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ALERT
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NINTH CIRCUIT

Title VII's Religious Organization Exemption is Not Jurisdictional but Wasn't Forfeited; Exemption Applies to Retaliation and Hostile Work Environment Claims.

The plaintiff worked for the Salvation Army for many years, lastly as a social services coordinator. A client filed an internal complaint against her. Her manager refused to let her see the complaint. The plaintiff filed a grievance against the manager. The plaintiff went out on medical leave due to fibromyalgia and didn't return to work after being cleared by her doctor. The Salvation Army terminated her employment. The plaintiff brought a lawsuit claiming hostile work environment because she had stopped attending religious services, retaliation for filing a grievance complaining of religious-based mistreatment, and failure to accommodate. Even though the Salvation Army didn't invoke Title VII's religious exemption in its answer, the district court granted summary judgment on that basis because the district court held it to be jurisdictional. The district court granted summary judgment to the employer on the merits of the ADA claim.

The Ninth Circuit affirmed. The religious organization exemption prohibits Title VII actions against religious organizations based on religious discrimination in favor of members of that religious organization. Although the exemption is construed narrowly, the court held that the Salvation Army qualified. The panel joined other circuits in holding that the exemption applies to claims for religious hostile work environment and retaliation based on complaints about religious discrimination. The EEOC Compliance Manual had limited the exemption to only hiring and discharge decisions.

The panel held that religious exemption is not jurisdictional and is subject to forfeiture if not timely raised. The court held that it must be pleaded as an affirmative defense. The Salvation Army did not do so. The court held that merely raising an affirmative defense of "failure to state a claim" did not suffice. However, absent a showing of prejudice, an affirmative defense may first be raised in a summary judgment motion. Here, there was no prejudice to the plaintiff because the exemption applied to the Salvation Army as a matter of undisputed fact.

The record did not support the plaintiff's claim that the Salvation Army did not engage in the interactive process. Moreover, the "accommodation" she had requested, seeing the original customer complaint filed against her, was not reasonable. Questionably, the court ruled because the plaintiff was allowed to return to work without restrictions, she was no longer suffering from a disability. The panel noted she had refused to provide supporting medical documentation.

Garcia v. Salvation Army, 918 F.3d 997 (9th Cir. 3/18/2019) (Korman (E.D.N.Y.), Schroeder, Watford)

Statement Made by Supervisor Concerning Reasons for Plaintiff's Non-Selection Admissible Even though Declarant Wasn't a Supervisor at the Time Statement was Made.

David Weil's employment by Frontier (and its corporate predecessors) began in 1999. In 2011, Weil was promoted to Call Center Manager of a

Frontier call center. In his 2011 performance review, Weil was praised for his leadership skills and received high overall scores. In September 2012, Weil became the interim acting director of the call center. Weil's overall performance rating, as well as his own self-rating, decreased from his 2011 ratings. After naming Weil the interim acting director, Frontier began the process of hiring a permanent director. Weil was considered for the position but it was given to a White woman. Plaintiff's former supervisor told him that he had three things against him - "You're a former Verizon employee, okay. You're not white. And you're not female." After Weil failed to comply with a PIP he was terminated from employment.

Weil brought suit against Frontier under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., Section 1 of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and the Washington Law Against Discrimination, Wash. Rev. Code § 49.60.010 et seq., for wrongful and discriminatory failure to-promote and termination. After discovery, Frontier moved for summary judgment. In opposing summary judgment, Weil presented his supervisor's statement and argued that it precluded the grant of summary judgment, because it was direct evidence of employment discrimination or at least evidence of pretext. Frontier then filed a motion *in limine* requesting, in part, that the court exclude the statement as inadmissible hearsay. Weil countered that the statement was not hearsay under Federal Rule of Evidence 801(d)(2)(D), asserting that the statement was made when she was still a Frontier employee, though she had been moved to a different role with the company by that time.

The district court determined that the statement offered by Weil was inadmissible under Federal Rule of Evidence 801(d)(2)(D) for lack of foundation, because the supervisor was not employed in the supervisor position at the time she made the statement to Weil. After excluding the statement, the district court assumed (without deciding) that Weil met his *prima facie* burden but concluded that, having excluded the statement, Weil failed to produce admissible evidence that Frontier's reasons for not promoting him were pretextual. Finally, the district court assessed Weil's wrongful termination claim and concluded that Weil had not presented a *prima facie* case. Weil appealed and the Ninth Circuit reversed in part.

The Court ruled that under Federal Rule of Evidence 801(d)(2)(D), a statement is not hearsay and may be admitted against an opposing party if the statement "was made by the party's agent or employee on a matter within the scope of that relationship and while it existed." The Rule sets forth three elements necessary for admitting a statement that would otherwise be excluded as hearsay: (1) the statement must be made by an agent or employee of the party against whom the statement is being offered; (2) the statement must concern a matter within the scope of that employment relationship; and (3) the statement must be made while the declarant is yet employed by the party. There is no additional requirement that the declarant must still be in the same scope of employment at the moment the statement is made. The second element requires that the statement concern a matter that was at sometime within the scope of the declarant's employment. A statement may concern a matter within the scope of employment—even though the declarant is no longer involved with that particular matter when the statement is made—as long as the declarant was involved with that matter at some prior point in his or her employment. The third element requires only that the statement be made while the declarant is yet employed; it does not require that the declarant still be in the same position that resulted in the matter being within the scope of the employment relationship. The Court ruled that the statement was admissible.

Viewing the facts and reasonable inferences therefrom in the light most favorable to Weil, the Court ruled that the supervisor's statement is evidence that Frontier's reasons were merely

pretext. Summary judgment on the failure to promote claims was reversed.

Relying on *McDonnell Douglas*, the Court ruled that to establish a *prima facie* case of termination Plaintiff must proof that: (1) he belongs to a protected class; (2) he was performing his job satisfactorily; (3) he suffered an adverse employment action; and (4) his employer treated him differently than a similarly situated employee who does not belong to the same protected class. The Court found that Weil failed to produce evidence that he was satisfactorily performing his job. He also failed to establish the fourth element. It is not enough for employees to be in similar employment positions; rather, the plaintiff and the comparator employee must be "similarly situated . . . in all material respects." Employees are similarly situated if they have "similar jobs and display similar conduct." Although Weil introduced evidence that no white female directors were placed on PIPs or terminated during the relevant management period, Weil did not introduce evidence that any of those employees failed to meet deadlines and complete tasks or had steadily declining performance reviews. For these reasons summary judgment on the termination claim was sustained.

Dissenting in part, Judge Bybee wrote that the district court properly excluded the proffered statement because it was not within the scope of the declarant's employment when she made it after having been relieved of her hiring and promoting duties. Judge Bybee concurred in the majority opinion insofar as it affirmed summary judgment on the termination claim.

Weil v. Citizens Telecom Services Company, LLC, 922 F.3d 993 (9th Cir. 4/29/2019). (N.R. Smith, Bybee, Antoon II (M.D. Fla.)

WASHINGTON COURT OF APPEALS

Under the WLAD an Employee or Applicant Can State a Cause of Action against a Third Party Who Interferes with Right to Obtain and Hold Employment Without Discrimination.

The Washington Department of Social & Health Services ("DSHS") conducts background checks for Washington employers who hire employees in a position that potentially involves unsupervised access to children or vulnerable adults. DSHS keeps certain records about reports of founded reports of child abuse. Such individuals are permanently prohibited from working with children and vulnerable adults. Individuals convicted of certain criminal offenses may, however, demonstrate their character and suitability. The plaintiff, who is Native American, applied to become a certified nursing assistant. She learned that DSHS had made a founded finding of child neglect against her because she got a DUI when her children were in the car. DSHS made an administrative finding of child neglect, which she says she never received notice of. The plaintiff asked DSHS to expunge her founded finding after she complied with all the conditions of her criminal diversion and no longer drinks alcohol. DSHS never responded to the request.

She filed suit in Superior Court claiming that Native Americans are four times as likely to have founded findings of child abuse or neglect than Whites. She claimed the DSHS policy against rehabilitation has a disparate impact on Native Americans' ability to obtain employment. She claimed there was no legitimate reason for the permanent ban. DSHS moved for judgment on the pleadings arguing that the WLAD did not apply. The Superior Court granted the motion.

Division III reversed, 2-1. The majority held that Howell pleaded a *prima facie* case of disparate impact based on race. Criminal background checks can have a racially disparate impact on

hiring. The majority held that it was irrelevant that DSHS was not the plaintiff's employer because under *Marquis v. City of Spokane*, 130 Wn.2d 97 (1993), it is not necessary that the defendant in a discrimination case be the employer of the plaintiff to state a claim under RCW 49.60.030. The majority did not decide whether proper defendants in claims under RCW 49.60.180 are limited to direct employers of the plaintiff.

The majority also rejected DSHS's arguments (1) that Initiative 1163, which requires long-term care workers to obtain background checks and immunized DSHS from liability and (2) DSHS had discretionary immunity from suit.

Concurring, Judge Lawrence-Berrey emphasized that RCW 49.60.030 is not limited to employer-employee relationships.

Dissenting, Judge Korsmo held that RCW 49.60.030 did not apply because DSHS was neither the plaintiff's employer or prospective employer. He also ruled that a disparate impact claim was not available in this context. The dissent also argued that the WLAD did not apply to a background statute regulatory program adopted pursuant to statute.

Howell v. DSHS, --- Wn. App. 2d ---, 436 P.3d 368 (Div. III 3/12/2019) (Siddoway, Lawrence-Berrey, Korsmo)

Under WLAD, Employer Liable for Non-Employee's Harassment if Employer was Negligent*; *No Workers' Compensation Bar for Long-Term Harassment.

Sheila LaRose was a public defender for Public Defenders Association ("PDA"). The PDA assigned her to represent a client a/k/a "Mr. Smith" on a charge of felony stalking. Prior to the assignment, PDA public defender Rebecca Lederer was representing Smith on a felony stalking charge. After Smith left Lederer a voicemail that he was in love with her, she requested that her supervisor allow her to withdraw and that a male attorney be appointed in substitution. Her request to withdraw was granted, but LaRose was appointed to represent Smith. LaRose was not given any information about Smith's history of stalking professional women or his interaction with Lederer and was not warned of any potential danger in representing him.

During LaRose's representation, Smith began to make repeated sexually motivated, harassing phone calls to LaRose at work. He soon was calling LaRose 10 to 20 times a day and making more disturbing sexual and offensive comments. LaRose complained of this conduct to her supervisor and asked to be removed from the case, but shortly thereafter she changed her mind because her representation had almost concluded. The calls got worse and LaRose continued to complain but she did not request to be taken off the case and her supervisor didn't suggest it. The harassment continued and if anything got worse. LaRose continued to complain but still did not ask to be removed. The harassment continued and LaRose reported to her supervisor that she was losing sleep. Finally, LaRose sought permission from the superior court to withdraw from representation of Smith pursuant to PDA policy when Smith requested a motion to withdraw his guilty plea. LaRose was allowed to withdraw, but the harassment continued and LaRose continued to complain to her supervisor who declined to help.

Smith was released from custody in November 2013 and began following and making contact with LaRose in public. The incessant calls continued and LaRose informed her supervisor that the unwanted sexual calls at work had not stopped. Eventually, Smith harassed LaRose at her home and left messages for her and her daughter. Smith finally was arrested and was charged with felony stalking. LaRose testified as the complaining witness at his trial. Smith was

tried and convicted and was sentenced to seven years in confinement.

LaRose was diagnosed with major depressive disorder, generalized anxiety disorder, and PTSD. She requested medical leave because her work continued to provoke stress and anxiety. The County granted her request. The County eventually terminated LaRose two years later, in 2017, when she was unable to continue working as a public defender.

LaRose filed numerous claims against the PDA and King County including claims for a hostile work environment, disability discrimination, and negligence. The claims under the WLAD were dismissed under CR 12 (b)(6). The claims of negligence were dismissed on a motion for summary judgment because her injuries were industrial injuries and barred by the Industrial Insurance Act ("IIA"). LaRose appealed and the Court of Appeals reversed in part.

As a case of first impression under the WLAD, the Court of Appeals relied upon federal cases and decided that "a *nonemployee's* harassment of an employee in the workplace will be imputed to an employer if the employer (a) authorized, knew, or should have known of the harassment and (b) failed to take reasonably prompt and adequate corrective action." (Emphasis added). The Court rejected the Defendants' argument that the harassment was neither severe or pervasive. It also ruled that the Defendants failed to take remedial action notwithstanding that LaRose agreed to remain on Smith's case.

The Court ruled that the IIA did not bar LaRose's WLAD claims. The IIA only covers injuries arising from a mental condition "if the condition resulted from a sudden, tangible, and traumatic event that produced an immediate result." A mental condition caused by long-term harassment may not qualify as an industrial injury. The Court ruled that there existed genuine questions of fact concerning whether LaRose's injury was caused by a single event or long-term harassment.

LaRose argued that the IIA bar is inapplicable under RCW 51.24.020 because the evidence shows that PDA and the County deliberately injured her. The Court rejected LaRose's claim that she was deliberately injured. To prove that an employer's actions fall within the deliberate intention exception under the IIA an employee must demonstrate that "(1) the employer had actual knowledge that an injury was certain to occur and (2) the employer willfully disregarded that knowledge." Neither gross negligence nor an act that has a substantial certainty of causing injury is sufficient to show an intent to injure. Because the PDA did not have certain knowledge that LaRose would suffer an injury, her claim for was properly dismissed.

In reference to the claim of negligence infliction of emotional distress, the Court ruled that LaRose had created a question of fact for all of the traditional elements of negligence. The Court found that a duty existed because a special relationship of employer/employee existed and the PDA had a duty to provide LaRose with a safe workplace. This was reasonably foreseeable and was caused by the negligence.

In reference to failure to accommodate and disparate treatment under the WLAD, the Court ruled that the Defendant had no duty to accommodate until such time as it because aware of the diagnosis of PTSD. Once the Defendants became aware of that diagnosis it granted her requests that she be assigned no new cases and for a medical leave of absence. The Court found no disparate treatment after her diagnosis. The dismissal of both claims was sustained.

LaRose v. King County, --- Wn. App. 2d ---, 437 P.3d 701 (Div. II 3/19/2019) (Maxa, Johanson, Lee)

MEMBER VICTORIES AND DEFEATS

The plaintiff in *Weil* was represented by Terry Venneberg.

The plaintiff in *LaRose* was represented by Mary Ruth Mann and James Kytle.

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