WELA
WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION
A NELA AFFILIATE
936 NORTH 34TH ST. SUITE 300
SEATTLE, WA 98103
www.welalaw.org
ALERT
Editors: Mike Subit / Jeffrey Needle

U.S. SUPREME COURT

Justices Will Decide Whether But-For Causation Applies to Federal Sector ADEA Claims

The Court granted certiorari on the question: "Whether the federal-sector provision of the Age Discrimination in Employment Act of 1967, which provides that personnel actions affecting agency employees aged 40 years or older shall be made free from any 'discrimination based on age'…requires a plaintiff to prove that age was a but-for cause of the challenged personnel action." The Eleventh Circuit held even though the federal statute does not require the plaintiff to prove the agency took the prohibited "because of" age, the plaintiff still had to prove "but-for" causation to establish liability rather than just show age was "a motivating factor."
Babb v. Wilkie, --- S. Ct. --- (6/28/2019)

NINTH CIRCUIT

Settlement Agreement Doesn't Bar Subsequent WARN Act Class Action Against Entity Specifically Excluded from Settlement of Prior WARN Act Class Action

The plaintiff was terminated without notice. Six days later the employer filed for bankruptcy. The plaintiff filed in the bankruptcy court a WARN Act class action claim that the employer failed to give employees the required 60 days' advance notice. The parties then settled the class action and dismissed the case. The release and the judgment specifically excluded a named entity that had not filed for bankruptcy. The plaintiff then filed a WARN Act class action against the named entity excluded from the settlement. The plaintiff claimed that entity was a "single employer" with the bankrupt entities and liable for the remaining wages and benefits due under WARN.

The defendant moved to dismiss asserting claim preclusion. The district court granted the defendant's motion on the ground that the defendant was not a party to the original settlement agreement preserving the WARN Act claims against it. The Ninth Circuit reversed. Because the judgment entered in the original case was the result of a settlement, normal claim preclusion rules don't apply. Instead a court must "look to intent of the settling parties to determine the preclusive effect of a dismissal with prejudice entered in accordance with a settlement agreement, rather than to general principles of claim preclusion."

Because the bankruptcy court entered the settlement agreement it became a final judgment whose preclusive effect is limited to the terms of the judgment. Therefore, it was irrelevant that the defendant was not a party to the settlement agreement.

Wojciechowski v. Kohlberg Ventures, LLC, 923 F.3d 685 (9th Cir. 5/8/2019) (Gould, Paez, Jack (S.D. Tex.))

Section 1981 Claims are Subject to Mandatory Arbitration

Plaintiff is an African American and was employed as a production worker for Tesla. His employment contract included an arbitration agreement. He claimed racial harassment, discrimination, and retaliation. He filed suit pursuant to 42 U.S.C. § 1981 and sought a declaration that claims brought under § 1981 were not arbitrable. The District Court granted Tesla's motion to compel arbitration and Plaintiff appealed. The Ninth Circuit affirmed.

The Court concluded that 42 U.S.C. § 1981 should "be added to the ever-expanding list of statutory causes of action subject to arbitration." "'We have become an arbitration nation.'" The Court relied upon *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), and *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742 (9th Cir. 2003) (en banc) (holding that claims under Title VII are subject to arbitration). The Court also relied upon the text of the Civil Rights Act of 1991 which encourages arbitration efforts "[w]here appropriate and to the extent authorized by law." The Court rejected Plaintiff's argument that the original text of Section 1981 did not authorize arbitration as irrelevant.

Judge Thomas concurred but wrote separately because although EEOC v. *Luce, Forward* is controlling precedent, he believes that it was wrongly decided.

Lambert v. Tesla, Inc., 923 F.3d 1246 (9th Cir. 5/17/2019) (M. Smith, Thomas, Vratil (D. Kan.)

On Reconsideration after One of the Panel Judges Died, Court Reverses Prior Decision Holding that City Violated Police Officer's Privacy by Terminating Her for Extra-Marital Relationship

In *Perez v. City of Roseville*, 882 F.3d 843 (9th Cir. 2018), the Court held in an opinion by Judge Reinhardt that the City violated a police officer's privacy by allegedly firing her due to an extra-marital affair. The panel unanimously held: "A department can violate its employees' rights to privacy and intimate association either by impermissibly investigating their private sexual conduct or by taking adverse employment action on the basis of such private conduct." The court rejected the individual officials' assertion of qualified immunity creating a split with the Fifth and Tenth Circuits.

Six weeks after the decision but before the mandate had issued Judge Reinhardt died. He was replaced on the panel by Judge Ikuta.

One of the original panel members, Judge Tashima, changed his mind on the qualified immunity issue. In a new opinion, the court held that the individual officers were entitled to qualified immunity. The majority disagreed with the original panel's determination that Ninth Circuit precedent had established that a police department could not terminate an employee based on private sexual activity. The majority read prior precedent to preclude such consideration only where the activities were "wholly irrelevant to a police department's work performance."

In this case the police department claimed that the sexual relationship had cause her to engage in inappropriate cell phone use in violation of department policy. Given that nexus to the plaintiff's job performance, the defendants were entitled to qualified immunity because the department could have believed the sexual relationship was not "wholly irrelevant" to job performance.

In dissent, district judge Molloy, also a member of the original panel, faulted the majority's new decision on the merits and on procedural grounds. He believed that the appropriate procedure would have been to take the original panel decision en banc. The court had originally declined to hear the case en banc.

Perez v. City of Roseville, 926 F.3d 511 (9th Cir. 5/21/2019) (Ikuta, Tashima, Molloy (D. Mont.)).

WASHINGTON COURT OF APPEALS

Arbitration Policy Buried in an Employee Booklet Requiring Conciliation and Shortening Statute of Limitations Unconscionable

Burnett worked as a delivery driver for Pagliacci Pizza. At orientation Burnett was given some forms and told to sign them. One of those forms was an Employee Relationship Agreement (ERA), which Burnett signed. Burnett was also

given a copy of Pagliacci's "Little Book of Answers" (Little Book) and told to read it at home. Although the ERA directs the employee to learn and comply with the rules and policies outlined in the Little Book, the ERA does not mention arbitration. The Little Book contained an arbitration policy which included a grievance and conciliation process of several steps as a prerequisite to bringing an arbitration claim, and the failure to comply with any step in the grievance and conciliation process foreclosed the ability to either arbitrate or bring suit.

Pagliacci terminated Burnett's employment on January 22, 2017. In October 2017, Burnett filed a putative class action against Pagliacci, alleging among other things that Pagliacci failed to provide delivery drivers with required rest and meal periods, failed to pay all wages due to delivery drivers, wrongfully retained delivery charges, and made unlawful deductions from delivery drivers' wages. Pagliacci moved to compel arbitration of Burnett's claims under its mandatory arbitration policy, which is printed in the Little Book. Plaintiffs alleged that the arbitration policy was both procedurally and substantively unconscionable. The trial court ruled that because the Little Book was not incorporated into the ERA, there was no binding agreement and denied the motion to compel arbitration. Pagliacci's appealed.

The Court of Appeals ruled that the arbitration agreement in the Little Book was incorporated by reference into the ERA. The Court nevertheless found that the agreement was both procedurally and substantively unconscionable.

The Court rejected Pagliacci's argument that an employer can impose new terms of employment on existing employees at any time simply by amending a handbook and giving employees notice that the conditions of their employment have changed. While changes to a Handbook can bind the *employer* to the promises made, it cannot bind the *employee.* "Pagliacci cites no Washington authority holding that an employer can foist an arbitration agreement on an employee simply by including an arbitration clause in an employee handbook that is provided to the employee." The Court distinguished *Gaglidari v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, 815 P.2d 1362 (1991).

The Court found that the ERA including the Little Book was an adhesion contract. The Court also found that "there is no evidence in the record that Burnett had a reasonable opportunity to understand the terms contained in the Little Book—and specifically the mandatory arbitration policy—before he signed the ERA. To the contrary, Burnett testified that he was told to sign the ERA to begin work and instructed to read the Little Book at home. Moreover, the arbitration policy was "buried in a booklet" in the same font size and formatting as the surrounding sections. "For these reasons, we conclude that Burnett lacked meaningful choice in agreeing to arbitrate, and thus the circumstances surrounding the formation of the parties' arbitration agreement were procedurally unconscionable." The Court held "that procedural unconscionability alone renders Pagliacci's mandatory arbitration policy unenforceable."

The Court nevertheless ruled that the provisions of the arbitration agreement were substantively unconscionable because "nonmutual provisions in an arbitration agreement have the effect of limiting an employee's ability to access substantive remedies or discouraging an employee from pursuing valid claims." In particular, the conciliation and grievance provision acted as a complete bar to arbitration and suit for employees who do not become aware of the claim until after the termination of their employment. Moreover, the necessity of compliance with the grievance and conciliation policy as a prerequisite to arbitration necessarily shortened the statute of limitations, which the Court found to be a separate basis for unconscionability. The Court declined to sever the

unconscionable portions of the arbitration agreement.

Burnett v. Pagliacci Pizza, Inc. , -- Wn. App. 2d. ---, 442 P.3d 1267 (6/17/2019) (Smith, Mann and Andrus)

MEMBER VICTORIES AND DEFEATS

The plaintiffs in *Burnett* were represented by Toby Marshall and Blythe Chandler.

JOIN THE WELA LISTSERV

WELA members are entitled to participate in an Internet-based electronic discussion group, or "listserv," that provides almost instant feed-back to questions and thoughts related to employment law. This is a terrific way to keep on top of the latest developments in the law, new defense tactics, judges, and recent jury attitudes. To become a part of this group, contact our moderator at welalaworg@gmail.com. We will verify your WELA membership and sign you up.