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

NINTH CIRCUIT

College Athletes Are Not Employees under the FLSA

Dawson played football for the University of Southern California ("USC"), a Division I FBS member of the NCAA's PAC-12 Conference. He claimed that the NCAA and PAC-12 were his "employers" within the meaning of the Fair Labor Standards Act, 29 U.S.C. §§ 201-219. Dawson alleged that the NCAA and the PAC-12 acted as an employer of the class members by "prescribing the terms and conditions under which student-athletes perform services." Dawson claims that the NCAA and PAC-12, as joint employers, failed to pay wages, including overtime pay, to Dawson and to class members in violation of federal and state labor laws. The district court dismissed the complaint for failure to state a claim. Dawson appealed and the Ninth Circuit affirmed.

The FSLA defines an "employee" as "any individual employed by an employer." 29 U.S.C. § 203(e)(1). To "employ" means "to suffer or permit to work." 29 U.S.C. § 203(g). To determine with the Plaintiff was an employee, the court applied the "economic reality" test which included 1) expectation of compensation, (2) the power to hire and fire, (3) and evidence that an arrangement was "conceived or carried out" to evade the law. The court ruled that neither the NCAA nor PAC-12 gave scholarship money to Dawson and their rules, which limited and controlled scholarships, were insufficient to create an expectation of compensation. Despite the fact that NCAA Bylaws pervasively regulate college athletics, it did not have the capacity to "hire and fire" student athletes. Even though "economic reality" in college sports is much different today than when first conceived, there is no evidence that the NCAA rules were "conceived or carried out" to evade the law. Moreover, "the revenue generated by college sports does not unilaterally convert the relationship between student-athletes and the NCAA into an employment relationship." The Ninth Circuit also dismissed Plaintiff's claims under California law. *Dawson v. National Collegiate Athletic Association*, 932 F.3d 905 (9th Cir. 8/12/2019) (Thomas, Kleinfeld, Wu (C.D Cal.)

Ninth Circuit Now Adopts "But-For" Causation Standard Under the ADA in Light of Supreme Court Precedent

Dr. Murray filed suit against the Mayo Clinic and claimed a violation of the ADA. The trial court instructed the jury that he had to prove "but for" causation instead of the "motivating factor" standard requested by Murray. The jury returned a verdict in favor the Mayo Clinic and Murray appealed.

Title I of the ADA provides that "[n]o covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). The Court had previously ruled that this language required that Plaintiff prove discrimination was a "motiving factor" in the decision to take adverse action. *See Head v. Glacier Northwest, Inc.*, 413 F.3d 1053 (9th Cir. 2005). But subsequent Supreme Court case law adopted a "but for" standard of causation based upon similar statutory language. *See Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), and *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013). The Ninth Circuit ruled that this intervening case law gave it a sufficient basis to overrule *Head.*

The Court adopted the "but for" standard of causation under the ADA and affirmed.

Murray v. Mayo Clinic, -- F.3d ---, (9th Cir. 8/20/2019) (Pearson (N.D. Ohio); Gould, Ikuta)

Court Need Not Decide Whether Obesity Must have Independent Physiological Cause to Qualify as an ADA Disability Because Plaintiff Fired for Non-Pretextual Reason

The employee worked as a facility maintenance technician. He was 300 lbs. at hire. Ten years later his weight had risen to 370 lbs. A supervisor saw him having difficulty walking. The employer became concerned about the plaintiff's ability to the job and checked his time records. The employer concluded he had fabricated his time records and fired him.

The plaintiff sued. The district court granted the employer summary judgment on the ground that to qualify as disability under the ADA, obesity must be caused by an independent physiological condition. The plaintiff appealed and the EEOC filed an amicus brief on his behalf arguing that obesity is medically a disease affecting bodily systems. The court did not reach that argument because it held that the employer had fired him for a non-pretextual nondiscriminatory reason.

Valtierra v. Medtronic, Inc., -- F.3d – (9th Cir. 8/20/2019) (Schroeder, M. Smith, Rakoff (S.D.N.Y.))

WASHINGTON SUPREME COURT

Obesity is Always an Impairment Under the WLAD

In a case certified from the Ninth Circuit, the Washington Supreme Court was asked to decide under what circumstances obesity can qualify as an impairment under the WLAD. The plaintiff had received a conditional offer from BNSF subject to a physical. He was 5' 6" and 256 lbs with a Body Mass Index ("BMI") of over 41. A BMI of over 40 is considered "morbidly obese." BNSF had a policy of not hiring individuals with a BMI over 35. BNSF refused to hire him "due to significant health and safety risks associated with extreme obesity." BNSF required him to pay for expensive testing to determine if he were physically fit, testing he could not afford.

He filed suit in King County Superior Court, but BNSF removed. Judge Robart ruled that under the WLAD a plaintiff must prove that his or her obesity is caused by an independent physiological condition or disorder or that the employer perceived the obesity to have such a cause and dismissed the case. The Ninth Circuit held that if obesity were a disability under the WLAD BNSF's action were illegal under *EEOC v. BNSF Railway Co.,* 902 F.3d 916 (9th Cir. 2018). The panel, however, asked the Washington Supreme Court to decide whether obesity was an impairment rather than a disability.

Writing for a majority of seven, Chief Justice Fairhurst agreed with WELA's argument that obesity is always an impairment under the WLAD regardless of whether it is caused by an independent physiological condition or disorder. The Court further held that the WLAD is broader than the ADA and courts should not import federal law to constrain the WLAD.

The Court retraced the history of its WLAD disability jurisprudence from *Pulcino v. Fed. Express Corp.*, 141 Wn.2d 629, 9 P.3d 787 (2000), to *McClarty v. Totem Elec*., 157 Wn.2d 214, 137 P.3d 844 (2006), and then *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 198 P.3d 1021 (2009). The Court confirmed that in 2007 "the legislature intended to adopt a broad and expansive definition of 'disability' in order to protect against discrimination." The Court also noted the liberally construction mandate.

The majority correctly reasoned that because it was undisputed that BNSF perceived Taylor had

"extreme obesity," if obesity is an impairment under the WLAD, then BNSF discriminated against him on the basis of disability. The Court noted that the medical community recognizes obesity as a primary disease. The majority reasoned that obesity is always impairment under the WLAD because it is both physiological and a disorder. The fact that obesity is often diagnosed merely by reference to weight, which everyone agreed was merely a physical trait, does not mean obesity is not a physiological disorder. The Court agreed with WELA's analogy to type 2 diabetes, which is often diagnosed by measuring the physical characteristic of plasma glucose level.

The majority also held that obesity is a condition under the WLAD and the Human Rights Commission's WAC defining disability. The regulation defines a disability as an abnormal condition that is a reason why the employee did not get or keep the job in issue. The Court upheld this definition under administrative deference. The Court agreed that "any mental or physical condition" may qualify as a disability under the WLAD.

The Court rejected the argument that obesity isn't a disability because a large percentage of the population is overweight or obese according to BMI. The Court agreed with WELA that "abnormal" under the WLAD does not refer to statistical frequency. It is also not limited to "immutable states of being." Therefore, under the WAC Taylor's obesity was both an impairment and a disability.

The majority rejected the business community's argument that recognizing obesity as an impairment will have a stigmatizing effect on persons with obesity thus. "It is difficult to see how protection under the WLAD will produce more psychological harm than is caused by companies freely and openly refusing to hire people because of their obesity."

Justices Yu and McCloud agreed with the majority that obesity does not have to be caused by a separate physiological disorder or condition to qualify as an impairment under the WLAD. They disagreed that obesity was always an impairment however. They would have reframed the question is when obesity is a disability under the WLAD. They argued this question requires an individualized inquiry regarding impairment rather a per se rule. They agreed that Taylor was impaired under the WLAD because his obesity caused other health conditions. The dissent expressed concern about the majority's far-reaching holding. The majority responded by noting that obesity, as opposed to high BMI, always affects body systems.

WELA's amicus brief was authored by Michael Subit, Jeff Needle, and Jillian Cutler.

Taylor v. BNSF Railroad Holdings, -- Wn.2d ---, 444 P.3d 606 (7/11/2019)

In House Counsel May Bring Breach of Contract Termination Claims; Employees Who Provide Information to Support Whistleblowing Can Bring Wrongful Discharge Claims

Jared Karstetter worked for the King County Corrections Guild ("Guild") under a five year contract which provided that he could only be terminated for "just cause" and that prior to termination the Guild had to give notice and an opportunity to correct any inappropriate behavior. In 2016, the King County ombudsman's office contacted Karstetter regarding a whistleblower complaint concerning parking reimbursements to Guild members. The Guild's vice-president directed Karstetter to cooperate with the investigation. After Karstetter provided requested documentation to the ombudsman, he was terminated from employment.

Karstetter filed suit alleging *inter alia* breach of contract and wrongful discharge in violation of public policy. The trial court allowed both claims

to proceed but granted the Guild's motion to dismiss on other state law claims. The Guild filed in interlocutory appeal and the Court of Appeals reversed. The Court of Appeals ruled that because RPC 1.16 allows a client to terminate an attorney for any reason and at any time, a breach of contract claim was foreclosed. It also ruled that even though Karstetter assisted a whistleblower lawsuit, he was not the whistleblower himself and therefore did not qualify to bring a claim for wrongful discharge in violation of public policy. The Supreme Court granted Karstetter's petition for review and reversed.

The Supreme Court recognized the distinct differences between retained and in-house counsel. "A rigid application of RPC 1.16 to all lawyers, including in-house employee attorneys, . . . ignores these abstract and practical distinctions . . . ." "We will not instruct in-house attorneys that our ethical rules allow employers to take away their livelihood and then also leave them without any legal recourse under the facts before us today." "We therefore hold that in the narrow context of in-house attorneys, contract and wrongful discharge suits are available, provided these suits can be brought 'without violence to the integrity of the attorney-client relationship.'"

In reference to wrongful discharge, the court ruled that those who provide information in support of a whistleblower's allegations are also entitled bring a wrongful discharge claim. The Guild argued that because Karstetter did not "desire[] to further the public good" when he provided the requested information (after obtaining permission to do so from his employer), he is not entitled to whistleblower protection. The court did not reach the question of whether a positive statement of subject intent to further the public good is required. But the court ruled that even if a positive statement of subject intent is required, Karstetter could clarify the pleadings to satisfy it.

Karstetter v. King County Corrections Guild, -- Wn.2d --, 44 P.3d 1185 (7/18/2019)

WASHINGTON COURT OF APPEALS

Salary Promised Under and Employment Contract Qualifies as "Wages" under RCW 49.52 Regardless of Whether Employee Performed the Work

The defendant agreed in writing to employ the plaintiff for two years at specified annual salary and benefits. The employer didn't pay either the salary or the benefits. Three months into the term, the employee submitted a payment demand. The employer responded that he would make the plaintiff an independent contractor with a higher salary but no benefits. The plaintiff refused, quit, and sued. The Superior Court awarded the plaintiff fully for two years' salary, two years exemplary damages and benefits due under the agreement.

The employer appealed the award of exemplary damages. The court of appeals ruled that money owed under an employment contract for future work constitutes wages under RCW 49.52. It rejected the argument that the money due under the contract fell outside the statute because the plaintiff quit three months into the contract and didn't perform the work required. The court of appeals further upheld the trial court's finding that the employer failed to show that he subjectively refused to withhold the wages due based on the argument he advanced in court.

The court also rejected the employer's argument that the plaintiff failed to mitigate by turning down the independent contractor position. The tribunal held that position was not equivalent to the employment position. Even assuming the increased salary evened out the benefits, this ignores "the difference in status as an independent contractor and status as an employee."

Essig v. Lai, -- Wn. App. 2d, ---, 444 P.3d 646 (Div. I. 7/8/2019) (Hazelrigg-Hernandez, Leach, Smith)

MEMBER VICTORIES AND DEFEATS

Judith Lonnquist represents the plaintiff in *Karstetter*.

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