

NINTH CIRCUIT

Federal Courts Lack Jurisdiction Over Pure Procedural Violations of Fair Credit Reporting Act

The Fair Credit Reporting Act requires employers who conduct background checks to provide the applicant with a copy of his/her credit report before the employer takes any adverse action. Here the employer conducted a background check and obtained the applicant's credit report. The employer disqualified the applicant for further consideration based on the report without providing the employee with a copy. In *Spokeo Inc. v. Robins*, 136 S. Ct. 1540 (2016), the U.S. Supreme Court held that a violation of a procedural right divorced from any concrete harm does not satisfy Article III. The district court held that this case involved a purely procedural right. The Ninth Circuit affirmed. Here, it would have made no difference to the employer's decision had the employer given the applicant the report before the disqualification. The applicant still would have been disqualified based on the accurate parts of the credit report.

Dutta v. State Farm Auto. Ins. Co., 895 F.3d 1166 (9th Cir. 7/13/2018) (Vitaliano (E.D.N.Y.), Paez, Ikuta)

Art School Employees Entitled to Trial on Qui Tam Claims

Relators, former admissions representatives for Academy of Art University, an art school in San Francisco, alleged that the school violated an incentive compensation ban included in its program participation agreement with the Department of Education, through which it qualified for federal funding in the form of federal financial aid to its students under Title IV of the

Higher Education Act. The Defendant brought a motion for summary judgment which was denied. The Defendant appealed.

The Department of Education oversees the grant of Title IV funds to colleges and universities. To qualify for grants, schools must comply with an incentive compensation ban which prohibits them from providing "any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities." 20 U.S.C. § 1094(a)(20); 34 C.F.R. § 668.14(b)(22). If individuals become aware of a school's violation of the incentive compensation ban, they can bring a qui tam action on behalf of the United States under the False Claims Act. An FCA claim requires: (1) a false statement or fraudulent course of conduct, (2) made with scienter, (3) that was material, causing (4) the government to pay out money or forfeit moneys due.

The Ninth Circuit ruled that the incentive program violated the statutory ban. One way to prove falsity is through an implied false certification. The Ninth Circuit ruled that a reasonable fact finder could conclude that requirement for implied false certification were satisfied, and that Defendant has not established as a matter of law that its violations of the incentive compensation ban were immaterial.

United States ex rel. Rose v. Stephens Institute, – F.3d --- (9th Cir. 8/24/2018) Graber, N.R. Smith, Zipps (D. Ariz.)

Employer Violates ADA by Requiring Disabled Applicants to Pay for Medical Examinations Required for Hire

Russell Holt received a conditional job offer from BNSF for the position of Senior Patrol Officer

contingent on Holt's satisfactory completion of a post-offer medical review. BNSF demanded that Holt submit an MRI of his back at his own cost (\$2,500), which he could not afford. BNSF revoked Holt's job offer, and the Equal Employment Opportunity Commission sued BNSF for violations of the ADA.

The district court granted the EEOC's motion for partial summary judgment. It determined that the EEOC had established all three elements of a *prima facie* case for disability discrimination under § 12112(a): The EEOC had shown that (1) BNSF had "regarded" Holt as having a disability due to his 2007 back injury; (2) Holt was qualified for the job; and (3) BNSF discriminated against Holt by requiring an MRI because BNSF regarded Holt as having a disability. The Court also entered a nation-wide injunction which mandated that "BNSF must bear the cost of procuring any additional information it deems necessary to complete a medical qualification evaluation." It also required that "[i]f BNSF chooses not to procure additional information, it must complete the medical examination process, i.e., it must use the medical information it does have to make a determination about whether the applicant is medically qualified for the job for which the applicant received the conditional offer." BNSF appealed.

The Ninth Circuit first concluded that Holt was regarded as disabled. "In regarded-as cases, . . . a plaintiff must show that the employer knew that the employee had an actual impairment or perceived the employee to have an impairment, and that the impairment was not transitory or minor." The Court ruled that by requesting an MRI, BNSF assumed that Holt had a "back condition" that disqualified him unless he could prove otherwise. And in rejecting Holt's application because it lacked a recent MRI, BNSF treated him as it would an applicant whose medical exam had turned up a back impairment or disability.

The dispute was not over whether BNSF could require Holt to get an MRI, but whether BNSF could require Holt to pay for it. The Court ruled it could not. By requiring that an applicant pay for an MRI—or else lose his or her job offer—because the applicant has a perceived back impairment is a condition of employment imposed discriminatorily on a person with a perceived impairment. Significantly, the Court reasoned that there would be no discrimination if all applicants were required to pay for medical exams at their own expense. "Where, however, an employer requests an MRI at the applicant's cost only from persons with a perceived or actual impairment or disability, the employer is imposing an additional financial burden on a person with a disability because of that person's disability."

Lastly, the Ninth Circuit remanded to the district court for fact finding relating to the nation-wide injunction.

WELA filed an amicus brief authored by Jesse Wing and Jeffrey Needle.

EEOC v. BNSF Railway Co., --- F.3d --- (9th Cir. 8/29/2018) (Gould, Fisher, Paez).

WASHINGTON SUPREME COURT

Company Owner Can Bring Claims Under the WLAD for Contract Discrimination

The plaintiffs in this case were a construction company and its majority owner. They alleged that the defendant, Lincoln County, refused to proceed with a contract the company had been awarded because the majority owner was a woman. The trial court dismissed the owner's WLAD claim for gender discrimination and the company's breach of contract/negligent misrepresentation claims. The court of appeals affirmed.

The Supreme Court reversed the gender discrimination claim dismissal in an opinion by Justice Fairhurst. The court reaffirmed that independent contractors can bring claims for gender discrimination under the WLAD. The

Justices ruled that there was sufficient evidence that the majority owner and the company were treated unfavorably compared to male-owned contracting firms. This included a statement by the County that the owner's shoes were not appropriate for a walk-through of the project, changing the walk-through procedures for a male owned business, and inconsistencies regarding the bond process. The Court also reversed dismissal of the company's negligent misrepresentation claim but affirmed dismissal of the contract claim.

Justices McCloud and Johnson would have affirmed dismissal of the gender claim.

Specialty Asphalt & Construction, LLC, v. Lincoln County, --- Wn.2d ---, 421 P.3d 925 (7/26/2018)

Employees May Recover both Exemplary Damages Under RCW 49.52 and Pre-Judgment Interest in Same Case

The plaintiffs in this class action argued that their employer denied them meal and rest breaks because it required them to remain constantly vigilant while taking their breaks. The trial court certified the case, rejected the employers' claim there was a bona-fide dispute about the legality of the meal and rest break policy after *Pellino v. Brinks, Inc.*, 164 Wn. App. 668, 267 P.3d 383 (2011), and awarded double damages and pre-judgment interest.

The court of appeals reversed the double damages award for the meal break violations and some of the pre-judgment interest on the rest break violations. The court of appeals held there was a bona-fide dispute whether the applicable CBA waived the meal periods. The appeals court also held that employees cannot obtain double damages and pre-judgment interest in the same case. Garda's petition for review to the Supreme Court was denied, but plaintiffs' cross petition for review on the issues double damages for meal breaks and pre-judgment interest was granted.

The Supreme Court reversed those rulings in an opinion by Justice McCloud. The Court held that

the standard for proving willfulness under RCW 49.52 is "low." A bona-fide dispute has both an objective and a subjective component. To establish a bona-fide dispute the employer must show both that it had "genuine belief" in the dispute at the time of wage violation and that the dispute must be objectively reasonable. The former is a question of fact; the latter is a question of law.

The majority ruled that the court of appeals erred by ruling that there was any doubt whether a CBA could waive the right to be paid for on-duty meal breaks. Moreover, the employer had argued that the CBA waived the right to an off-duty unpaid meal break not the right to a paid on-duty meal break. The employer argued there was no wage violation because it paid the employees for their meal breaks. The Court held that the employees did not receive an on-duty meal break because they were never relieved from all work duties. The Court held the CBA language showing the lack of waiver was "clear and unmistakable" so there was no labor law preemption problem.

The Supreme Court also rejected Garda's claim that the Labor Management Relation Act preempted Plaintiffs' state law claim. "[S]ection 301 preemption does not apply to every dispute between an employer and a union employee. '[I]t would be inconsistent with congressional intent under [section 301] to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.'" Moreover, the CBA did not waive the right to a meal break in "clear and unmistakable language."

The Court rejected the court of appeals ruling that employees cannot recover pre-judgment interest and double damages in the same case. The Justices ruled that they served different purposes. Pre-judgment interest compensates the plaintiff for the loss of use of a money not received and depends on whether the claim at issue is liquidated, i.e., subject to calculation without opinion. By contrast exemplary damages under RCW 49.52 are punitive damages. They are designed to punish and deter the employer's blameworthy conduct, not to

compensate the employee. Pre-judgment interest is available on the back-pay owed even where the employee obtains double damages.

The trial court had ruled that the employer did not subjectively believe that the Federal Aviation Authorization Act preempted the employees' wage claims, and arguments that the employees knowingly submitted to the violations and individually waived their meal breaks were objectively unreasonable. The court of appeals did not reach these questions. The Supreme Court remanded on these issues.

Justices Johnson, Owens, and Fairhurst dissented on the CBA waiver issue.

WELA wrote an amicus brief authored by Katie Cameron and Jeffrey Needle.

Hill v. Garda CL Northwest Inc., --- Wn.2d ---, 424 P.3d 207 (8/23/2018)

VICTORIES AND DEFEATS

Dan Johnson and Adam Berger represent the employees in *Hill*.

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