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

Religious School Teachers Fall Within Ministerial Exception to Anti-Discrimination Law Coverage

Agnes Morrissey-Berru taught at Our Lady of Guadalupe School (OLG), and Kristen Biel taught at St. James School. Both were employed under nearly identical agreements that set out the schools' mission to develop and promote a Catholic School faith community; imposed commitments regarding religious instruction, worship, and personal modeling of the faith; and explained that teachers' performance would be reviewed on those bases. Each was also required to comply with her school's faculty handbook, which set out similar expectations. Each taught religion in the classroom, worshipped with her students, prayed with her students, and had her performance measured on religious bases.

Both teachers sued their schools after their employment was terminated. Morrissey-Berru claimed that OLG had demoted her and had failed to renew her contract in order to replace her with a younger teacher in violation of the Age Discrimination in Employment Act of 1967. Biel alleged that St. James discharged her because she had requested a leave of absence to obtain breast cancer treatment. Both claims were dismissed at summary judgement and reversed by the Ninth Circuit which ruled that the teachers were not "ministers" within the meaning of *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC,* 565 U.S. 171 (2012). The Supreme Court granted certiorari and reversed.

The Court explained that "educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school." The Court found that as elementary school teachers, both Morrissey-Berru and Bile were responsible for providing instruction in all subjects, including religion, and were the members of the school staff who were entrusted most directly with the responsibility of educating their students in the faith. And not only were they obligated to provide instruction about the Catholic faith, but they were also expected to guide their students, by word and deed, toward the goal of living their lives in accordance with the faith. Even though their titles did not include the term "minister" and they had little formal religious training, they both had their core responsibilities as teachers of religion. "A religious institution's explanation of the role of such employees in the life of the religion in question is important." Accordingly, the Court ruled that both teachers were "ministers" within the meaning of *Hosanna-Tabor* and that the civil rights statutes did not apply.

Concurring, Justices Thomas and Gorsuch would have deferred to the religious organization's assessment of which employees fell within the ministerial exception.

Dissenting, Justices Sotomayor and Ginsburg criticized the majority for abandoning the factors the Court had set forth in *Hosanna-Tabor* as relevant to the analysis of when the exception applies.

Our Lady of Guadalupe School v. Morrissey-Berru, 140 S. Ct. 2049 (2020).

NINTH CIRCUIT

Surgeon with Clinical Privileges at Medical Center is Independent Contractor Not Employee

Henry, a white male, is a board-certified general and bariatric surgeon licensed to practice medicine in Hawaii. He joined the staff of Adventist Health Castle Medical Center ("Castle") in 2015, and, with clinical privileges, performed surgeries at Castle's facility located in Kailua, Hawaii. Henry's contract provided that he was an "independent contractor."

Henry complained of discrimination at Castle, which initiated a review of his past surgeries. This assessment led to his precautionary suspension, and, later, Castle's Medical Executive Committee recommended that Henry's clinical privileges be suspended until he completed additional training and demonstrated competency in various areas of concern. After an internal appellate process upheld the suspension, Henry filed suit in February 2018 for alleged violations for racial discrimination and retaliation in violation of Title VII. The trial court granted summary judgment on the basis that Henry was an "independent contractor" not covered by Title VII. Henry appealed and the Ninth Circuit affirmed.

After reciting a non-exhaustive list of criteria to utilize, the Court found that the following mandated his status as an independent contractor: 1) Castle paid Henry for his on-call time which only accounted for 10% of his earnings. This arrangement is emblematic of an independent contractor relationship; 2) Henry did not receive any typical employee benefits from Castle; 3) Henry and Castle reported Henry's earnings to the IRS not as if Henry were a Castle employee, but as if he were an independent contractor. Castle issued him a 1099 tax form, not a W-2; and 4) Henry reported his Castle earnings on a Form 1040 for self-employed individuals.

The Court also found that Henry's obligations to Castle were limited, providing him the freedom to run his own private practice. Henry leased Castle space for elective surgeries on his own patients, performed general surgeries at a competing hospital, and could refer his patients to any hospital of his choosing. The Court concluded that "[e]mployees normally do not have this level of work freedom." Moreover, the contracts between Castle and Henry described him as an independent contractor, which the Court found to be "significant."

The Court found unpersuasive the high skill required by surgeons, the provision of medical equipment and assistants, and the imposition of medical mandatory standards. The Court explained that "in the physician-hospital context, '[t]he level of skill required, location of the work, and source of equipment and staff are not indicative of employee status because all hospital medical staff are skilled and must work inside the hospital using its equipment.'"

Henry v. Adventist Health Castle Medical Center, 970 F.3d 1126 (9th Cir. 8/14/2020) (Owens, Friedland, Nelson)

Amazon Package Deliverers are "Transportation Workers" Exempt from the Federal Arbitration Act Because They Engage in Interstate Commerce Regardless of Whether They Cross State Lines

Plaintiffs contracted to provide delivery services for a subsidiary of Amazon to make "last mile" deliveries of products from Amazon warehouses to their final destinations. The deliverers use personal vehicles, bicycles, or public transportation. Most deliveries do not cross state lines. Deliverers agreed in their Terms of Service that they were independent contractors and any disputes would be resolved by arbitration. The dispute resolution agreement waived the right to collective and class resolution. The dispute resolution agreement stated it was governed by the Federal Arbitration Act ("FAA") and not Washington law, which governed the rest of the Terms of Service.

In 2016 Plaintiffs filed a wage and hour class action in federal court alleging violation of the

FLSA, Washington and California law, and the Seattle wage ordinance. Amazon moved to compel arbitration. After staying the case for several years pending *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), and *New Prime Inc. v. Olivera*, 139 S. Ct. 532 (2019), Judge Coughenour denied the motion to compel arbitration. The district court ruled that the plaintiffs fell within the transportation worker exception to the FAA. Because the Terms of Service explicitly forewent the application of Washington law, the district court ruled there was no enforceable agreement to arbitrate. Amazon appealed. The Ninth Circuit affirmed 2-1.

The majority rejected Amazon's argument that the deliverers were engaged in purely intrastate activity. The majority ruled that transportation workers need not cross state lines to be engaged in interstate commerce within the meaning of the FAA. The First Circuit had recently reached the same conclusion. The majority held that the only time workers for a transportation company fall outside the exception is when their job duties are only tangentially related to the movement of goods. The workers here transported packages that originated outside the state in which they were delivered. The warehouses here are simply one stage in the delivery process, unlike food delivery services. Amazon's business includes both the selling and delivering of goods.

The majority also agreed with the district court that there was no enforceable agreement to arbitrate. Because the plaintiffs fall within the transportation worker exemption to the FAA, Amazon could not use other provisions of the FAA to enforce the agreement. Because no law governs the arbitration agreement, there is no arbitration agreement to enforce.

Judge Bress dissented in a lengthy opinion. He agreed with Amazon that the deliverers were engaged only in local commerce because they didn't cross state lines.

Rittmann v. Amazon.com., 971 F.3d 904 (9th Cir. 8/19/20) (M. Smith, N. Smith, Bress)

WASHINGTON SUPREME COURT

Union Lacks Associational Standing to Bring Lawsuit on Behalf of Its Members Where Union Must Rely on Representative Testimony at Trial to Prove Damages

The Washington State Nurses Association ("WSNA") filed a lawsuit on behalf of 28 member nurses seeking damages under Washington law for unpaid hours, overtime, and missed meal breaks. The employer moved for summary claiming the union lacked standing. The Superior Court denied the motion but certified its ruling for discretionary review. The Court of Appeals denied the employer's motion for discretionary review. The Superior Court then held bench trial at which nine nurses testified about their unpaid hours and missed meal breaks. While the union submitted a damages calculation formula based on the employer's records, the court was required to weigh the testimony of the nurses in order to apply the formula. The Superior Court ruled in favor of the union and awarded almost $1.5 million in damages, double damages, attorneys' fees and costs.

The hospital appealed arguing inter alia WSNA lacked standing. The court of appeals transferred the case to the Supreme Court. The Justices ruled 5-4 the union lacked association because the damages had to be established through representative testimony. Writing for the majority, Justice Montoya-Lewis focused on the prudential prong (as opposed to the constitutionally required prongs) of the 3-part test for associational standing: whether the relief requested requires the participation of the organization's members.

Prior Washington Supreme Court case law permitted association only where damages are certain, easily ascertainable, and within the

knowledge of the defendant. The majority distinguished a court of appeals case that allowed for associational standing by a union where the damages would be proved by representative testimony because the court of appeals case involved a settlement.

The majority rejected the use of representative testimony to establish damages in associational standing cases as inconsistent with the Court's prior precedent and Rule 23 protections for absent class members. The majority noted that associational cases have no certification process and do not require court approval of the settlement. The majority asserted that the requirement that damages be certain, easily ascertainable, and within the knowledge of the defendant provided protections to the members of the association.

The majority noted that in this case nothing prevented the employees from engaging in collective or class actions. In such a case, "the prudential nature of the third prong might be served by expanding its application" beyond current case law.

In dissent Justice Yu accused the majority of taking an overly restrictive view of standing. She pointed out that Washington Supreme Court precedent had held that "testimony" is not the equivalent of "participation" for the purposes of associational standing. Justice Yu noted that that the employer's own failure to keep required records is what created the need for representative testimony in the first place.

The dissent disagreed with tying the strictness of the third prong of associational standing to whether there were other means of proceeding collectively. The dissent also noted that tying associational standing to a lack of disagreement over damages between the parties was perverse. The dissent would have affirmed on the merits except that it agreed with the employer the trial court failed to show the basis for its computing damages and would have remanded for that.

Washington State Nurses Ass'n v. Community Health Sys., Inc. --- Wn.2d ---, 469 P.3d 300 (8/13/2020).

Employer's Mandatory Arbitration Policy in Handbook Not Presented to Employee with Employment Agreement Is Unenforceable; Policy is also Unconscionable

Plaintiff was hired by Pagliacci as a delivery driver. At the time of his hire, he was required to sign an Employee Relationship Agreement ("ERA"). The ERA provides that employees are employees-at-will and can be terminated at any time in any manner with or without notice and without cause. It further provides that employee will learn and comply with the rules stated in the Little Book of Answers. The ERA does not directly mention arbitration. The Little Book contained a dispute resolution process ("F.A.I.R.") and an arbitration agreement.

The arbitration agreement required the employee to submit any dispute for resolution in accordance with the F.A.I.R. Policy and if those procedures are not successful in resolving the dispute, then submit the dispute to binding arbitration. The F.A.I.R. Policy requires that before commencing arbitration, the employee first "report the matter and all details" to his or her supervisor (Supervisor Review). If Supervisor Review does not resolve the matter to the employee's satisfaction, he or she may initiate non-binding conciliation, and the "F.A.I.R. Administrator will designate a responsible person at Pagliacci Pizza (who may be its owner) to meet face-to-face with you in a non-binding Conciliation." The F.A.I.R. Policy further provides that failure to comply with all provisions of the dispute resolution process forecloses any right to bring a claim in either arbitration or court. The Little Book states: "The

limitations set forth . . .shall not be subject to tolling, equitable or otherwise."

Pagliacci terminated Burnett's employment on January 22, 2017. In October 2017, Burnett filed a putative class action against Pagliacci alleging a variety of wage and hour violations. Pagliacci moved to compel arbitration of Burnett's claims under its mandatory arbitration policy. Plaintiff 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. The Court of Appeals affirmed, *Burnett v. Pagliacci Pizza*, 9 Wn. App. 2d 192 (2019) and the Supreme Court granted review and affirmed in a unanimous opinion by Justice Madsen.

The Supreme Court ruled that mutual assent is required for the formation of a valid contract, and that it is essential to the formation of a contract that the parties manifest to each other their mutual assent to the same bargain at the same time. This rule applies to the formation of an arbitration agreement just as it does to the formation of any other contract. The Court agreed with the Court of Appeals 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. "Because Burnett lacked knowledge of the incorporated terms, he never assented to the MAP." Relying on *Nelson v. Cyprus Bagdad Copper Corp*., 119 F.3d 756 (9th Circ. 1997), the Court ruled:

[T]the unilateral promulgation by an employer of arbitration provisions in an Employee Handbook does not constitute a `knowing agreement' on the part of an employee to waive a statutory remedy." 119 F.3d at 762. "[T]he right to a judicial forum is not waived even though the Handbook is furnished to the employee and the employee acknowledges its receipt and agrees to read and understand its contents." *Id.* "[T]he right is not waived even when the employee performs his obligations by commencing or continuing to do his assigned work and accepting a paycheck in return." *Id*

The Court recognized that either procedural or substantive unconscionability is sufficient to invalidate an arbitration agreement. Even assuming that a valid contract had been formed, the Court stated that Burnett "lacked meaningful choice," because essential terms were hidden, and Burnett had no reasonable opportunity to understand the arbitration policy before signing the employment contract. "[W]e hold that even *if* an arbitration agreement was indeed established, it was procedurally unconscionable and unenforceable." (emphasis original).

The Court recognized that substantive unconscionability exists when a contractual provision is one-sided, is shocking to the conscience, monstrously harsh, and exceedingly calloused. The Court agreed with the Court of Appeals that "the effect of Pagliacci's two-step mandatory arbitration policy is 'so one-sided and harsh that it is substantively unconscionable.'" The Court explained that Pagliacci's requirement that employees submit claims to its F.A.I.R. policy before arbitration was unconscionable because it (1) operate[s] as a complete bar as to terminated employees because they have no way to report the matter to a supervisor, (2) shorten[s] the statute of limitations for any employee because the procedures do not toll the statute of limitations (and the time for completing the procedures is completely within the Pagliacci's control), and (3) provide[s] no exception to the requirement for supervisor review where a supervisor is the person subjecting the employee to unfair treatment.

The Court found that the unconscionable parts of the arbitration agreement were not severable because Pagliacci's F.A.I.R. Policy procedures are intertwined with the arbitration provision. The Court concluded that "Permitting severability ... in the face of a contract that is permeated with unconscionability only encourages those who draft contracts of adhesion to overreach. If the worst that can happen is the offensive provisions are severed and the balance enforced, the dominant party has nothing to lose by inserting one-sided, unconscionable provisions."

Burnett v. Pagliacci Pizza, Inc., - Wn.2d ---, 470 P.3d 486 (8/20/2020)

WASHINGTON COURT OF APPEALS

Employee Need Not Provide Medical Documentation to Support Accommodation Request

The plaintiff suffered from the side effects of brain surgery. She sometimes forgot to clock-in and clock-out. She was issued a disciplinary notice for failing to do so. In response, she provided a note from her doctor informing the employer of her brain surgery and its side effects. When the employer did nothing in response, she filed a complaint with the Seattle Office of Civil Rights for denial of reasonable accommodation. A week later the employer claimed a client had complained the plaintiff had not come to work as scheduled and suspended the plaintiff. The suspension letter said she would be reinstated if her physician cleared her to return to work. The plaintiff's physician did so. Instead of reinstating the plaintiff, the employer requested additional guarantees from the physician and did not return her to work.

Two city agencies found that the employer had failed to accommodate the employee's disability and retaliated against her for making administrative complaints. The employer appealed the complaints to a hearing examiner who dismissed all claims. The city filed a petition for review and the Superior Court reversed the hearing examiner's dismissal order finding genuine issues of fact. The employer than appealed to the Court of Appeals.

Much of the Court of Appeals opinion was devoted to administrative law. On the merits, the Court of Appeals agreed with the Superior Court that the employer was not entitled to summary judgment. The court of appeals confusingly applied the *McDonnell Douglas-Burdine* shifting burdens framework to a denial of the reasonable accommodation claim. Such cases do not turn on circumstantial evidence of discriminatory intent or proof of pretext.

The real issue in the case was whether there was a genuine dispute the plaintiff could perform the essential functions of her position. The Court of Appeals followed the EEOC's regulations on what functions were essential. The court ruled the employer had failed to establish that utilizing the clock-in/clock-out system was an essential function. The court also rejected the employer's argument that the plaintiff had to provide medical proof of disability to make a request for accommodation.

Continuing with its earlier confusing ruling, the Court of Appeals considered whether the employer had provided non-discriminatory reasons for rejecting the plaintiff's requested accommodation. The court ruled that the employer's claim the plaintiff had failed to make a proper request for reasonable accommodation to be legally insufficient.

The Court of Appeals also confused matters on the retaliation claim by asserting that once the employee shows retaliation was a substantial factor in the adverse action, the employer can justify the adverse action based on legitimate reasons. The Court of Appeals did reject the employer's argument that a medical suspension is

not an adverse employment action. The court also held that a factfinder could find pretext based on the timing.

City of Seattle, Seattle Office for Civil Rights v. American Heathcare Serv., Inc., -- Wn. App. 2d ---, 468 P.3d 637 (Div. I 7/20/2020) (Dwyer, Smith, Leach).

Court Properly Excluded Employer's Evidence as Hearsay where only Relevance to Employer's Theory of the Case Required Admission for Truth of the Matter Asserted

Plaintiff worked as the director of a preschool. She received positive feedback and raises. That changed when she informed her employer she was pregnant. The employer terminated her less than one month after learning of the pregnancy. One of the employer's agents told the plaintiff that the company's owners wanted her to take unemployment and rest before having a baby as people in China do. When the plaintiff protested, the agent told her the owners were not happy with her work. In a later conversation, the employer claimed it had terminated the plaintiff for financial reasons but hoped that she could return after the baby arrived.

The plaintiff filed suit. The employer refused to produce the majority shareholder on its Board of Directors for deposition. At trial, the Superior Court refused to allow the other Board members to testify about statements the majority shareholder had made about the reasons for terminating the plaintiff. At trial, the employer argued the plaintiff had been terminated for financial mismanagement. The court refused to allow testimony that following the plaintiff's termination the employer found an additional 110 missing receipts. The jury returned a $466,000 verdict for the plaintiff.

On appeal, the employer argued that the Superior Court's exclusion of evidence was erroneous. The Court of Appeals disagreed. The court ruled that because the board member's out of court statements were relevant only if they were introduced for the truth of the matter the Superior Court properly excluded them. Moreover, even if the evidence had been relevant the Superior Court properly excluded it under ER 403 because the employer never presented him for deposition.

As to the missing receipts, the employer failed to appeal the Superior Court's ruling that the receipts did not constitute after acquired evidence. The employer conceded at trial that the missing receipts did not show embezzlement. The Court of Appeals refused to let the employer change position on appeal.

Bengtsson v. Sunnyworld Int'l, Inc., --- Wn. App. 2d ---, 469 P.3d 339 (Div. I 8/10/2020) (Dwyer, Chun, Smith)

VICTORIES AND DEFEATS

Jennifer Robbins represented the union in *WSNA*.

Toby Marshall and Blythe Chandler represented the employees in *Burnett*.

Katie Chamberlin and Joe Shaeffer represented the employee in *Bengtsson*.

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WELA Alert Editors

Michael Subit msubit@frankfreed.com (206) 682-6711

Jeffrey Needle jneedlel@wolfenet.com (206) 447-1560

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