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ALERT
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U.S. SUPREME COURT

20 Employee ADEA Threshold Doesn't Apply to Public Employers

The question in this case was whether the 20-employee threshold applicable to private employers under the ADEA also applies to public employers. Some circuits had said yes; some, including the Ninth Circuit, had said public employers are covered regardless of their size. The Supreme Court unanimously agreed with the Ninth Circuit in an opinion by Justice Ginsburg.

Mount Lemmon Fire Dist v. Guido, 139 S. Ct. 22 (11/6/2018)

NINTH CIRCUIT

Causation Standard Under Section 1981 is "a Factor"

The plaintiff in this case was an African-American owned operator of a television network. It sued a cable television carrier under § 1981. The plaintiff sued in federal court. The defendant argued that in light of recent Supreme Court decisions requiring "but-for" causation outside Title VII discrimination that standard applied to claims under § 1981. Relying on prior Ninth Circuit precedent, the district court held that the standard was "a motivating factor." The district court certified the issue to the Ninth Circuit.

The panel agreed with the defendant that both *Gross v. FBL Fin. Serv.*, 557 U.S. 167 (2009) and *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013), undermined prior Ninth Circuit law regarding the causation standard for § 1981, because prior circuit cases had looked to Title VII for the right test. The court instead looked to the text of the statute, which guarantees "the same right" to contract "as enjoyed by white citizens." The court held that if discrimination plays any role in the denial of the equal right to contract, the statute is violated. It held that a plaintiff can prevail under § 1981 by showing race as "a factor" in the decision.

The panel rejected the defendant's argument that the First Amendment barred plaintiff's race discrimination claims. The court declined to decide whether rational basis or heightened scrutiny applied because the result was the same under either test. The court ruled § 1981 was content-neutral and narrowly tailored to accomplish its purposes.

National Ass'n of Af. American-Owned Media v. Charter Communications, Inc., 908 F.3d 1190 (9th Cir. 11/19/2018) (M. Smith, Schroeder, Ngyuen).

Teacher at Elementary Catholic School's ADA Claim Not Barred by Ministerial Exception

Plaintiff was employed as a fifth grade school teacher at St. James Catholic School. Biel received a bachelor's degree in liberal arts and a teaching credential from California State University. Biel is herself Catholic, and St. James prefers to hire Catholic teachers, but being Catholic is not a requirement for teaching positions at St. James. Biel had no training in Catholic pedagogy at the time she was hired. Her only such training was during her tenure at St. James: a single half-day conference where topics ranged from the incorporation of religious themes into lesson plans to techniques for teaching art classes.

Biel taught the fifth graders at St. James all their academic subjects. Among these was a standard religion curriculum that she taught for about thirty minutes a day, four days a week, using a

workbook on the Catholic faith prescribed by the school administration. Biel also joined her students in twice-daily prayers but did not lead them. She likewise attended a school-wide monthly Mass where her sole responsibility was to keep her class quiet and orderly.

Biel's contract stated that she would work "within [St. James's] overriding commitment" to Church "doctrines, laws, and norms" and would "model, teach, and promote behavior in conformity to the teaching of the Roman Catholic Church." St. James's mission statement provides that the school "work[s] to facilitate the development of confident, competent, and caring Catholic-Christian citizens prepared to be responsible members of their church[,] local[,] and global communities." According to the school's faculty handbook, teachers at St. James "participate in the Church's mission" of providing "quality Catholic education to . . . students, educating them in academic areas and in . . . Catholic faith and values." The faculty handbook further instructs teachers to follow not only archdiocesan curricular guidelines but also California's public-school curricular requirements.

Biel received a favorable teaching evaluation. Less than six months after that evaluation, Biel learned that she had breast cancer and informed the school administration that her condition required her to take time off to undergo surgery and chemotherapy. Sister Mary Margaret told Biel a few weeks later that she would not renew Biel's contract for the next academic year, citing her belief that Biel's "classroom management" was "not strict" and that "it was not fair . . . to have two teachers for the children during the school year." Biel filed suit alleging a violation of the American with Disabilities Act ("ADA"). The district court granted summary judgment to the school on the basis of the ministerial exception to the First Amendment. Biel appealed, and the Ninth Circuit reversed.

In *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 565 U.S. 171 (2012), the Supreme Court expressly declined to adopt "a rigid formula for deciding when an employee qualifies as a minister," and instead considered "all the circumstances of [the plaintiff's] employment." 565 U.S. at 190. The Court found that Biel had no religious credentials, training, or ministerial background as existed in *Hosanna-Tabor*. Nor did St. James hold Biel out as a minister by suggesting to its community that she had special expertise in Church doctrine, values, or pedagogy beyond that of any practicing Catholic. Her job title was "Grade 5 teacher." Although Biel taught lessons on the Catholic faith four days a week and incorporated religious themes and symbols into her overall classroom environment and curriculum, *Hosanna-Tabor* does not require these job duties to be considered in isolation.

> The First Amendment 'insulates a religious organization's selection of those who will personify its beliefs.' citation omitted. But it does not provide carte blanche to disregard anti-discrimination laws when it comes to other employees who do not serve a leadership role in the faith. We cannot read *Hosanna-Tabor* to exempt from federal employment law all those who intermingle religious and secular duties but who do not 'preach [their employers'] beliefs, teach their faith, . . . carry out their mission . . . [and] guide [their religious organization] on its way.' 565 U.S. at 196.

The panel reversed the district court and remanded for trial on the merits.

Judge Fisher of the Third Circuit dissented. He believed the ministerial exception applied because Biel performed a religious function.

Biel v. St. James School, 911 F.3d 603 (9th Cir. 12/17/2018) (Friedland, Fisher (3d Cir), Watford)

WASHINGTON SUPREME COURT

Employer Who Knew or Suspected Plaintiff Had Engaged in Protected Activity Not Entitled to Summary Judgment on Retaliation Claim

Plaintiff alleged that she was terminated from employment in retaliation for protected activity under the WLAD. The decision maker admitted that he knew of a prior lawsuit against the company but did not know that the lawsuit was a claim under the WLAD. The company argued that it lacked sufficient knowledge for the employer to be liable for retaliation. Plaintiff argued that knowledge of protected activity should be imputed to the employer if the decision maker "knew or suspected" of the protected activity. Plaintiff also argued a general corporate knowledge theory. The Court of Appeals affirmed summary judgment for the employer. The Supreme Court granted review.

In a 8-1 decision authored by Justice Wiggins, the Supreme Court reversed the Court of Appeals. The Supreme Court ruled that the Plaintiff did not have to show that the employer knew the prior lawsuit involved the WLAD. It was enough that the employer knew about a lawsuit that was, in fact, protected activity. A decision-maker need not have actual knowledge about the legal substance of a protected action. Instead, "the decision-maker need have actual knowledge only that the employee took the action in order to prove a causal connection."

The Court also adopted the "knew or suspected" standard because it furthers the remedial purposes of the WLAD. Actual knowledge of the protected activity is not required. "Employers are not limited to retaliation decisions based on information they actually know to be true. Instead, 'common sense and experience establish that employers also make employment decisions on what they suspect or believe to be true.'" The Court did not reach the general corporate knowledge theory.

Justice McCloud dissented. She agreed with the majority's legal standard but disagreed the evidence of actual knowledge or suspicion met the standard. She argued the company did not know or suspect the prior lawsuit was protected under the WLAD.

The Court remanded for trial on the merits.

Jeff Needle and Christie Fix filed a brief for WELA in support of the plaintiff.

Cornwell v. Microsoft Corp., --- Wn.2d ---, 430 P.3d 229 (11/29/2018)

WASHINGTON COURT OF APPEALS

"A Negative Factor" Test Applies to Claims Employer Terminated Employee Due to Absences Protected Under the FMLA/WFLA.

Plaintiff worked at a fruit warehouse and packing facility. The company had an attendance point policy that penalized the employee for being absent without giving 24 hours advanced notice. The company had a practice of not penalizing employees for absences due to medical emergencies. Plaintiff experienced medical complications from pregnancy. Her supervisor knew she was pregnant. Her doctor prescribed her two days bed-rest and she brought in note saying so. The employer gave her attendance points because she provided only same-day notice.

A few months later she left work early due to kidney stones. She had previously been hospitalized for kidney stones for which the employer assessed no points. She claimed she told her supervisor that she had missed work because of the kidney stones, but the company assessed her points anyway. She then went on maternity leave. Following her return, the company terminated her

for exceeding the allowed points total for absences.

She filed suit in state district court claiming among other things that the employer had terminated her for Washington Family Leave Act (WFLA) protected absences. The court granted the employer's motion for summary judgment and the superior court affirmed. Division III granted discretionary review, reversed, and remanded for trial. The appellate court held that the WFLA mirrors the FMLA and should be interpreted consistently with federal law.

The court construed the plaintiff's claim as one claiming "retaliation" for exercising her rights under the WFLA. The plaintiff argued the court should apply the *McDonnell Douglas-Burdine* framework. The employer argued that the "a negative factor" test set forth in *Bachelder v. America West Airlines*, 259 F.3d 1112 (9th Cir. 2001), applied. The court held that the *Bachelder* test applied because the employer's motive was irrelevant to whether it had terminated the plaintiff for protected absences. To establish a claim the plaintiff must show (1) she was absent for an WFLA covered reason; (2) he or she suffered an adverse employment action; and (3) the covered leave was a negative factor in the employment decision.

Bachelder had called such a claim an "interference" claim, and applied principles applicable to federal labor law "interference" claims. The court in this case noted that the claim at issue literally falls under 29 C.F.R. § 825.220(c), which says the prohibition on "interference" also prohibits an employer from "discriminating or retaliating." The subsection then defines that to include an employer's use of "taking FMLA leave as a negative factor" in employment decisions. The *Bachelder* court had held that this part of regulation was inconsistent with the statutory definition of "discrimination" under the FMLA, which by its terms refers to employer actions taken against someone for "opposing" any practice made unlawful by the FMLA or "participating" in an FLMA-related proceeding. But the FMLA includes "discrimination" because of "opposition" under statutory section prohibiting "interference with rights." As the court in this case correctly noted, "the statutory source for this regulation [29 C.F.R. § 825.220] is an area of confusion and dispute."

Here it was undisputed that the employer fired the plaintiff due to absences that were in fact protected. The only dispute was whether she had adequately notified the employer of her need for WFLA leave. The court emphasized the notice requirement was "not onerous" Here, the plaintiff had informed the company she was pregnant. Given that pregnancy is a type of condition that can create the need for unforeseeable protected leave, her burden of providing additional notice of incapacitation due to pregnancy was "at least somewhat reduced."

The court held a reasonable jury could find that the plaintiff had given adequate notice that her need for bed rest was WFLA protected. A reasonable jury could also find that she had told her supervisor of her need for episodic leave for kidney pain.

The court rejected the company's argument that it was justified in penalizing her because she had not complied with company policy because the policy did not provide an avenue for claiming unforeseeable WFLA leave that did not result in hospitalization. Because the policy did not comply with the WFLA, it provided no defense.

Espindola v. Apple King, -- Wn. App. 2d --, 430 P.3d 663 (Div. III 11/29/2018) (Pennell, Korsmo, Fearing)

An Employee Who Keeps Working Despite Wage Underpayment to Which He Objected Has Not Knowingly Submitted to the Employer's Violations and an Employee Who Quits Because of Such Violations May Assert a Claim for Constructive Wrongful Discharge.

Plaintiff worked for Pro-Cut as a slab operator. Pro-Cut's employees were not paid for the first 30 minutes or last 30 minutes of drive time between Pro-Cut's shop and a job site, the company's reasoning being that it could not charge the customer for that time. In 2008, Mr. Peiffer noticed that his time cards were being altered. Times recorded by Mr. Peiffer were sometimes "whited out" and new times were written in when his supervisor believed employees had inflated their work time. He also removed time entered for the first and last half-hour of travel.

Mr. Peiffer objected to Mr. Sainsbury's alteration of his time cards and was told that if he did not like the policy, he could quit. He initially refused to quit, but ultimately refused to return to work unless Pro-Cut paid him the full wages owed him.

On July 3, 2012, Mr. Peiffer filed a wage complaint with the Department of Labor and Industries, which immediately opened an investigation. The Department's investigation remained open for 14 months during which it never issued a citation or notice of assessment and no administrative action was begun. According to the department investigator assigned, she was able to determine that "there were clearly some wage violations" but his claim was "extremely difficult."

The statutory framework contemplates that an investigation will be completed in 60 days. By statute, the Department is required to provide advance written notice if it has good cause for taking longer to complete its investigation and is required to specify the duration of the extension. During the 14 months the Department's investigation was pending, the investigator sent a number of "60-day letters" to Mr. Peiffer, indicating that his claim required more time to investigate. She did not send copies of the 60-day letters to Pro-Cut, which was unaware of the L&I complaint.

Peiffer filed suit including *inter alia* several causes of action seeking unpaid wages and prejudgment interest and a claim for constructive wrongful termination in violation of public policy. After Peiffer filed suit, the L&I investigator closed the claim.

In an effort to avoid reasonable attorney fees under RCW 49.48.030, the Defendants stipulated that they owed Mr. Peiffer wages in the amount of $31,631.69. This amount was calculated based on the Defendants' assumption that the statute of limitations was not tolled during the L&I investigation. At trial, the court ruled that the statute of limitations was tolled during the period of investigation, and awarded lost wages, prejudgment interest, and an amount to off-set the adverse consequences of receiving a lump sum award. Although the court found that the violations were willful, it also found that Peiffer had knowingly submitted to the wrongful withholding. The court also dismissed the claims of wrongful discharge.

Peiffer requested a lodestar of $73,395 and requested a multiplier. He sought $9,778 in costs, including reimbursement for counsel's out-of-state travel to Washington. The Court awarded $50,000 in fees without an explanation and $5,503 in costs which were also unexplained but appears to be for withheld travel expenses to Washington. Pro-Cut appealed and Peiffer cross appealed.

The Court of Appeals ruled that during the L&I investigation the statute of limitation was tolled pursuant to RCW 49.48.083(5). "If an employee files a wage complaint with the Department and then files a civil action while the investigation is pending, RCW 49.48.083(5), . . . , tolls the statute

of limitations until the Department resolves the complaint or the civil action is completed. . . ."

Disagreeing with trial the court, the panel ruled that Peiffer was not entitled to an award to off-set the adverse tax consequences for receiving a lump sum award. The Court distinguished *Blaney v. International Ass'n of Machinists & Aerospace Workers, District No. 160,* 151 Wn.2d 203, 87 P.3d 757 (2004), on the grounds that an off-set is not actual damages or costs and the Court declined to broadly interpret "wages" to include an off-set.

In reference to Peiffer's cross appeal, the Court held that the trial court erred in dismissing the claim of constructive wrongful discharge because Peiffer has presented sufficient evidence to establish that he was constructively discharged from employment. The Court held that to establish a constructive discharge claim the employee must show that the intolerable conditions the employer created that led the employee to resign contravened a clear mandate of public policy. Refusing to pay an employee a substantial amount of wages due by changing time cards is an intolerable working condition that contravenes public policy. Peiffer had repeatedly complained to no avail.

The Court also ruled that there was insufficient evidence to support a finding that Peiffer knowingly submitted to the withholding of wages. In order to "knowingly submit" an employee must have deliberately and intentionally deferred to [the employer] the decision of whether they would ever be paid. "One 'submits' when one 'bow[s] to the will or authority of another: YIELD[S]' or 'become[s] resigned: acquiesce[s] uncritically.'" Citing Webster's Dictionary at 2277. The unchallenged findings reflect that Peiffer objected to the withholding on numerous occasions and therefore did not submit.

In reference to the award of attorney fees, "[w]hen a trial court awards significantly less attorney fees than requested, 'it should at least indicate what part of the lawyer's work the court discounted as unnecessary or unreasonable, how much of the lawyer's hourly fee the court found excessive, or the manner by which the court reduced.'" The Court of Appeals found that the reduction to $50,000 and the failure to aware a multiplier was without explanation and remanded for reconsideration of the amount and whether to award a multiplier. Lastly, the court remanded to re-determine the amount of costs awarded. While not required to award costs for travel expenses, they can be awarded in a wage claim.

Peiffer v. Pro-Cut Concrete and Breaking, Inc., --- Wn. App. 2d ---, --- P.3d ---- (Div. III 12/18/2018). (Siddoway, Lawrence-Berrey, Korsmo)

Plaintiff Failed to Establish Prima Facie Case of Denial of Disability Accommodation Because She Failed to Notify Employer of Need for Additional or Different Accommodations

Plaintiff worked for City Light as a laborer. She suffered a back injury. Overtime it worsened to the point that she couldn't do her job. The employer let her transfer to another position and provided her with a standing desk, rubber floor mat, and padded seat cushions for her work vehicle.

Years later she sued for failure to accommodate. The Superior Court granted the City's motion for dismissal. Division One affirmed. The appellate court ruled that the plaintiff had a disability under the WLAD. The court assumed it substantially limited a major life activity. The court rejected her claim that, when she was temporarily transferred to another worksite following her return from medical leave, the employer did not respond to her need for accommodation quickly enough.

The court ruled that she had failed to provide the employer with notice of her need for other accommodations. The court held the City had no

notice that the prior accommodations were no longer effective. The court rejected the argument that the interactive process applies only before it is determined an individual to have a qualifying disability. The court held the interactive process applies to determine the reasonableness, i.e., the effectiveness of current accommodations.

Gamble also alleged that the City had failed to accommodate here by allowing to work a four ten schedule. She had one before she went on medical leave. While she was on leave, the City changed its policy and no longer allowed anyone to work such a schedule. Gamble then requested to work a schedule with one day off every two weeks. She never told the City she still wanted a four ten schedule. The court ruled that it was her obligation to tell the City she wanted a four ten schedule as an accommodation after it had been removed per general policy.

Gamble v. City of Seattle, --- Wn. App. 2d. ---, --- P.3d --- (Div. I 12/24/2018) (Mann, Verellen, Becker).

VICTORIES AND DEFEATS

Alex Higgins and Matt Bean represent the employee in *Cornwell*.

Favian Valencia represents the employee in *Espindola.*

Jack Sheridan represents the employee in *Gamble.*

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