

U.S. SUPREME COURT

Court will Revisit Scope of First Amendment Ministerial Exemption from Employment Law

The Supreme Court granted certiorari in *Biel v. St. James School*, 911 F.3d 603 (9th Cir. 2018). There the Ninth Circuit ruled 2-1 that a former elementary school teacher at a Catholic School who claimed she had been terminated because she had breast cancer in violation of the ADA was not a minister for the purpose of the First Amendment exemption from generally applicable employment laws. The case is consolidated with *Morrissey-Berru v. Our Lady of Guadalupe*, 760 Fed. Appx. 46 (9th Cir. 4/30/2019), which raises the same issue in the context of an ADEA claim.

St. James v School v. Biel, 120 S. Ct. --- (12/18/2019)

NINTH CIRCUIT

Federal Employee's Substitution, After the Statute of Limitations Has Run, of the Head of the Agency as the Defendant in Place of the Improperly Named Agency Relates Back

Plaintiff sued the Federal Aviation Administration under Title VII of the 1964 Civil Rights Act. She filed suit within the 30-day limitations period set by statute, see 5 U.S.C. § 7703(b)(2), but she mistakenly named the FAA and her former supervisor as the defendants instead of the agency head. After the 30-day statute of limitations had expired, the FAA moved to dismiss Silbaugh's action on the ground that she had named the wrong defendant. Silbaugh responded by immediately filing an amended complaint that dropped the FAA and her former supervisor as defendants and substituted in their place Secretary Chao. Secretary Chao then filed her own motion to dismiss. She argued that Silbaugh's action is

barred by the statute of limitations because her amended complaint was filed outside the 30-day limitations period. Secretary Chao further argued that Silbaugh's amended complaint cannot relate back to the date of her original complaint because the requirements for relation back under Rule 15(c) have not been met. Judge Martinez agreed and dismissed Silbaugh's action with prejudice. The Ninth Circuit reversed.

The Court ruled that the amended complaint related back to the original filing under Rule 15(c). The Court explained that the purpose of the rule is "the elimination of unjust dismissals" resulting from pleading mistakes that cause no prejudice to the defendant. The Court ruled that Silbaugh's mailing of the summons and complaint to either the United States Attorney or the Attorney General satisfied the requirements for relation back under Rule 15(c)(2), notwithstanding the fact that the summons was not signed by the clerk of court. Her amended complaint naming Secretary Chao as the proper defendant therefore relates back to the date of her original complaint.

Silbaugh v. Chao, 942 F.3d 911 (9th Cir. 11/14 2019) (Watford, Berzon, Boggs (6th Cir.))

District Courts Should Not Presume that Settlements in Class Actions Negotiated Prior to Certification are Fair and Reasonable; Notice Given to Transient Workers was Inadequate

The plaintiffs in this case were exotic dancers working in various nightclubs. They alleged they were misclassified as independent contractors and denied wages due under the FLSA and California law. They filed a collective and class action. After the district court denied the defendant's motion to compel arbitration, and while that order was on appeal, the parties went to mediation and negotiated a settlement.

Several potential class members who had filed their own similar lawsuits objected to the settlement. The district court overruled the objections and granted preliminary approval. More than 1,500 of the approximately 4,700 class notices came back as undeliverable, although that number ultimately was reduced to 560. No reminder, follow-up, or electronic notice was sent to any class member, although the plaintiffs' counsel did create a settlement website and set up posters in exotic dance clubs.

Only 18.5% of the eligible class members submitted claim forms to receive cash payments from the settlement. Despite vigorous objections, the district court gave final approval to the settlement. The objectors appealed both the adequacy of the notice and the district court's approval.

Turning first to the notice issue, the panel rejected the objectors' claim that the notice had to mention the related litigation they had filed because Rule 23 didn't require such information. The court agreed with the objectors that in a case involving "transient" class members, the single mailed notice sent here was insufficient. The court found it troubling that 12% notices were ultimately determined to be undeliverable. The other means of notice, such as the posters, were not reasonably calculated to reach former dancers. The court suggested that notices should have been distributed through social media and online message boards that exotic dancers frequented. Therefore, the district court erred in approval of the notice process.

The court also agreed with the objectors that the district court abused its discretion in approval of the settlement. The panel held that district courts must apply a higher level of scrutiny where, as here, the named plaintiffs negotiate a settlement prior to class certification, to assure that the settlement was not a product of collusion or a

conflict of interest. Not only did the district court not apply heightened scrutiny, the court erred by holding that a settlement that is the product of arms-length negotiations between experienced counsel is presumptively fair and reasonable.

The panel agreed with the objectors that there were subtle signs of implicit collusion including (1) a clear sailing agreement that the defendants would not challenge plaintiffs' counsels' attorneys' fees and costs request up to \$1 million; (2) a disproportionate cash distribution to attorneys' fees; (3) large incentive payments to the named plaintiffs untethered to any service to the class; and (4) a reversion of unclaimed funds to the defendants.

The court emphasized that reversionary payments can be included in class settlements. In some cases, they may provide articulable benefits to the class and any concerns about perverse incentives or collusion may be ameliorated by other aspects of the settlement. District courts have an obligation to scrutinize reversionary clauses and seek adequate justification for their inclusion.

The panel remanded the case to the district court to determine the fairness of the settlement under the proper legal standard.

Roes, I-2, v. SFBSC Mgt., LLC, 944 F.3d 1035 (9th Cir. 12/11/2019) (Tashima, M. Smith, Piersol (D.S.D)).

Administrative Finding that Agency Did Not Unlawfully Retaliate Against State Employee Has Preclusive Effect under Section 1983 but not Under State Law

Plaintiff Eric Bahra was fired from his post as a social services practitioner in Defendant San Bernardino County's Department of Children and Family Services ("CFS"). Plaintiff challenged his termination, unsuccessfully, through an appeal to the Civil Service Commission of the County of San Bernardino ("Commission"). He then filed suit alleging that CFS and two of its employees

fired him in retaliation for his whistleblowing activities, in violation of California Labor Code section 1102.5 and 42 U.S.C. § 1983. The district court dismissed the action on the ground, *inter alia*, that the Commission’s decision precluded Plaintiff’s claims. The Ninth Circuit affirmed the dismissal of the § 1983 claim and reversed the claim filed under California law.

In reference to the § 1983 claim, the Court considered whether the administrative proceeding had the requisite “judicial character.” “To have a ‘sufficiently judicial character,’ a proceeding must, among other things, provide a claimant with an ‘adequate opportunity to litigate.’” Whether a litigant had a sufficient opportunity to litigate depends on whether “both parties had a full and fair opportunity to argue their version of the facts and an opportunity to seek court review of any adverse findings.” Here, the Court ruled that Plaintiff had a full opportunity to litigate the propriety of his termination before the administrative agency, as evidenced by the comprehensive evidentiary record and the availability of judicial review.

The Court noted a recent California appellate ruling which held that administrative findings by a state agency do not preclude claims for retaliation brought under section 1102.5. Accordingly, the Court reversed for the claim filed under California law.

Bahra v. County of San Bernardino, --- F.3d ---- (9th Cir. 12/30/2019) (Graber, Berzon, Christen)

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