Court found that the school took disciplinary action against the students which satisfied its legal obligation. The school had wide discretion to determine the most appropriate action to be taken against adolescent students.

The Court dismissed Plaintiff's allegation that the Vice Principal's use of the term "ragged" or "ragging" created a hostile work environment. The Court found that use of this term in this context did not invariably connote a woman's menstrual cycle. According to the Court:

> Campbell's argument entirely disregards the difference between the well-known phrase to "rag" or "rag on" something and the potentially offensive phrase "on the rag." As both the DOE's investigator and the district court found, the distinction is critical. The phrase to "rag" something is not at all offensive; it simply means "rail at" and "scold" or "torment" and "tease."

Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/rag (last visited May 29, 2018); accord Rag, Oxford English Dictionary, http://www.oed.com/view/Entry/157425 (last visited May 29, 2018). Moreover, the Court concluded even if the derogatory meaning was inferred it was isolated and not sufficiently severe or pervasive to constitute a hostile work environment.

On the issue of retaliation, the Court recognized that the absence of an adverse employment action sufficient to defeat a claim of disparate treatment,

may nevertheless be sufficient to sustain a claim of retaliation. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68 (2006). An investigation in retaliation for protected activity may suffice to state a claim for retaliation even though the same investigation is not an adverse action for purposes of disparate treatment. The Court nevertheless found that Campbell failed to demonstrate that the school's stated reason for its investigation of her or its requirement that she teach remedial math were pretextual. Campbell's Title IX claims were dismissed based upon the same analysis used to dismiss her Title VII claims.

*Campbell v. Hawaii Dept. of Education*, 892 F.3d 1005 (9th Cir. 6/11/2018) (O'Scannlain, Clifton, Ikuta)

## WASHINGTON SUPREME COURT

### *Agricultural Piece-Rate Workers Entitled to Separate Hourly Compensation for Work Outside Piece Rate Work*

By a vote of 5-4 the Supreme Court answered in the affirmative a certified question from Judge Mendoza of the Eastern District asking whether agricultural works paid on a piece-rate must receive separate minimum wage compensation for work performed outside the agreed piece-rate work. The case involved a class of seasonal and migrant agricultural workers who are paid on a piece-rate basis to pick fruit. The workers argued that Washington law required their employer, Dovex, to separately pay them at least minimum wage for tasks outside the agreed-upon piecework such as transporting ladders, traveling between orchards, attending training, and storing equipment regardless of the fact that their piece-rate wages divided by their total hours exceeded the minimum wage requirement.

Justice Yu's majority opinion repeatedly stated it was addressing only agricultural piece-rate workers and not "the legitimacy of a compensation structure similar to Dovex's when used outside the context of agricultural work." The majority focused on the inclusion of the term "per hour" in the statute guaranteeing minimum wage for agricultural workers. The majority held that "evidences an intent to create a right to compensation for each individual hour worked, not merely a right to workweek averaging."

The majority also found support for its earlier decision in *Lopez Demetrio v. Sakuma Bros.*, 183 Wn.2d 649, 355 P.3d 258 (2015), which is read to stand for the proposition that "[w]ithout an applicable exception, time spent on job duties that are not otherwise compensated must be compensated on a per hour basis." The majority also endorsed the Ninth Circuit's interpretation in *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003), that Washington law provides a per hour right to a minimum wage.

The majority rejected the employer's assertion that *Innis v. Tandy Corp.*,141 Wn.2d 517, 7 P.3d 807 (2000), allowed workweek averaging in this context because that case involved workweek averaging under a different statutory provision. The majority also distinguished in *Lopez Demetrio*'s allowance of workweek averaging for rest breaks because the applicable statute requires the uncompensated work at issue here to be paid hourly.

The majority distinguished an L&I regulation allowing workweek averaging for non-agricultural piece-rate workers because L&I itself agreed it did not apply. The majority refused to defer to an L&I policy allowing for piece-rate workweek averaging because it applied the regulation governing nonagricultural workers and administrative policies are not entitled to deference.

The majority also relied on the mandate of liberal construction and Washington's "long and proud history of being a pioneer in the protection of employee rights." The majority found these considerations particularly persuasive with respect to vulnerable workers who endure difficult working conditions, have limited education, and face language barriers. If the contract rate is

higher than the minimum wage, the contract rate applies.

Justice Stephens's dissent on behalf of herself and Justices Johnson and Owens focused on the statute's requirement that employees receive a minimum wage "rate" for every hour worked. She argued that the piece-rate already accounts for non-production time. Her dissent viewed all activities associated with harvesting as covered by the piece-rate work. Therefore, nothing in the Minimum Wage Act required payment for piece-rate down time.

Her dissent disagreed that Washington requires a minimum wage be paid for each hour worked. Instead, the statute requires employers to pay employees the equivalent of the minimum wage for each hour worked. The dissent looked to the federal law for support and did not put significance in the Legislature's omission of the term "workweek used in federal law because federal law did not include that terms when the Minimum Wage Act was enacted.

Her dissent recognized but found no significance in L&I's omission of adult agricultural workers for the regulations allowing workweek averaging. Her dissent disagreed this that this case involved an employer's refusal to pay for certain work activities. Her dissent also relied on *Alvarez* and *Lopez Demetrio* as supporting its legal analysis.

Justice Stephens's dissent predicted that consequences of the majority's construction of the Minimum Wage Act would extend beyond the agricultural context because the statute applies to nonagricultural pieceworkers and commissioned based employees. She accused the majority of silently reformulating Washington wage and hour law in accordance with California law.

Chief Justice Fairhurst joined only the portions of Justice Stephens dissent that construed the statutory language at issue.

WELA filed a brief in support of the plaintiffs.

*Carranza v. Dovex Fruit Co*., 190 Wn.2d 612, 416 P.3d 1205 (5/1/2018)

***Court Will Decide Whether Carranza v. Dovex Fruit Co. Applies to Non-Agricultural Piece-Rate Workers***

Six weeks after the *Carranza* decision, Judge Coughenour of the Western District certified the question whether the Minimum Wage Act requires non-agricultural employers to pay their piece-rate employees per hour for time spent on activities outside of piece-rate work? Several federal judges had previously held "no," but Judge Coughenour agreed with Justice Stephens's dissent that the majority opinion in *Carrranza* undermined those decisions.

*Sampson v. Knight Transp. Inc.*, 2018 WL 2984825 (W.D. Wash. 6/14/2018).

**WASHINGTON COURT OF APPEALS**

***Adverse Labor Arbitration Findings Collaterally Estops Plaintiff From Asserting that his Termination Constituted Disability Discrimination***

Plaintiff worked for the Washington State Patrol. He was terminated because of his involvement in a pile-up on Interstate 90. His union filed a grievance, which went to arbitration. The arbitrator found the officer's account of the incident was untruthful and there was just cause for his termination based on his untruthfulness during the investigation. The arbitrator specifically found that the employer had applied its discipline in an even-handed and reasonable manner. The union had contended that acute anxiety disorder caused the officer to make untruthful statements to investigators. The arbitrator ruled that the disorder did not cause the officer to make the untruthful statements at issue.

The officer subsequently filed an action alleging disability discrimination in his termination. The Superior Court ruled that the labor arbitration collaterally estopped the plaintiff from asserting

that disability discrimination with respect to his termination. The court of appeals agreed. The appellate court made clear the case involved issue preclusion rather than claim preclusion. Issue preclusion only limits the re-litigation of factual issues.

The court of appeals agreed with the plaintiff that in deciding whether to apply issue preclusion based on a labor arbitration a court should not only consider the normal collateral estoppel factors but the additional factors applicable to issue preclusion from agency determinations. The additional factors are (1) whether the agency acted within its competence (2) differences between the administrative proceeding and court procedures and (3) public policy. However, the court modified the first factor to ask whether the issue is within the scope of the reference to arbitration.

Applying the "identify of issues" factor for issue preclusion, the court correctly held that the arbitrator's finding that the officer's untruthfulness—the basis for his termination—was not caused by his mental condition precluded him from seeking a contrary court determination of that issue.

The court, however, incorrectly reasoned the labor arbitration prevented the plaintiff from proving his prima facie case element of "doing satisfactory work." This collapsed the first and third steps of *McDonnell Douglas-Burdine* framework. The court further conflated the first and third steps of the framework by stating that the prima facie case requires that the plaintiff show he was "discharged under circumstances that raise a reasonable inference of discrimination." That is one way a plaintiff can discharge his burden at the third step of the framework.

*Scholz v. Washington State Patrol*, 3 Wn. App. 2d. 584, 416 P.3d 1261 (Div. III 5/17/2018) (Siddoway, Lawrence-Berrey, Korsmo)

**VICTORIES AND DEFEATS**

Marc Cote represents the employees in *Carranza*. Toby Marshall, Erika Nusser, Hardeep Rekhi and Greg Wolk represent the employees in *Sampson*.

**COMMENT**

***Tales from the Trenches: Defendant Sanctioned and Held in Civil Contempt for Failure to Comply with Discovery Orders***

Our client brought claims against her former employer, TrueBlue, Inc., for discrimination and retaliation under the Washington Law Against Discrimination and Washington's Family Leave Act. Defendant claimed that it terminated Plaintiff in a Reduction in Force ("RIF") rather than for discriminatory or retaliatory reasons. Plaintiff served requests for production regarding the RIF and Defendant produced no RIF-related documents in response. Plaintiff moved to compel, and Defendant told the court that no documents relating to the RIF existed. The Court warned that if documents or emails were later discovered, then it would sanction Defendant pursuant to *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 343, 858 P. 2d 1054 (1993).

Plaintiff subpoenaed RIF-related documents from her former manager, who no longer worked for the Defendant and lived in Georgia. He produced RIF-related emails referring to Plaintiff's termination that were issued from Defendant's email server during the relevant time period. Plaintiff asked that the court compel Defendant to produce hard drives and allow Plaintiff's expert access to TrueBlue's servers to search for Electronically Stored Information ("ESI") relating to the RIF. The court ordered Defendant to allow an ESI expert selected by Plaintiff to search for responsive documents and emails on Defendant's server backup tapes.

By examining the ESI produced, we discovered that thousands of documents had been withheld from us, including email that our own client had

authored. Again, defense counsel said no other documents existed, and again we moved to compel, and for contempt, arguing that Defendant willfully disregarded the court-ordered protocol and had not produced complete discovery. We relied on *Fisons*, as well as *Magaña v. Hyundai*, 167 Wn. 2d 570, 584, 585-86, 220 P. 3d 191 (2009), for the assertion that a corporation may not limit its search for information responsive to discovery to avoid an "extensive computer search[.]"

The court found that Defendant was "adamant in opposing Plaintiff's January 2018 motion to compel… that no further emails existed," however, "after plaintiff's expert was authorized to visit defendant's IT Department, defendant was forced to admit that these emails did in fact exist and other 3,000 were produced." Order of April 18, 2017, ECR Sub. No. 237. The Court sanctioned Defendant for discovery violations and held the Defendant in contempt of court. Washington courts, in addition to authority under CR 37, have inherent and statutory authority to find a party in civil contempt of court. RCW 7.21.020; *Graves v. Duerden*, 51 Wn. App. 642, 647-48, 754 P.2d 1027 (1988). In two subsequent orders, the court ordered Defendant to pay our fees, costs, and expenses in the amount of $183,532.66. It further authorized a third fee petition to be filed relating to the orders on contempt and sanctions, which was resolved by the parties. The matter is ongoing.

---Elizabeth A. Hanley

*Lopez v. TrueBlue, Inc., King County Superior Court.*

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