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ALERT

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NINTH CIRCUIT

Circuit Clarifies Test for CAFA Jurisdiction

Plaintiffs filed a wage and missed meal break class action in California state court. The defendant removed to federal court alleging jurisdiction under the Class Action Fairness Act ("CAFA") and the amount in controversy exceeded $5 million. The district court sua sponte remanded. The court granted the defendant's permission for discretionary appeal and reversed.

The court reiterated the notice of removal need contain only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold, which was the case. The district court erred in requiring the notice to contain evidentiary submissions. Instead of granting remand, the district court should have allowed the defendant to submit evidence supporting its valuation.

The court held that a defendant may not assume a 100% violation rate on an allegation that the it "routinely" fails to comply with its wage obligations. Here, the defendant made plausible assumptions regarding a violation rate for failure to pay overtime and provide breaks in light of the allegations of the complaint. The amount in controversy represents the maximum amount the plaintiff could reasonably recover. The defendant need not to prove it violated the law at the assumed rate. On remand, the defendant must prove its assumptions were "reasonable."

The circuit reaffirmed that the prospective attorneys' fees must be included in the amount in controversy but rejected the defendant's contention that a 25% contingency should be deemed reasonable. The circuit left it to the district court decide on remand.

Arias v. Residence Inn by Marriott, 936 F.3d 920 (9th Cir. 9/3/2019) (Callahan, Fisher (3rd Cir.), Christen)

Section 1985(2) Conspiracy Claims May be Brought by Plaintiffs Who were Not Parties to the Proceeding with which the Conspiracy Allegedly Interfered

Christian Head, M.D., is an African-American, board-certified head and neck surgeon who held dual appointments for over a decade at the Department of Veterans Affairs ("VA") and University of California, Los Angeles ("UCLA"). Head filed an employment discrimination lawsuit against the Secretary of the VA, alleging racial discrimination, retaliation, and hostile work environment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. Head also sued his VA supervisors, Dr. Dean Norman and Donna Beiter, alleging that they violated 42 U.S.C. § 1985(2) by conspiring to deter him from testifying in a colleague's and his own civil rights cases. Based on existing Ninth Circuit law, the district court granted the defendants' motion for summary judgment on the conspiracy claim on the basis Head was not a party to the proceeding allegedly interfered with. The Ninth Circuit reversed.

Section 1985(2), in relevant part, proscribes conspiracies "to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified." If one or more persons engaged in such a conspiracy "do, or cause to be done, any act in furtherance of the object of such conspiracy, ... the party so injured ... may have an action for the recovery of damages

occasioned by such an injury ... against any one or more of the conspirators." 42 U.S.C. § 1985(3).

The panel held that *Haddle v. Garrison*, 525 U.S. 121 (1998), overruled prior Ninth Circuit law, which had limited proper §1985(2) plaintiffs to parties to the proceeding allegedly interfered with. In *Haddle* the Court held both parties and non-parties can bring such a claim.

Head v. Wilkie, 936 F.3d 1007 (9th Cir. 9/5/2019) (Paez, Tashima, Katzmann (Court of International Trade))

WASHINGTON SUPREME COURT

Under Washington Law, Non-agricultural Workers Are Not Entitled Hourly Pay for Time Spent Performing Activities Outside of Piece-Rate Work

Plaintiffs are commercial truck drivers. They filed a class action in federal court claiming under Washington law drivers who are paid for driving using a mileage-based piece rate must be paid hourly for non-driving activity. The piece rate is intended to compensate for not only driving but activities associated with driving. Other drivers are paid a flat rate for each round-trip load.

Plaintiffs argued that these methods of compensation violate Washington law because they are not paid hourly for nondriving tasks. The district court originally rejected this claim but reconsidered after *Carranza v. Dovex Fruit Co.*, 190 Wn.2d 612 (2018). The district court asked the Washington Supreme Court to decide whether *Carranza* applied to non-agricultural workers. Writing on behalf of six Justices, including the four *Carranza* dissenters, Justice Yu said no.

The majority said that with limited exceptions, the Minimum Wage Act "allows employers to measure compliance with the MWA by dividing an employee's total wages earned in a week by the total hours worked." The employer argued that WAC 296-126-021 specifically authorizes workweek averaging of *all* hours worked for nonagricultural workers. The employees argued that *Carranza* requires the regulation to apply only to hours spent on the piecework or else the regulation is invalid.

The majority held that the regulation "sets forth a valid method for measuring compliance with the MWA for nonagricultural workers paid on a piecework basis." The majority ruled that *Carranza* should limited to agricultural workers because such workers are excluded from the regulation. The majority rejected the employees' argument that the regulation could reasonably read to require employers to satisfy their obligation to pay for all hours worked *before* applying work week averaging.

The majority next held that workweek averaging, as authorized by the regulation, is consistent with the MWA and that "our holding in Carranza was necessarily limited to the narrow context of that case because no regulation authorized workweek averaging for agricultural workers." The majority ruled that the "fact workweek averaging may not be applied to agricultural workers…does automatically not mean that workweek averaging is invalid as applied to everyone." Given the differences between agricultural and non-agricultural work, L&I could reasonably decide to have different methods of measuring compliance with the MWA.

The majority also rejected the argument that because WAC 296-126-021 was promulgated pursuant to rule making authority under RCW 49.12, it doesn't apply to the MWA. The majority held that the regulation could still fill a statutory gap under the MWA.

In dissent, Justices Owens, Gordon-McCloud, and Wiggins argued *Carranza* compels the conclusion that the MWA requires nonagricultural employers to pay their piece-rate employees on a separate hourly basis, at least equal to minimum wage, for

time spent performing activities outside their piece rate work. The dissent reasoned that Carranza was based on the language of the MWA, which applies equally to all workers. Consequently, the dissent would have held WAC 296-126-021 WAC 296-126-021 is contrary to the statute.

Sampson v. Knight Transp. Inc., 193 Wn.2d 878, 448 P.3d 9 (9/5/2019)

Court Grants Review of Case Invalidating Arbitration Agreement

The Court has granted review in *Burnett v. Pagliacci Pizza, Inc.*, 9 Wn. App. 2d 192, 442 P.2d 1267 (2019). The court of appeals invalidated the arbitration agreement at issue. The court of appeals case is summarized in the May-June 2019 WELA Alert.

WASHINGTON COURT OF APPEALS

Civil Courts Must Defer to Hierarchical Church's Determination that Local Church's Severance Agreement with Pastors Were Invalid and Unenforceable in Civil Court

A local Presbyterian church entered into written contracts with its pastors agreeing, in exchange for their continued service, to pay them severance if their employment were terminated without cause by the direction of the national church. The national church later took control of the local church and terminated the pastors. An administrative commission of the national church unilaterally determined that the severance agreements were invalid and unenforceable. The church then requested a declaratory judgment to invalidate the agreements. The pastors counter-claimed for breach of their agreements.

The Superior Court granted summary judgment to the church on all claims on the basis of *Presbytery of Seattle, Inc, v. Rohrbaugh*, 79 Wn.2d 367 (1971), which held that courts must defer to the decisions of the highest tribunal of a hierarchical church with respect to property issues. Division One affirmed and held that *Rohrbaugh* deference applies to all civil disputes decided by a hierarchical church with a binding internal dispute resolution process.

Division One disagreed with the employees that it mattered that in prior cases the employees had voluntarily submitted their claims to the church for resolution and here the church had acted unilaterally. The court of appeals ruled this factual distinction has "no bearing on the rule that a civil court must defer to the decision of the highest tribunal of a church that is hierarchically structured."

Presbytery of Seattle, Inc., v. Schulz, --- Wn. App. 2d ---, 449 P.3d 1077 (Div. I 10/7/2019) (Leach, Mann, Dwyer)

There is No Statutory Right to Payment of Accrued Paid Time Off at Termination

Plaintiffs resigned from employment without notice. The company refused to pay them their accrued paid time off ("PTO") based on a provision in the employee manual saying the employer may withhold payment for accrued PTO to any employee who resigns without notice. The employees filed a claim for failure to pay wages and unjust enrichment. The Superior Court granted summary judgment to the employer. Division One affirmed.

The court agreed that PTO constituted wages. After reviewing applicable case law, the court of appeals ruled that the right to payment for PTO is contractual not statutory. "Appellants cite no authority to counter the proposition that in Washington an employee's right to payment for accrued PTO is only contractual."

Sornsin v. Scout Media, Inc., --- Wn. App. 2d --, 450 P.3d 193 (Div. 1. 10/14/2019) (Leach, Hazelrigg-Hernandez, Smith).

Construction Workers Who Filed Construction Lien for Wages Due Entitled to Attorneys' Fees Even Though Employer Didn't Dispute the Amount Owed

The Defendant decided to develop a housing project on its property and hired contractors to do the work. Plaintiffs provided framing labor for Sandoval Construction but were not paid for the days they worked during a two-week period. Sandoval responded that he would pay the crew within a few days. Sandoval never paid the laborers and threatened that Plaintiffs would get in a lot of trouble if they contacted the Department of L&I.

The laborers, aided by counsel, filed a lien against EMC's property and sent EMC copies of the lien and the complaint to be filed to start this lawsuit. They claimed $6,605.10 in unpaid wages. Counsel filed the complaint on February 24, 2017. On March 3, EMC sent the laborers' counsel a check for the lien amount, along with a letter thanking counsel for giving EMC notice of the laborers' claims and stating that EMC was not aware of them before counsel's notification. On March 4, the laborers' counsel asked that EMC pay $2,714.00 in legal expenses. EMC offered $500.00 to settle this matter, which counsel rejected.

In May, the laborers filed a combined fee and summary judgment motion. They asked for $8,206 in incurred legal expenses plus future reply and oral argument expenses. The superior court awarded the laborers $7,000 in attorney fees, relying on RCW 60.04.181; it found that the laborers "are the prevailing parties in an action because they filed their complaint in the instant action and recovered 100% of the lien wages sought in their complaint." The employer appealed and the Court of Appeals affirmed.

This case was one of first impression because no prior case considered an award of attorney fees under the construction lien statute where the underlying claims were not fully adjudicated. Applying Webster's Third New International Dictionary, the Court ruled that "the ordinary meaning of 'prevailing party in the action' does not require that a court have awarded a party a judgment for that party to have prevailed." Moreover, specific sections of the construction lien statute, including the attorney fees provision, "are to be liberally construed to provide security for all parties intended to be protected by their provisions." The statute protects "any person furnishing labor" by authorizing that person to file a lien for the contract price of labor. The Court concluded: "The plain language of the construction lien statute, including its ordinary meaning, related provisions, and the statutory scheme, does not require that EMC oppose the laborers' entitlement to wages for the trial court to have discretion to award the laborers attorney fees. The laborers 'prevailed' in the commonsense meaning of the word because they recovered their unpaid wages."

Lastly, the Court noted that laborers often do not have the resources to hire attorneys and attorneys will not handle many of their wage claims on a contingency fee basis because of the amount of the claims. So, a fee shifting statute provides a reasonable way to provide laborers with access to courts to enforce their right to be paid for work they have performed. These policy decisions also informed the Court's decision.

Hernandez v. Edmonds Memory Care, LLC., -- Wn. App. 2d ---, 450 P.3d 622 (Div. I. 10/21/ 2019) (Leach, Smith, Schindler)

MEMBER VICTORIES AND DEFEATS

Erika Nusser and Toby Marshall represent the employees in *Sampson*.

Blythe Chandler, Toby Marshall, and Erika Nusser represent the employees in Burnett.

Mike Subit represents the employees in *Schulz*.

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.