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ALERT

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U.S. SUPREME COURT

Justices Take Broad View of FAA Transportation Worker Exemption

The plaintiff in this case worked as a truck driver. He signed a contract stating he was an independent contractor not an employee. The contract also contained an arbitration clause. The plaintiff filed a wage and hour case stating he was an employee entitled to minimum wage. The company moved to compel arbitration. The plaintiff claimed that the FAA exempted his agreement with the company as a "contract of employment" with a transportation worker. The district court and the First Circuit sided with the plaintiff.

The Supreme Court affirmed in a unanimous opinion by Justice Gorsuch (Justice Kavanaugh did not participate). The Court first held that the application of the transportation worker exception was an antecedent question of law for the court. The Court held that was true regardless of whether the agreement contains a delegation clause empowering the arbitrator to decide arbitrability. On the merits, the Court ruled that the term "contract of employment" included at the time the FAA was enacted in 1925 both employer-employee agreements and independent contractor agreements. "Employment" in 1925 was synonymous with "work." Congress's use of the term "workers" rather than "employees" further supported this interpretation.

Justice Ginsburg filed a concurring opinion asserting some statutes other than the FAA should be interpreted in light of changing times.

New Prime Inc. v. Oliveira, 139 S. Ct. 532 (1/15/2019)

Justices to Decide Whether Title VII Administrative Exhaustion is Jurisdictional

Lois Davis sued Fort Bend County for religious discrimination despite the fact that Davis plainly never raised a charge of religious discrimination before the EEOC. The district court dismissed Davis's suit for lack of subject matter jurisdiction. But the Fifth Circuit reversed, holding that administrative exhaustion is not a jurisdictional prerequisite to suit, and that the County forfeited a failure-to-exhaust defense by raising it too late. The Court granted certiorari to resolve a split in the circuits. The presented question is:

> Whether Title VII's administrative exhaustion requirement is a jurisdictional prerequisite to suit, as three Circuits have held, or a waivable claim-processing rule, as eight Circuits have held.

Fort Bend County, Tx v. Davis, 139 S. Ct. 915 (1/1/19). Case below: 893 F.3d 300 (5th Cir. 2018).

NINTH CIRCUIT

"Honest Belief" Jury Instruction is Reversible Error

BNSF hired Frost as a track laborer in June 2011. Within the first two years of his employment, Frost was disciplined twice for fouling the track. BNSF issued a notice of investigation and conducted a hearing regarding the second incident. Following the hearing, it was found that Frost did not know the details of his track authority and that he had violated BNSF safety rules. It was concluded that Frost should be discharged due to the seriousness of the violation

and the fact that it occurred so soon after the first disciplinary incident.

Frost filed suit alleging retaliation under the Federal Railroad Safety Act (FRSA). He claimed that he was engaged in protected activities—*i.e.*, for reporting the PTSD injury following the first incident and for filing an OSHA complaint alleging disciplinary retaliation shortly thereafter. Frost's complaint alleged that these protected activities were contributing factors to BNSF's decision to terminate him, and he sought an award of emotional distress damages, punitive, damages, and attorney's fees. At the close of the evidence, the trial court gave an "honest belief" jury instruction, over Frost's objection, that:

> BNSF cannot be held liable under the Federal Railroad Safety Act if you conclude that defendant terminated plaintiff's employment based on its honestly held belief that plaintiff engaged in the conduct for which he was disciplined.

The jury returned a verdict in favor of BNSF. Frost appealed. The Ninth Circuit reversed.

To establish a claim of unlawful discrimination under the FRSA, the plaintiff must prove by a preponderance of the evidence that his or her protected conduct "was a contributing factor in the unfavorable personnel action alleged in the complaint." 49 U.S.C. § 42121(b)(2)(B)(iii)). A contributing factor is "any factor, which alone or in connection with other factors, tends to affect in any way the outcome of the decision." If the plaintiff succeeds, the employer can attempt to rebut the allegations and defeat the claim by demonstrating "by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of [the protected activity]." 49 U.S.C. § 42121(b)(2)(B)(iv). The Court ruled proving discriminatory intent is satisfied if the employer acted *in retaliation for* protected activity and there is no requirement that FRSA plaintiffs separately prove discriminatory intent. 49 U.S.C. § 42121(b)(2)(B). "[T]he presence of an employer's subjective retaliatory animus is irrelevant. All a plaintiff must show is that his 'protected activity was a contributing factor in the adverse [employment] action.'" 29 C.F.R. § 24.104(f)(1).

The Court of Appeals rejected the "honest belief" jury instruction. "That instruction is not consistent with the FRSA's statutory scheme" which only requires that a Plaintiff prove that his protected conduct was a contributing factor to his ultimate termination. To rebut Frost's case, BNSF had to prove that the same discipline would have been imposed with or without the injury report or the OSHA complaint. "Frost was not required to show that his injury report was the *only* reason or that no other factors influenced BNSF's decision to terminate him." Nor is it foreclosed "that an impermissible factor or consideration contributed to the decision to discipline Frost." The Court ruled that the use of the "honest belief" instruction was prejudicial.

The same reasoning applied in FRSA cases would be applicable to all federal anti-discrimination statutes.

Frost v. BNSF Railway Company, 914 F.3d 1189 (9th Cir. 1/30/2019) (Christen, Fernandez, N.R. Smith)

Plaintiffs' CBA Pre-Empted Overtime Pay Claims But Not Necessarily Other Wage Claims

Plaintiff filed a proposed class action alleging failure to pay overtime, minimum wage violations, and meal and rest break violations. His employer conducted operations on offshore drilling platforms. The employer had a CBA with the plaintiff's union. The plaintiff filed in state court. The employer removed. The district court granted the employer's motion to dismiss on the grounds of labor law preemption, reasoning that the court would have to interpret the CBA.

The Ninth Circuit affirmed part and reversed in part. The court restated the rule that wage and

hour law is a state police power concern that is not necessarily preempted with respect to unionized employees. The first question a court must answer is whether the right at issue existed solely because of the CBA. Here, the California overtime law at issue provided it would not apply where a CBA governed. Given that, the overtime claims at issue in the case were solely the product of the CBA and preempted by labor law.

Plaintiff's other claims were not dependent entirely on the CBA for their existence. The next question a court must answer is whether the state law requires an "interpretation" of the CBA, which means there is an active dispute over the meaning of the contract terms. The panel remanded this question to the district court.

Curtis v. Irwin Indus., Inc., 913 F.3d 1146 (9th Cir. 1/25/2019) (Ikuta, Owens, Gilliam (N.D. Cal.))

Prospective Employer's Disclosure Form Did Not Meet Requirements of Fair Credit Reporting Act

In the process of applying for employment with CheckSmart Financial, LLC, Desiree Gilberg completed a three-page form containing an employment application, a math screening and an employment history verification. Two weeks later, Gilberg signed a separate form, entitled "Disclosure Regarding Background Investigation.'" After receiving Gilberg's signed disclosure form, CheckSmart obtained a criminal background report, which confirmed that Gilberg did not have a criminal record. CheckSmart did not obtain a credit report.

CheckSmart hired Gilberg, who worked for CheckSmart for five months before voluntarily terminating her employment. Gilberg then brought this putative class action against CheckSmart, alleging two claims: (1) failure to make a proper FCRA disclosure and (2) failure to make a proper disclosure under California's Investigative Consumer Reporting Agencies Act (ICRAA). Summary judgment was entered for the employer, and the employee appealed.

FCRA prohibits an employer from obtaining an applicant's consumer report without first providing the applicant with a standalone, clear and conspicuous disclosure of its intention to do so and without obtaining the applicant's consent: 15 U.S.C. § 1681b(b)(2)(A). *See also* Cal. Civ. Code §§ 1785.20(5)(a), 1786.16(a)(2)(B). The Court ruled that under both statutes "the required disclosure must be in a document that 'consist[s] solely of the disclosure.'" The ordinary meaning of "solely" is "[a]lone; singly" or "[e]ntirely; exclusively." Citing The American Heritage Dictionary of the English Language 1666 (5th ed. 2011). "Because CheckSmart's disclosure form does not consist solely of the FCRA disclosure, it does not satisfy FCRA's [or California's] standalone document requirement."

FCRA and ICRAA require a disclosure form to be "clear and conspicuous." 15 U.S.C. § 1681b(b)(2)(A)(I); Cal. Civ. Code § 1786.16(a)(2)(B). "Clear" means "reasonably understandable" citations omitted, and "conspicuous" means "readily noticeable to the consumer." Each are analyzed separately. The Court ruled that the disclosure form was not "clear" because it contained language that a reasonable person would not understand, but it was "conspicuous."

The Ninth Circuit affirmed in part, vacated in part, and remanded for further proceedings.

Gilberg v. California Check Cashing Stores, LLC, 913 F.3d 1169 (9th Cir. 1/29/2019) (Fisher, M. Smith, Piersol (D.S.D)).

Growers and Contractor Were Joint Employers Under Title VII

Green Acre Farms and Valley Fruit Orchards (the Growers) are fruit growers in the State of Washington. The Growers experienced labor shortages and entered into agreements with Global Horizons, Inc., a labor contractor, to obtain temporary workers for their orchards. With the Growers' approval, Global Horizons recruited workers from Thailand and brought them to the

United States under the H-2A guest worker program, which allows agricultural employers to hire foreign workers for temporary and seasonal work.

Two of the Thai workers filed discrimination charges against the Growers and Global Horizons with the Equal Employment Opportunity Commission (EEOC). After an investigation, the EEOC brought this action under Title VII of the Civil Rights Act of 1964. The EEOC alleged, among other things, that the Growers and Global Horizons subjected the Thai workers to poor working conditions, substandard living conditions, and unsafe transportation on the basis of their race and national origin. The district court entered a default judgment against Global Horizons, which became insolvent.

At the motion to dismiss stage, the district court divided the EEOC's allegations into those involving "orchard related matters" (referring to working conditions at the orchards) and those involving "non-orchard related matters" (referring to housing, meals, transportation, and payment of wages). The district court then held that the EEOC had plausibly alleged the Growers were joint employers of the Thai workers as to orchard-related matters, but not as to non-orchard-related matters. The court accordingly dismissed all allegations against the Growers relating to non-orchard related matters. It also granted the Growers' motions for attorney's fees on the ground that the EEOC's claims were frivolous and without foundation from the outset. The EEOC appealed and the Ninth Circuit reversed.

All parties agree that the Growers and Global Horizons were joint employers of the Thai workers with respect to orchard related matters. The "salient question" was whether the EEOC plausibly alleged that the Growers were also joint employers with respect to non-orchard-related matters.

The Court recognized that two entities may simultaneously share control over the terms and conditions of employment, such that both should be liable for discrimination relating to those terms and conditions. The two entities in such circumstances are deemed to be "joint employers" of the employees in question. The Court applied the common-law agency test to determine whether two or more entities are "joint employers" within the meaning of Title VII. Under the common-law test, "the principal guidepost" is the element of control: "the extent of control that one may exercise over the details of the work of the other." *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 448 (2003). The Court has provided a non-exhaustive list of factors to consider when analyzing whether the requisite control exists:

> the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Nationwide Mutual Insurance Co. v. Darden, 503 U.S. 318, 323-34 (1992) (internal quotation marks omitted). There is "no shorthand formula" for determining whether an employment relationship exists, so "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Id.* at 324 (internal quotation marks omitted). The Court explicitly rejected the "economic-reality" test.

Although employers do not typically have control over non-working conditions, such as housing,

here the nature of the H-2A program establishes a different relationship between an employer and the foreign guest workers it employs. The H-2A regulations place on the shoulders of an "employer" the legal obligation to provide foreign guest workers with housing, transportation, and either low-priced meals or access to cooking facilities. 20 C.F.R. § 655.102(b)(1), (4), (5)(iii). Under the regulations, these benefits constitute "material terms and conditions of employment." The Growers possessed ultimate authority over those matters and could have demanded changes, withheld payment, or ended the contract with Global Horizons altogether. "The power to control the manner in which housing, meals, transportation, and wages were provided to the Thai workers, even if never exercised, is sufficient to render the Growers joint employers as to non-orchard-related matters."

A joint employer, however, is not automatically liable for the conduct of a different joint employer. To be liable, an employee must prove that the defendant employer knew or should have known about the other employer's conduct and "failed to undertake prompt corrective measures within its control." A simple negligence standard applies.

The Court reversed in part and remanded for additional proceedings.

U.S. EEOC v. Global Horizons, et al., 915 F.3d 631 (9th Cir. 2/6/ 2019). (Watford, Gould, Rothstein (W.D. Wash.))

Jury Instruction Error Requires Retrial of Plaintiff's SOX Claim but Error Did Not Affect State Law Wrongful Discharge Verdict for Employee

The plaintiff was the former general counsel of the defendant. He wrote a memo to the company board of directors that management had deliberately violated the Foreign Corrupt Practices Act ("FCPA"). He was later placed on leave for "acting a little bizarre lately." The board of directors found no evidence of an FCPA violation and fired him. A jury found in favor of the plaintiff on his Sarbanes-Oxley ("SOX"), Dodd Frank, and California wrongful discharge claims. The jury awarded him $11 million.

On appeal, the Ninth Circuit agreed with the employer that the district judge had improperly instructed the jury that violations of the of the FCPA's anti-bribery and "books and records" provisions could be the basis for a SOX violation as rules and regulations of the SEC. The district court had reasoned that the FCPA was an amendment to the Securities and Exchange Act. The court held that because the FCPA was a statute, it could not be a rule or regulation under SOX.

The panel rejected the company's argument that the general counsel could not have reasonably believed the FCPA violation was an SEC regulation violation sufficient to violate SOX. Under SOX, the employee does not have to prove he reported an actual violation. It is enough the employee believed "there might have been a violation" and was fired for suggesting further inquiry. More generally, "reasonableness" is evaluated in light of the knowledge available to a person of the same experience and training as the plaintiff. The plaintiff need not communicate the reasonableness of those beliefs to one employer to engage in protected activity. Given this, the proper remedy was retrial of the SOX claims.

The panel directed judgment in favor of the employer in light of the U.S. Supreme Court's decision in *Digital Realty Trust Inc.* holding Dodd-Frank doesn't apply to internal whistleblowing. The panel affirmed the verdict for the plaintiff on his California wrongful discharge claim.

Wadler v. Bio-Rad Labs., Inc., 916 F.3d 1176 (9th Cir. 2/26/2019) (Bennett, Graber, Kobayashi (D. Haw.))

WASHINGTON COURT OF APPEALS

CBA Did Not Unambiguously Waive Right to Rest and Meal Breaks

Plaintiffs were unionized nurses. Their CBA allows for arbitration of contractual disputes but not statutory ones. The CBA also provided that meal and rest periods should be administered in accordance with state law but gave rest breaks of 15 minutes rather than 10 minutes. The employer argued that the employees were required to arbitrate their meal and rest break claims. The Superior Court disagreed.

The court of appeals affirmed on the basis that the source for the right to meal and rest breaks was statutory not contractual. The court rejected the employer's claim that because the plaintiffs were public employees, there was a presumption of arbitration under Washington law.

While the opinion suggests that the plaintiffs sued to enforce the entire 15-minute rest break, five minutes of which were purely contractual, the employees only sued for 10 minute rest breaks.

The panel also ruled the employer had waived its right to compel arbitration by not moving soon enough. The company's December 2016 answer raised it as a defense. The employer litigated for nine months before filing its motion to compel.

Lee v. Evergreen Hosp. Med. Ctr., -- Wn. App. --, 434 P.3d 1071 (Div. I. 2/11/2019) (Verellen, Andrus, Mann)

Divided Panel Rejects Minimum Wage for State Court Jurors

Plaintiffs are prospective jurors who allege King County is violating the Juror Rights Statute, RCW 2.36.080(3), and the Minimum Wage Act, RCW 49.46.020(1), by refusing to pay minimum wages for each hour of jury service. The Jurors Rights Statute prohibits the exclusion of jurors based upon "economic status." Plaintiffs argued that there exists an implied cause of action under the statute and the County's failure to pay minimum wage has a disparate impact on the basis of economic status. Plaintiffs also argued that jurors satisfied the economic-dependence test and are therefore "employees" within the Minimum Wage Act. Plaintiffs relied upon *Bolin v. Kitsap County*, 114 Wn.2d 70, 785 P.2d 805 (1990), which held that jurors were "employees" for the purpose of receiving workers compensation under the Industrial Insurance Act. Plaintiffs also argued that RCW 2.36.150 did not foreclose compensation beyond "reimbursement" of "expenses." The trial court granted King County's motion for summary judgment and the Plaintiffs appealed.

The Court of Appeals ruled that "[j]urors are not entitled to compensation for their service. Instead, jurors are entitled only to what compensation is granted to them by [RCW 2.36.150]," which limits reimbursement for expenses to no more than $25 nor less than $10 per day of service. The Court of Appeals also ruled that RCW 2.36.080(3) does not create an implied cause of action for jurors because it is inconsistent with the underlying purpose of the statute which is to protect the opportunity for people to be considered for jury service. The Court distinguished *Bolin v. Kitsap County* on the basis that it had been decided under the "right to control" test and not the economic-dependence test. The Court never considered the economic dependence test because "[j]ury service is service performed as a civic duty" and therefore "jurors are not entitled to compensation for their service." Lastly, the Court ruled that Plaintiffs lacked standing under both statutes.

Judge Bjorgen dissented on all issues under the Juror Rights Statute, RCW 2.36.080. He opined that the opportunity to serve is meaningless when the choice is between jury service and meeting basic family needs.

> For those with low paying jobs without leave for this purpose, the cost of jury service may be a missed rent payment or skipped

> meals. For those without understanding employers, jury service may come at the cost of a job. Faced with such risk, the choice to exclude oneself is hardly voluntary.

In short, this "Hobson's choice" is no choice at all.

> [T]he absence of compensation beyond the allowed reimbursement for expenses, makes jury service untenable for many lower income citizens. To say that one voluntarily excludes oneself by declining jury service instead of risking, say, eviction or loan default, is to search the law with blinders. The lack of reasonable compensation compels their self-exclusion from this high privilege of citizenship. The justice system itself excludes many low income citizens on account of economic status in violation of RCW 2.36.080(3).

A Petition for Review is Pending.

Rocha v. King County, --- Wn. App. ---, 435 P.3d 325 (Div. II 2/21/2019). (Lee, Sutton, Bjorgen)

MEMBER VICTORIES AND DEFEATS

Cynthia Heidelberg represents the employees in *Lee.*

The plaintiffs in *Rocha* are represented by Toby Marshall and Jeffrey Needle.

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