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ALERT
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U.S. SUPREME COURT

Federal Sector Prohibition on Age Discrimination Does Not Require But-For Causation

The federal sector provision of the ADEA provides that personnel actions "shall be made free from any discrimination based on age." The plaintiff, a clinical VA pharmacist, claims that the VA took away a special designation, which made her eligible for promotion, due to her age. The district court granted summary judgment. The 11th Circuit affirmed based on circuit precedent requiring proof of but-for causation for federal sector ADEA claims.

The Supreme Court reversed 8-1. Writing for the majority, Justice Alito held that the plain text of the statute established "that age need not be a but-for cause of an employment decision in order for there to be a violation…." "Based on" indicates a but-for causal relationship. But "based on" modifies "discrimination" not "personnel action." Therefore, "age must be a but-for cause of discrimination—that is, of differential treatment—but not necessarily a but-for cause of a personnel action itself." "If age discrimination plays any part in a way a decision is made, then the decision is not made in a way that is untainted by such discrimination."

Justice Alito gave as an example of an actionable a promotion policy one that adds 5 points to the scores of younger applicants but in a situation where a younger applicant would have scored higher than an older applicant regardless of the discrimination. Even though the discrimination did not affect the outcome, and therefore, was not a but-for cause of the denial of promotion, it would still violate the federal prohibition. The majority ruled there was nothing anomalous about holding the federal government to a stricter standard than private employers.

The majority went on to hold that proof of but-for causation is important in determining the appropriate remedy. "[P]laintiffs who demonstrate that they were only subject to unequal consideration cannot obtain, reinstatement, backpay, compensatory damages, or any other forms of relief related to the end result of an employment decision." The majority emphasized that remedies "should not put a plaintiff in a more favorable position he or she would have enjoyed absent discrimination. But that is precisely what would happen if individuals who cannot show that discrimination was a but-for cause of the end result of a personnel action could receive relief that alters or compensates for the end result." The majority said such a plaintiff could receive "injunctive or other forward-looking relief."

Justice Sotomayor joined by Justice Ginsburg authored a concurring opinion stating that the majority did not foreclose claims based on a discriminatory process—for example a successful applicant was still subjected to discriminatory process. Also, they did not foreclose reimbursement of a plaintiff for the expenses of a discriminatory test.

Justice Thomas dissented. He argued that the default for discrimination law is but-for causation and the language here is not sufficiently clear to overcome that presumption.

Babb v. Wilkie, 140 S. Ct. 1168 (4/6/2020)

NINTH CIRCUIT

Low-Level Payroll Processing Employee's Decision Not to Pay Overtime Imputable to Employer; FLSA Does Not Provide for Right of Contribution for Defendant

The defendant, EESG, was a staffing company that places employees with other employers. The defendant continues to handle payroll processing for the placed employees. The ESSG responsible for processing payroll for one company decided, at the request of an ESSG subcontractor, not to pay overtime to placed employees. Ultimately, there were over 1,000 violations. The Dep't of Labor sued. The district court grated summary judgment to the Secretary and ordered ESSG to pay $75,000 in back wages plus an equal amount as liquidated damages. ESSG appealed.

The court of appeals rejected the argument that ESSG couldn't be liable for the actions of the low-level employee who made the decision not to pay overtime. ESSG chose the low-level employee to be its agent for this purpose. The panel agreed that the actions of the employee were willful because she had to override warnings in the ESSG payroll system to not pay overtime. Under 9th Circuit law a finding of willfulness precludes an employer good faith defense.

The panel rejected ESSG's argument that the FLSA implicitly allows indemnification or contribution. The court disagreed that just because there is joint and several liability under the FLSA, there is necessarily a right to contribution from another defendant. Applying the four-factors for federal implied rights of action, the court held ESSG was not entitled to indemnification or contribution from any other employer.

Scalia v. Employer Solutions Staffing Group, 951 F.3d-1097 (9th Cir. 3/2/2020) (Graber, Hurwitz, Miller)

Employer Disclosure Regarding Obtaining a Consumer Report About a Job Applicant May Also Contain Information Explaining What the Disclosure Would Entail

The Fair Credit Reporting Act ("FCRA") requires employers who obtain a consumer report on a job applicant to notify the applicant via a clear and conspicuous disclosure. A consumer report is a detailed background information report. By law, the disclosure must be in a stand-alone document that does not contain extraneous information even if it is related to the disclosure.

The plaintiff applied for a job as a supermarket employee. He was hired subject to a background check. He was presented with a disclosure informing him the employer would be obtaining a consumer report about him. The disclosure explained the purpose for the report and what information might be gathered.

When the report was finished, the entity that conducted the background check provided the employee with a copy of the report as the law requires. The cover letter told the plaintiff he could dispute the accuracy or completeness of the information but said nothing about discussing the report with the employer. The background check entity sent the plaintiff a second letter saying the employer had decided to terminate his employment based on the consumer report.

The plaintiff filed an action in federal court claiming the employer had willfully violated the FCRA by including extraneous information in the disclosure and by failing to inform him he could discuss the consumer report with the employer. The district court granted the employer's motion to dismiss for failure to state a claim.

The appellate court reversed the dismissal of the extraneous information claim based on a Ninth Circuit decision that had come down since the district court's decision. The court held that a disclosure could contain information explaining what the requested disclosure entails without violating the prohibition on extraneous information. The appellate court found some of the language in the disclosure violated the standalone requirement. The district court also erred by not considering whether the disclosure was "clear and conspicuous."

The panel agreed with the district court that the FCRA does not mandate that an opportunity to discuss the report with the party who requested it.

Walker v. Fred Meyer, Inc. 953 F.3d 1082 (9th Cir. 3/20/20) (Tashima, Fletcher, Berzon)

An Employer May Use After-Acquired Evidence to Show that a Plaintiff was Not Qualified for the Position for which the Plaintiff Sought an Accommodation

The plaintiff worked for an Army contractor. She had a history of PTSD which grew worse and caused her to miss work. She went on FMLA. When she returned, she asked to work from home. The employer refused but extended her FMLA. The employer fired the employee for not obtaining a release to return to work with no restrictions. The employee filed suit.

During discovery, the employer learned the plaintiff lacked the bachelor's degree the position required. The company moved for summary judgment on the ground the plaintiff was not a qualified individual. The plaintiff moved for summary judgment on failure to engage in the interactive process. The district court granted the employer's motion.

The ADA protects only qualified individuals with a disability. "Qualified" means the individual can perform the essential functions of the position with or without accommodation. EEOC regulations state that "qualified" determination first requires that the individual to prove she possessed the prerequisites of the job including education. Once that issue is resolved in the plaintiff's favor, the court determines whether the employer can perform the essential functions of the position.

The court held that Ninth Circuit precedent required the panel to follow the two-step process for determining "qualified" set forth in the regulations It was undisputed that the plaintiff never satisfied the educational requirements for the position in question. Therefore, it was irrelevant whether the plaintiff could or could not perform the essential functions of the position. The court suggested the EEOC might want to reconsider its two-step interpretation of the "qualified" requirement in the statute.

The plaintiff and the EEOC argued that because her lack of qualification was irrelevant to the decision to terminate, the information learned during discovery was subject to the limitations of the after-acquired evidence doctrine and could only limit damages. The panel rejected this argument. The panel held an EEOC regulation requires the "qualification" determination to be made based on the objective circumstances at the time of the employment action. The determination is not limited to the facts known to the employer at the time because the employer's subjective knowledge is irrelevant.

The court rejected the applicability of *McKinnon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995), which holds that after-acquired evidence only goes to damages. The panel noted that the case involved an unlawful termination and the

employer's claim that if would have fired the employee for lawful reasons had it known about them at the time. Less persuasive was the panel's assertion that employer *McKinnon* did not attempt to use after-acquired evidence to rebut the plaintiff's prima case but rather a retroactive, legitimate non-discriminatory reason.

Although the panel held it "defies logic to say an employee was terminated for a reason that the employer was not even aware of at the time[,] [t]he same is not true of the qualification inquiry. An employer's ignorance cannot create a credential where there is none." The panel then suggested that *McKinnon*'s limitations on the use of after-acquired evidence only come into play after the plaintiff establishes her prima facie case.

The panel recognized that there was Seventh Circuit case law both in conflict and in accord with its decision. The court considered the case law in the other circuits to be supportive of its holding. The panel disputed that its rule will cause employers to search harder for lack of qualifications on the part of the plaintiff. The court noted that employers have that incentive under *McKinnon* in any event to try to limit damages.

Because the plaintiff was not a qualified individual with a disability, the employer had no obligation to engage in the interactive process.

Anthony v. TRAX Int'l, 955 F.3d 1153 (9th Cir. 4/17/2020) (Wardlaw, Fletcher, Linn (Fed. Cir.))

WASHINGTON SUPREME COURT

State Jurors are Not Entitled to Minimum Wage

Plaintiffs have served as jurors in King County or have received economic hardship exemptions. Plaintiffs filed a putative class action seeking minimum wage for the time spent serving on a jury. Plaintiff relied upon the Washington Minimum Wage Act ("MWA"), RCW 49.48, the Jurors' Rights Act, RCW 2.36.080(3), and the Court's inherent authority to supervise the administration of justice. Plaintiff sought declaratory and injunctive relief and damages. Excluded from the class were jurors who were compensated by their employer for their jury service.

RCW 2.36.150 provides that jurors shall be reimbursed for expenses at the rate of not less than $10 or more than $25 a day. Since 1959 jurors in the State of Washington have received $10 a day to reimbursed them for their expenses. As a consequence, low income jurors have been unable to serve because they cannot afford to spend days, weeks, or sometimes months without an income. Washington law provides that jurors who are unable to meet their basic needs or the needs for their family may apply for an economic hardship exemption. Between 2011 and 2016 (the last year for which statistics were available), King County excused more than 5,100 prospective jurors on account of financial hardship—more than 850 per year on average. But this is only the tip of the iceberg and does not include those jurors who are excused by a trial judge or those jurors who simply fail to comply with a juror summons. King County has a yield rate of approximately 29 percent. As a result, in King County low income jurors are consistently under-represented on juries. Because there exists a tragically high correlation between race and economic status, people of color are significantly under-represented on King County juries.

Plaintiffs argued that jurors are employees under the Washington Minimum Wage Act. The Court disagreed. In *Bolin v. Kitsap County*, 114 Wn.2d 70, 75, 785 P.2d 805 (1990), the Court ruled that jurors are employees for the purpose of receiving workers' compensation. The Court in *Bolin* determined that "jurors [are] under a superior court judge's control" and therefore "are county employees." *Id.* at 76. Stated another way,

"[j]urors are employees of the county by virtue of their responsibility to the superior court." *Id.* at 75. The Court ruled that *Bolin* was inapplicable under the MWA. Under the MWA, the Court found that "jurors are excluded from the definition of 'employee' because they receive reimbursement in lieu of compensation while engaged in the activities of a local governmental body." "We find that jurors are not employees entitled to minimum wage for the purposes of the MWA because no employer-employee relationships exists statutorily under RCW 49.46.010(3)(d) or otherwise." "Based on the unique nature of jury service, it follows that jurors are not employees in the traditional sense of the term."

RCW 2.36.080(3) prohibits exclusion "from jury service in this state on account of membership in a protected class recognized in RCW 49.60.030, *or on account of economic status.*" (Emphasis added). Plaintiffs argued that there exists an implied cause of action under this statute. The Supreme Court disagreed. "[T]he purported 'exclusion' occurs because judges grant hardship requests made by jurors under RCW 2.36.100." Applying the test recognized in *Bennett v. Hardy*, 113 Wn.2d 912, 920-21, 784 P.2d 507 (1990), the Court concluded that the legislative intent did not support the *requested remedy*, rather than any remedy: "The language of the statute evidences an intent to prohibit acts of exclusion, rather than requiring counties to pay minimum wage to discourage jurors from self-excluding by seeking hardship excusals." Moreover, "RCW 2.36.080(1) does not support implying an increase in pay because it establishes a policy that "qualified citizens have the opportunity . . . to be considered for jury service," which suggests this policy is limited to the master jury list."

Although argued and briefed at every stage of the proceedings, the Court held that Plaintiffs had not sufficiently raised the issue of the Court's obligation to supervise the administration of justice. The Court concluded that "the impact of low juror reimbursement on juror diversity, low income jurors, and the administration of justice as a whole are valid points. . . .these concerns are best resolved in the legislative arena."

Justice Yu, joined by Justice Madsen, concurred in part and dissented in part. Justice Yu dissented from the majority insofar as the majority concluded that low income jurors were not systemically excluded from jury service. She nevertheless agreed that the remedy is with the legislature.

Justice Gonzales dissented. "When a seemingly neutral practice results in a systematic exclusion of a protected category of persons, it is discriminatory." "Properly understood, the jurors' rights act, RCW 2.36.080, prevents discrimination based on economic status. A cause of action is implicit. We may—and in this case should—imply a cause of action when a statute protects an identifiable group of people but contains no explicit enforcement mechanism."

Rocha v. King County, --- Wn.2d --, 460 P.3d 624 (4/9/2020)

WASHINGTON COURT OF APPEALS

Close Temporal Proximity Between Protected Activity and Discharge is Insufficient Standing Alone to Demonstrate Pretext

Mackey began working at Home Depot's Vancouver, Washington store in 2006. During her employment, Mackey suffered from depression, post-traumatic stress disorder (PTSD), and degenerative disc disease. She asked for accommodations related to all of these conditions.

Mackey alleged that Krall, an assistant manager, verbally berated and attacked her. Mackey began to cry. She told Krall that she felt she was "being attacked," that because of her depression and PTSD she could not think when she was attacked, and that Krall made her "skittish." Krall told Mackey "we all have problems." On the following

morning, Mackey reported the incident with Krall to Robert Tilton, the store manager.

Approximately two weeks later, Home Depot terminated Mackey's employment for violation of its Acting with Integrity and Honesty/Conflict of Interest policy." The disciplinary notice, prepared cited "Selling, buying or distributing merchandise or services at other than the authorized prices." The notice stated that, although Mackey had not stated how many of her quotes were affected, she admitted to giving double discounts, giving volume bid discounts to non-qualifying customers and non-qualifying orders, and giving multiple customers discounts well above her $50 threshold. The notice further stated that Mackey had given an estimated total of over $17,000 in unauthorized discounts without manager approval. Mackey disputed the results of the investigation in writing, but acknowledged that there was accidental "double dipping" on some of her sales and she admitted that one incident of double dipping was intentional on her part, but that Krall had authorized the additional discount.

Mackey filed a lawsuit against Home Depot alleging four causes of action: (1) discriminatory discharge, (2) retaliation for opposing an unlawful practice, (3) wrongful discharge in violation of public policy, and (4) failure to provide reasonable accommodation. The trial court granted the summary judgment motion and dismissed all of Mackey's claims against the defendants. Mackey appealed the trial court's summary judgment order. The Court of Appeals affirmed.

The Court of Appeals resolved the discrimination, retaliation, and notably the wrongful discharge claims by applying the *McDonnell Douglas Burdine* burden shifting analysis. The Court ruled that Mackey had established a prima facie case for all claims but failed to establish pretext or otherwise prove that an unlawful motive was a substantial factor.

In reference to discrimination, the Court recognized the prima facie case required Plaintiff to establish that she was (1) within a statutorily protected class, (2) discharged by the defendant, and (3) doing satisfactory work. Despite the considerable evidence to the contrary, the Court found that Mackey satisfied a prima facie case because she denied that she violated any Home Depot policies, gave unauthorized volume discounts, or gave double discounts. She essentially claimed that the findings of Home Depot's investigation were wrong. "Mackey submitted evidence that her work was satisfactory. Therefore, we conclude that for purposes of summary judgment, Mackey established a prima facie case of discriminatory discharge."

In reference to retaliation, the Court concluded that Mackey stated in her declaration that she complained about disability discrimination, and although Home Depot denied a disability discrimination complaint, for purposes of summary judgment "a nonmoving party's declaration must be taken as true and can create a genuine issue of material fact even if it is 'self-serving.'" Home Depot denied causation because the decision-maker denied knowledge of the protected conduct. The Court concluded that the identity of the decision-maker was unclear and there existed a reasonable inference Tilton (the person to whom the incident was reported) was one of the decision makers. The Court also concluded that proximity in time between the protected activity and the termination was sufficient to establish the protected activity was a causal factor in the decision to take adverse action.

In reference to the wrongful discharge claim, the Court reiterated that Mackey's declaration was sufficient to establish that she complained about disability discrimination prior to the notice of termination, and that disability discriminated was a clear public policy. The Court again relied upon temporal proximity to establish causation.

The Court nevertheless determined that Mackey had not established that Home Depot's stated reason was a "pretext" for discrimination. The Court ruled although Mackey's declaration relevant to job performance was sufficient to establish a prima facie case of discrimination and retaliation, it was insufficient to establish pretext because it did not dispute the employer's stated reason for discharge. Likewise, even if proximity in time was sufficient to establish a prima facie case of causation on the retaliation and wrongful discharge claims, standing alone it was insufficient for the purpose of establishing pretext.

Lastly, the Court affirmed the dismissal of reasonable accommodation because Mackey failed to inform Home Depot that the accommodation provided was insufficient.

Mackey v. Home Depot USA, Inc. – Wn. App. 2d ---, 459 P.3d 371 (Div. III 3/3/ 2020) (Maxa, Melnick, Glasgow)

MEMBER VICTORIES AND DEFEATS

Toby Marshall and Jeff Needle represented the employees in *Rocha*

Moloy Good represented the employee in *Mackey*

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