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ALERT
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NINTH CIRCUIT

En Banc Court Holds Washington Family Care Act Claim Does Not Require Interpretation of Collective Bargaining Agreement and is Therefore Not Preempted by Railway Labor Act.

Alaska Airlines denied the plaintiff's request for family care leave claiming that she had already scheduled her banked vacation days in accordance with the collective bargaining agreement governing her employment as a flight attendant. The plaintiff filed a complaint with L&I claiming a violation of the Washington Family Care Act ("WFCA"). The WFCA is subject to applicable terms of a governing CBA except where a restriction limits the employee's choice as to the type of leave she may use for permitted purposes. L&I ruled for plaintiff on the basis that the CBA provision limiting the use of banked vacation time was a void limitation on choice of leave.

Alaska sued L&I to enjoin the administrative proceedings claiming that the plaintiff's state law claim was so bound up with the terms of the CBA that the Railway Labor Act ("RLA") preempted it. Judge Robart ruled against Alaska on the basis that the agency merely had to consult the undisputed terms of the CBA to resolve the plaintiff's state law claim and not interpret the CBA. A Ninth Circuit panel reversed, holding that the right to take paid leave arose from the CBA. En banc the Ninth Circuit sided with Judge Robart, 6-5.

Judge Berzon ruled that the RLA preemption did not arise where the plaintiff's state law claim can be resolved without infringing on the role of grievance and arbitration. The RLA is not concerned whether the employer has to comply with state law that varies from jurisdiction to jurisdiction. Here the right to take vacation leave for a purpose permitted by state law is not grounded entirely in the CBA. The law applies to all Washington employees. Nor does the plaintiff's claim require interpretation of the CBA. The meaning of the CBA provision at issue isn't disputed.

In dissent, Judge Ikuta reasoned that a claim under the WFCA is based on rights provided by the CBA. The dissent rejected L&I's view of the statute as conferring a non-negotiable right to choose any earned leave provided by the CBA. Most of the dissent was devoted to a criticism of the majority's RLA pre-emption analysis.

Alaska Airlines Inc. v. Schurke, 898 F.3d 904 (9th Cir. 8/1/2018) (en banc), cert. pet. filed.

Employee Spoke as Pubic Employee but Agreement Prospectively Limiting Her Speech Violates First Amendment

Barone began working for the Springfield Police Department ("Department") as a Community Service Officer II ("CSO II"). She focused on victim advocacy, and served as a Department liaison to the City's minority communities. Throughout her tenure, members of the Latino community complained to Barone about racial profiling by the Department. She relayed these complaints to Department leadership.

On February 5, 2015, Barone spoke at a City Club of Springfield event on behalf of the Department; she wore her uniform; and her supervisor attended. She understood that she attended and participated in the event as a representative of the Department. A member of the audience at the event asked her whether she was aware of increasing community racial profiling complaints. She said that she "had heard such complaints."

A week later, Chief Doney placed Barone on administrative leave due to her alleged untruthfulness in connection with investigations into the two pre-2015 occurrences. In July 2015, the Department suspended Barone for four weeks without pay, and informed her that she would be required to sign a Last Chance Agreement ("the Agreement") when she returned to work. Paragraph 5(g) of the amended Agreement barred Barone from saying or writing anything negative about the Department, the City, or their employees. However, she could report complaints involving discrimination or profiling by the Department. The amended Agreement also provided that Barone would remain subject to a generally applicable order that barred her from publicly criticizing or ridiculing the Department and barred her from releasing confidential information. Barone refused to sign the Agreement as amended and Chief Doney terminated her employment with the Department.

Barone sued the City, the Chief, and numerous individuals under 42 U.S.C. § 1983. She alleged First Amendment retaliation for having answered questions about racial profiling, and imposing an unlawful prior restraint contained in the Last Chance Agreement. The district court denied Barone's motion for partial summary judgment on her prior restraint claim. The district court granted summary judgment in favor of Appellees on Barone's claims. Barone timely appealed

The Ninth Circuit dismissed the First Amendment retaliation claim on the grounds that she spoke as a public employee within the scope of her job duties. *See Garcetti v. Ceballos*, 547 U.S. 410 (2006). "An employee does not speak as a citizen merely because the employee directs speech towards the public, or speaks in the presence of the public, particularly when an employee's job duties include interacting with the public."

In analyzing the issue of prior restraint, the Court utilized the *Pickering* test: 1) whether the restriction affects a government employee's speech "as a citizen on a matter of public concern." 2) if it does, "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." The first step of the *Pickering* test involves two separate inquiries—first, whether the restriction reaches speech on a matter of public concern, and second, whether the restriction reaches speech only within the scope of a public employee's official duties. Paragraph 5(g) of the Amended Last Chance Agreement forbid any negative speech about City or Department misconduct except for reporting police "discrimination or profiling." The Ninth Circuit found that this was an issue of public concern because it would sweep in any disagreement about the City's services, employees, or elected officials, including speech on topics or individuals that do not overlap with Barone. " In the prior restraint context, we focus on the chilling effect of the employer's policy on the employee's speech, rather than the employer's subjective intent."

The Court also found that Paragraph 5(g) lacked adequate justification under *Pickering*. "[W]hen the Government defends a regulation on speech as a means to. . . prevent anticipated harms, it must do more than simply `posit the existence of the disease sought to be cured.'" "While we recognize[] that 'police departments would operate more efficiently absent inquiry into their practices by the public efficiency grounded in the avoidance of accountability is not, in a democracy, a supervening value." Moreover, Paragraph 5(g) was not limited to employment related speech, let alone speech that reasonably could cause a disruption at the Department. "Paragraph 5(g) makes no distinction between speech that reasonably could be expected to disrupt the Department's operations and speech that will not cause a disruption."

Lastly, the Ninth Circuit found that there existed a genuine issue of material fact about whether the City Manager delegated final policymaking.

Barone v City of Springfield, OR, 902 F.3d 1091 (9th Cir. 9/5/2018) (M. Smith, Murguia, Hellerstein (S.D.N.Y.))

District Courts Should Apply a Summary Judgment-Type Standard in Deciding Whether to Decertify an FLSA Collective Action

This case involved an FLSA collective action brought by members of the Los Angeles Police Department. Following typical judicial practice, the district court granted preliminary certification at an early stage of the litigation. About 2,500 officers opted into the case. After several years of discovery, the district court decertified the action on the basis that the evidence showed the denial of overtime pay was not caused by a single, department wide policy. The district court applied a three-part test on whether the claims were similarly situated: (1) the factual and employment setting of the officers; (2) the City's defenses; and (3) fairness and procedural considerations. The opt-in plaintiffs appealed.

The Ninth Circuit affirmed in a lengthy opinion. In a ruling of first impression in the Ninth Circuit the court held that the opt-in plaintiffs could appeal the decertification order. Once an FLSA plaintiff opts in, she has the same status as the original plaintiffs. Unlike a class action, a collective action is not a representative action. It is a mass action of individual plaintiffs. The dismissal of the opt-in plaintiffs even without prejudice is a final judgment for purposes of appeal. The Third Circuit has ruled to the contrary.

The court criticized the two-stage approach for collective action litigation. The court noted that "certification" and "decertification" are terms taken from Rule 23 for opt-out class actions. The sole consequence of provisional certification of an opt-in collective action is the sending of a court approved written notice to workers who may wish to join the litigation. "Decertification" means the opt-in plaintiffs are not sufficiently similarly situated to be part of the existing case. Despite these criticisms, the court recognized the two-stage approach had become widespread and has practical case-management advantages.

Here the officers had alleged that there was a uniform unwritten policy that dissuades and prevents them from accurately reporting their overtime. The City, however, submitted uncontroverted evidence that the officers performed different tasks, worked in different locations under hundreds of different supervisors.

The panel noted that district courts have followed two approaches in analyzing "similarly situated." The minority of districts courts look to Rule 23(a) concepts. The panel rejected this approach. The standard for FLSA joinder is lower than Rule 23 or even the standards for permissive joinder or consolidation.

The majority of district courts conduct a flexible inquiry into the factual differences between the plaintiffs and the desirability of collective treatment. The Ninth Circut criticized this approach as too abstract and offers "no clue as to what *kinds* of 'similarity' matter under the FLSA." Moreover, the "fairness and procedural considerations" prong imports inapplicable Rule 23 concepts through the backdoor. Instead the court held that a district court should decertify a collective action of otherwise similarly situation plaintiffs "unless the collective mechanism is truly infeasible."

The court therefore rejected both the majority and minority approaches. Instead, courts deciding whether to decertify a collective action post-discovery should apply a standard akin to summary judgment. As such, a court cannot resolve merits-based issues that overlap with the issue of decertification by weighing the evidence. The court must ask whether, viewing the record in light most favorable to the non-moving party, there is sufficient evidence to support whether the plaintiffs are similarly situated.

Here, whether the plaintiffs are similarly situated depends on whether there was an unwritten Department-wide policy discouraging overtime. Even taking the evidence in the light most favorable to the plaintiffs, there was insufficient evidence to create a factual dispute about the existence of such a policy. There was no sampling or statistical evidence. Also, there was a lot of evidence that the Department had complied with the FLSA.

Campbell v. City of Los Angeles, 903 F.3d 1090 (9th Cir. 9/13/2018) (Berzon, Linn (Fed. Cir), M. Smith).

Whether and When Obesity is an Impairment under the WLAD Certified to Washington Supreme Court

BNSF extended the plaintiff a conditional offer of employment subject to a physical. The company medical examiner determined that he had a Body Mass Index over 40, which is considered severely obese. BNSF deemed him unqualified. BNSF said they might reconsider if he underwent costly testing at his own expense. The plaintiff could not afford the exam. He filed suit.

BNSF then moved for summary judgment, arguing that obesity is not a disability *unless caused* by a physiological disorder and that it did not perceive Taylor as having an obesity-related disability. The district court granted partial summary judgment and ruled that *the cause* of obesity determined whether it was a disability. "[U]nder the WLAD, a plaintiff alleging disability discrimination on the basis of obesity must show that his or her obesity is caused by a physiological condition or disorder or that the defendant perceived the plaintiff's obesity as having such a cause." After later granting BNSF summary judgment on Taylor's claim that BNSF perceived him as disabled due to the condition of his knees and back, the district court dismissed Taylor's case with prejudice. Taylor appealed.

The appellate court recognized that in *EEOC v. BNSF Railway*, the Ninth Circuit had held that an employer violates the ADA when it withdraws a conditional job offer based on a prospective employee's failure to pay for medical testing that the employer required solely because the employer perceived the prospective employee as disabled or impaired. The court presumed the same rule applied under the WLAD.

The panel also recognized that the Ninth Circuit had not decided whether obesity qualified as a disability or impairment under the ADA. The panel also recognized that Washington law might provide broader coverage. It noted that the WLAD definition is broader because it "includes" certain conditions. Moreover, unlike the WLAD, the ADA clearly applies only to "physiological conditions." The parties disputed whether that is true under the WLAD. The court therefore certified to the Washington Supreme Court whether and under what circumstances obesity qualifies as an impairment under the WLAD.

The panel then went on to consider this question under the ADA. The EEOC treats obesity as an ADA disability only when it is the result of a physiological disorder. Pre- and post-ADAAA circuit courts had done the same.

Taylor v. Burlington Norther Railroads Holdings, Inc., 904 F.3d 846 (9th Cir. 9/17/18) (Fisher, Gould, Paez)

U.S. DOL Regulation Precludes Employers from Counting Work Spent on Non-Tipped Tasks or Non-Incidental Tasks Related to Tipped Tasks Towards Wage Subject to FLSA Tip Credit

The FLSA permits employers to take a tip credit for employees in tipped occupations. The tip credit offsets the employer's obligation to pay minimum wage, although the employees must receive minimum wage between their pay and tips. A group of servers and bartenders filed suit claiming their employer violated the FLSA by treating them

as tipped employees when they were engaged in non-tipped tasks such as cleaning toilets or non-incidental tasks related to serving and bartending, such as cleaning and maintaining soft drink dispensers in excess of 20% of the workweek.

The district court granted the employer's motion to dismiss for failure to state a claim because at no time did the employees earn less than minimum wage and the U.S. DOL dual jobs regulation does not apply when the employee works in different occupations related to the tipped occupation. A divided panel affirmed. The en banc court held the employer violated the FLSA.

Writing for an eight-judge majority, Judge Paez determined that the dual jobs regulation as construed by the agency's 1988 guidance prohibits the employer's practice in this case. The majority held the dual jobs regulation was entitled to *Chevron* deference. The majority held that the FLSA did not speak to the precise question and the regulation was a permissible construction of the statute.

The guidance rather than regulation sets the 20% limitation on non-incidental tasks related to tipped tasks. The majority held the regulation was entitled to *Auer* deference because the guidance is both reasonable and consistent with the dual jobs regulation. The dual jobs regulation is ambiguous in that it doesn't explain how to classify the person's occupation. The majority considered it significant the guidance had been in place for 30 years and predated the employer's conduct in this case.

The majority rejected the argument that an employee who receives minimum wage on average has no claim that the employer failed to pay him/her minimum wage for all hours worked. The majority distinguished cases involving failure to pay overtime for every hour worked.

Judge Graber agreed that the regulation deserved *Chevron* deference and that *Auer* applied to the guidance. She agreed that the guidance policy regarding the need to pay separately for work unrelated to the tipped occupation was consistent with regulation. But she would have affirmed the district court as to denial of wages for non-tipped work related to being a server.

Judges Ikuta and Callahan would have paid the guidance no deference and would have affirmed the district court. They claimed that the DOL had engaged in a 50-year undercover effort to undermine the tip credit rule of the FLSA.

Marsh v. J. Alexander's, LLC, 905 F.3d 610 (9th Cir. 9/18/2018) (en banc)

Arbitration Agreement Enforceable against Employer but Not against Union

The plaintiff was an aircraft maintenance technician. After being fired, he filed a retaliation complaint under 49 U.S.C. § 42121, aka AIR 21, which bars air carriers from penalizing workers for alerting airlines or federal agencies to airline safety issues. A plaintiff must first file with the U.S. DOL. The agency can either grant or deny relief. The employee can sue in federal court to enforce the DOL's order. Here the plaintiff reached a settlement after filing a complaint, which the DOL approved. The settlement reinstated him to his position and contained an arbitration provision for future disputes with his employer.

Several years later, the plaintiff received other discipline that he alleged was in retaliation for subsequent whistleblowing. He filed for arbitration and filed another complaint with DOL, against both the airline and his union. After some complicated proceedings, the airline and the union both filed suit to compel arbitration. The district court granted both motions. The plaintiff appealed.

The circuit affirmed as to the employer but reversed as to the union. The court had little trouble finding the plaintiff's dispute with the

airline fell within the arbitration clause of his prior settlement agreement. The court rejected the argument that AIR 21 prohibits arbitration. The court also rejected the argument that the airline's participation in a DOL investigation waived its right to compel arbitration. An investigation is not litigation and is not subject to arbitration.

The court found the union was not a party to the arbitration agreement nor a beneficiary. In such a situation the principle that doubts concerning the scope of an arbitration clause should be resolved in favor or arbitration does not apply because whether there is an obligation to arbitrate is a question of contract. The panel held that the district court had erred by compelling arbitration because there was a colorable argument the union had acted as the agent of the airline. The appellate court ruled that the union was not the agent of the airline.

American Airlines Inc. v. Mawhinney, 904 F.3d 1114 (9th Cir. 9/26/2018) (Berzon, N.R. Smith, Castel (SDNY))

Pre-ADAAA Case Law Does Not Apply to Current ADA Definition of "Regarded As."

Plaintiff-appellant Herman Nunies was a delivery driver for HIE Holdings, Inc. ("HIE"). His primary duties included operating HIE's company vehicle; loading, unloading, and delivering five-gallon water bottles; and occasionally assisting in the warehouse. The position required lifting and carrying a minimum of 50 pounds and other physical tasks. Nunies claims that he injured his shoulder and wanted to transfer to a part-time, less-physical warehouse job. The requested transfer was approved and all set to go through until Nunies told HIE about his shoulder injury. Two days after Nunies allegedly informed HIE about his injury, the company rejected his transfer request and forced him to resign. Nunies brought a disability discrimination suit against HIE under the ADA and state law, arguing that HIE terminated him because of his shoulder injury. HIE moved for summary judgment, which the district court granted. The Ninth Circuit reversed.

To set forth a prima facie disability discrimination claim, a plaintiff must establish that: (1) he is disabled within the meaning of the ADA; (2) he is qualified (i.e., able to perform the essential functions of the job with or without reasonable accommodation); and (3) the employer terminated him because of his disability. "The term 'disability' means, with respect to an individual – (A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(1)(A)–(C). The ADA does not define "physical or mental impairment," but the Equal Employment Opportunity Commission's ("EEOC") regulations define physical impairment as "[a]ny physiological disorder or condition . . . affecting one or more body systems, such as . . . musculoskeletal . . . ." 29 C.F.R. § 1630.2(h)(1).

Under the ADAAA, an individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment *whether or not the impairment limits or is perceived to limit a major life activity*. 42 U.S.C. § 12102(3)(A) (emphasis added). The ADA excludes individuals from regarded-as coverage if the impairment is both transitory (i.e., expected to last six months or less) and minor (which the statute does not define). 42 U.S.C. § 12102(3)(B).

Here, Plaintiff claimed that the employer regarded him as being disabled. The Ninth Circuit ruled that the district court erred when it concluded that to succeed in a regarded as claim the employee must prove that the employer subjectively believed that Plaintiff was substantially limited in a major life activity. A reasonable jury could conclude that HIE effectively terminated Nunies "because of" its

knowledge of Nunies' shoulder injury. The Court ruled that the employer bears the burden to show that an injury is "transitory and minor" and that in this case the employer offered no evidence to support its affirmative defense.

Plaintiff also claimed discrimination on the basis of an actual disability. To establish a disability under the actual disability prong of the definition, a plaintiff must show that he has "a physical . . . impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102(1)(A).

"[M]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." *Id.* § 12102(2)(A). The relevant regulations add that "substantially limits" should "be construed broadly" and that "[a]n impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting." 29 C.F.R. § 1630.2(j)(1)(I) & (ii).

Contrary to the district court's ruling, Nunies did identify two major life activities: working and lifting. The Court concluded that there is at least a dispute about whether Nunies' shoulder injury substantially limited those life activities. The fact that Nunies continued working through the pain does not mean that he was not substantially limited in his ability to work. In order for an impairment to substantially limit a major life activity it "need not prevent, or significantly or severely restrict" the activity. *Id*. § 1630.2(j)(1)(ii). The Court recognized that a stabbing pain when raising one's arm above chest height substantially limits the major life activity of lifting and possibly working.

Nunies v. HIE Holdings Inc., 904 F.3d 837 (9th Cir. 9/17/2018), *superseded by* 908 F.3d 428 (9th Cir. 11/1/2018) (Tashima, Fletcher, Hurwitz)

WASHINGTON SUPREME COURT

Most Wrongful Discharge Cases Will Fall Under Thompson; Judge Fearing's Treatise on "Overriding Justification" Repudiated.

Plaintiff alleged that he was terminated from the University because he complained of a safety violation in the University gymnasium. The University claimed he was terminated for insubordination. The employee brought suit alleging wrongful discharge in violation of a clear mandate of public policy and that the University failed to produce a copy of his personnel file which he had requested after termination. The trial court granted the University's motion for summary judgment on both issues and the employee appealed. The Court of Appeals affirmed summary judgment on the wrongful discharge claim but reversed on the personnel file claim. The Plaintiff filed a petition for review on the wrongful discharge claim and the defendant filed a cross petition on the personnel file claim. The Supreme Court granted review on issues raised in both the petition and cross petition.

In a unanimous opinion by Justice Owens, the Supreme Court first ruled that the *Thompson* framework for wrongful discharge applies if the case does fits into one of the four traditional categories of wrongful discharge: (1) where employees are fired for refusing to commit an illegal act; (2) where employees are fired for performing a public duty or obligation, such as serving jury duty; (3) where employees are fired for exercising a legal right or privilege, such as filing workers' compensation claims; and (4) where employees are fired in retaliation for reporting employer misconduct, i.e., whistle-blowing. Otherwise, the Perritt framework applies. Because Plaintiff was alleging that he was a whistleblower, the case should not have been decided under the Perritt framework.

The Court found that Plaintiff's case failed under the *Thompson* framework. Under *Thompson*,

Plaintiff has the burden to show that his "discharge may have been motivated by reasons that contravene a clear mandate of public policy." Although the Defendant had previously conceded that student safety was supported by a clear mandate of public policy and that was never briefed nor argued by either party, the Court ruled that student safety failed the clarity test. Even if Plaintiff had met the first step, the Court ruled that failed to satisfy the causation element, which requires the plaintiff to show that the public-policy-linked conduct was a "significant factor" in the decision to discharge the worker.

Although unnecessary to decide this case, the Court offered guidance about the application of the overriding justification element in those rare cases when the Perritt framework applies. In those cases, the Court ruled that the employer has the burden of proof on the affirmative defense of overriding justification. To succeed in the defense, an employer need not admit clarity, jeopardy, *and* causation. (The argument that the employer must admit causation remains open.) The Court also ruled that the federal doctrine of after acquired evidence, by analogy, did not support the Court of Appeals conclusion that the employer need not be motivated by the overriding justification.

Finally, the Court ruled that there exists no implied cause of action under RCW 49.12.240 and RCW 49.12.250.

WELA submitted an amicus brief regarding the proper framework for wrongful discharge claims.

Martin v. Gonzaga University, ___Wn.2d ___, 425 P.3d 837 (9/13/2018).

Employer's Compensation System Based on "Production Minute" is not a Piecework Plan

This case decides whether an employee answering customer service calls and paid by the production minute is entitled to be paid on piecework basis or at the contract rate or minimum wage rate, which ever is greater. The Ninth Circuit certified the following question to the Washington Supreme Court: "[W]hether an employer's payment plan, which includes as a metric an employee's 'production minutes,' qualifies as a piecework plan under Washington Administrative Code [WAC] Section 296-126-021?" The Supreme Court explained:

"In Washington, hourly workers are entitled to their contractual hourly rate of pay (or the legal minimum wage) for every hour worked. Piece rate workers, on the other hand, are entitled to their contractual piece rate (or the legal minimum wage), but that rate is not necessarily guaranteed for every hour individually worked: a higher production hour might subsidize a lower production hour. Citation omitted. That means that the characterization of a compensation formula as either hourly or piece rate can have a dramatic effect on the amount of money that a Washington employer must pay its employees.

The dispute in this case concerns the correct characterization of Xerox's payment plan under Washington law. Xerox has designed a compensation formula for its call center employees based on what Xerox calls a "production minute" — a unit of time (not a unit of tangible items, like bushels, or shirts, or pounds) during which a call center employee services incoming calls. . . . If the "production minute" forms the basis for a bona fide piecework system, then one set of minimum wage rules and regulations apply. But if the "production minute" instead forms the basis for an hourly payment system, then another set of hourly and minimum wage protections apply. The characterization of that compensation formula either as hourly or piecework forms the basis for this wage dispute brought by call center employee Tiffany Hill against her employer Xerox . . . ."

The State Supreme Court answered the certified question "no," 6-3. The majority opinion by Justice Gordon McCloud ruled that the contract or

minimum wage rate applies and not the piece work rate. Justices Stephens, Owens and Johnson dissented.

Hill v. Xerox Business Services, LLC, ___Wn.2d ___, 426 P.3d 703 (9/20/2018).

VICTORIES AND DEFEATS

Kathy Barnard represents the employee in *Alaska Airlines Inc. v. Schurke.*

Toby Marshall, Dan Johnson and Marc Cote represented the employees in *Hill v. Xerox.*

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