

Ninth Circuit

Denial of Class Certification Affirmed Where No Common Method Existed for Proving Wage and Hour Violations at Issue

In a case arising under California law, plaintiffs filed a class action challenging Bank of America's calculation of overtime pay for call center employees. If employees worked overtime and received a bonus during the same period, BofA would apply the bonus to the employee's straight time pay to calculate the regular rate for the purpose of overtime premiums.

The plaintiffs brought claims for failure to pay minimum wage, overtime, and denial of second meal breaks. The district court found no predominance as to the overtime claim and the Ninth Circuit affirmed. The circuit cited the principle that a court must ensure the class is not defined so broadly as to include individuals who could not have been harmed by defendant's allegedly unlawful conduct. If the class includes many such members that indicates individualized inquiries would be necessary to determine whether a class member has been injured.

The circuit held that because the class as defined included many individuals who did not work overtime or earn a bonus during the relevant time-period, it included members who can have no claim for compensation. The court agreed with BofA that this was not an issue of individualized damages, which generally does not defeat predominance, but whether class members were subject to the policy being challenged. Here, there was no common method of answering this question.

Castillo v. Bank of America, N.A., 980 F.3d. 723 (9th Cir. 11/18/2020) (Gould, Ikuta, Ezra (D. Haw.))

District Court Failed to Consider Totality of Customer's Harassment of Employee

Plaintiff Jennifer Christian was employed at the Bank as an Associate in Vancouver, Washington. In 2013, Plaintiff began receiving notes from a customer stating that she was "the most beautiful girl he'[d] seen" and that the customer "would like to go on a date" with her. Plaintiff rejected these advances, but the conduct continued. He sent her a long letter stating that she "was the most beautiful woman he's ever seen, that . . . [she] was his dream girl, that [they] were meant to be together, [and] that he wanted to be with [her]." She showed the letter to her manager and colleagues who warned her to be careful. Undeterred, the customer inquired from other employees about how he could date her. She was advised to call the police. The conduct continued and Plaintiff's manager explained that people were concerned about her safety.

Christian told her manager that she did not want the customer to be allowed to return to the Bank. According to Christian, the manager promised her that he would not allow the customer to return but never in fact communicated that decision to the customer. Instead, according to Christian, the manager asked her to call the customer to tell him that it was inappropriate to send her flowers. Christian felt uncomfortable calling the customer but agreed to do so because she felt that the manager "didn't seem like he wanted to deal with it." She telephoned the customer and informed him it was inappropriate to send her flowers and that she was not going to go on a date with him. She told him to stop asking her on dates and to stop asking her colleagues about how to get a date with her. The customer said "okay."

But the conduct continued. Ultimately, the Bank closed the customer's account but later allowed the customer to open a new account. Thereafter,

the customer returned to the Bank and stared at Plaintiff for 45 minutes causing Plaintiff to become extremely concerned and distressed. After reporting this conduct to management, she was assured that they would close his account and he would not be allowed in the Bank again. Plaintiff refused to return to work until a no-trespass order was entered and management told her to hide in the break-room if he returned. Eventually, the Bank closed the account again and Plaintiff agreed to a transfer with less hours to avoid the customer. Soon after, Christian resigned her position, stating in an email that she was leaving because her “doctor has declared it is bad for [her] health to continue working at Umpqua Bank.”

Christian filed suit against the Bank alleging gender harassment under Title VII and the Washington Law Against Discrimination. The trial court granted summary judgment and the Ninth Circuit reversed.

The Ninth Circuit considered whether the harassment Christian suffered was so severe or pervasive that the Bank is liable for it. The Ninth Circuit ruled that the trial court erred when it only considered one incident as actionable harassment - the customer’s visit to the Bank to reopen his account. “The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships,” *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81–82 (1998), and “what might be an innocuous occurrence in some circumstances may, in the context of a pattern of discriminatory harassment, take on an altogether different character, causing a worker to feel demeaned, humiliated, or intimidated on account of her gender.” *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1109 (9th Cir. 1998).

The trial court also erred when it failed to consider incidents in which Plaintiff “did not have any direct, personal interactions with the [c]ustomer,” such as when he wrote her a letter describing her as his “soulmate,” sent her flowers, and watched

her in the bank lobby. Title VII imposes no such requirement. The trial court should have considered “those incidents that do not involve verbal communication between the plaintiff and harasser, physical proximity, or physical or sexual touching.”

The district court also erred in neglecting to consider the record evidence of interactions between the customer and third persons, such as the customer’s repeated visits to the Bank to “badger[] [Christian’s colleagues] about how he was going to get a date with [Christian].” “Offensive comments do not all need to be made directly to an employee for a work environment to be considered hostile.”

The Ninth Circuit ruled that whether the Bank took prompt remedial action raised a genuine issue of material fact. The Court refused to accept the notion that a victim’s own actions immunize her employer from liability for ongoing harassment. Moreover, “a factfinder could determine that the transfers...also unreasonably burdened Christian. [A] victim of sexual harassment should not have to work in a less desirable location as a result of an employer’s remedy for sexual harassment.”

Christian v. Umpqua Bank, 984 F.3d 801 (9th Cir. 12/31/2020) (Paez, Rawlinson, Kobayashi (D. Haw.)).

Washington Supreme Court

Overtime Exemption for Agricultural Workers Unconstitutional as Applied to Dairy Workers

RCW 49.46.130(2)(g) exempts individuals who work on farms from the general statutory entitlement to overtime. A class of dairy workers filed a case for wage and hour violations including failure to pay overtime. They sought a declaratory judgment that the exemption was unconstitutional on two grounds (1) a privilege or immunity in violation of Article I, section 12 of the Washington Constitution with respect to Article

II, section 35, which grants workers in dangerous conditions the right to health and safety protections and (2) the state Constitution equal protection clause because the state law overtime exemption was based on a federal one adopted for racially discriminatory reasons.

The parties moved for summary judgment. The trial court held there exists a fundamental right to work and earn a wage but did not rule whether the overtime exemption violated this right or was unconstitutional. The workers filed for discretionary review and the Supreme Court accepted.

Writing for a majority of five (Gonzalez, Gordon McCloud, Yu, and Wiggins), Justice Madsen ruled that in contrast to its federal counterpart, the Washington Privileges and Immunities Clause is a viable constitutional provision that prevents legislative favoritism of special interests. Courts must independently analyze (1) whether the challenged law grants a “privilege” or “immunity” and (2) if so, whether there is a “reasonable ground” for the grant of privilege or immunity. Historically, however, Washington courts had limited its reach to “fundamental rights of state citizenship.” Rights left to the discretion of the legislature are not considered fundamental.

The Court held that article II, section 35 says “the legislature shall pass laws for the protection of persons working in...employments dangerous to life or deleterious to health” establishes a fundamental and mandatory right to statutory protection for citizens working in extremely dangerous conditions. The Court then held that the dairy workers constitute the type of workers protected by the constitutional provision. The Court next ruled that the Washington Minimum Wage Act was the type of protection that article II, section 35 requires. Therefore, the overtime exemption was a “privilege” or “immunity”

within the meaning of the Washington Constitution.

The Court then moved to the second step of the analysis. Washington courts had already held that the reasonable ground test is a more exacting than rational basis review. Under the reasonable grounds test, a court will not hypothesize facts to justify a legislative distinction. Instead, the court will scrutinize the legislative distinction whether it in fact serves the legislature’s goal. To be upheld, the provision must be justified in theory and in fact.

The Court rejected all of the company’s proffered justifications. The seasonal nature of farming didn’t change the fact that dairy workers experience constant, factory-like conditions. Moreover, the legislative history of the exemption didn’t rely on the seasonal nature of farming or advance any other reasonable grounds for the exemption. The only legislative purpose of the Minimum Wage Act is to protect the health and safety of Washington workers, as required by article II, section 35.

The majority did not reach the equal protection argument. The majority ruled in a footnote that whether its decision was retroactive was not ripe. The Court, however, awarded attorneys’ fees to the workers under RCW 49.48.030, which requires a judgment for wages. The majority held the only issue remaining in the trial court was the amount of overtime pay owed to the workers.

Justices Gonzalez, Gordon McCloud, and Yu issued a concurring opinion. They would have applied at least intermediate, if not strict scrutiny, to the state overtime exemption. They agreed that the federal exemption upon which the state exemption was based was adopted for racially discriminatory reasons. They noted the continuing discriminatory conditions farmworkers generally experience. They would have held that farmworkers are precisely the type of second-

class citizen whose interests are a central concern of the equal protection clause. While the concurrence agreed the retroactivity issue was not before the Court, if it were, the concurrence would have declined to apply the decision only prospectively.

Justice Stephens' dissent argued the case concerned a statutory benefit granted only at the discretion of the legislature. The dissent would have held that the entitlement to overtime pay is not a fundamental right implicating the Washington State Constitution. The dissent would have continued to look to federal privileges and immunities law for guidance and limited the scope of the doctrine under Washington law to "fundamental, natural rights." The dissent also would have limited the doctrine to "personal" as opposed to "public" rights. Because the Washington Constitution does not guarantee the right to overtime pay to all citizens, and such right is not a "natural" right, the overtime exemption should not be deemed a privilege or immunity.

The dissent construed article II, section 35 as giving the legislature broad discretion to pass necessary laws. Whether a law is necessary is up to the legislature. For this reason, the provision does not create a fundamental right of state citizenship. Moreover, the dissent concluded that article II, section 35 did not grant personal or private rights but rather governs the legislature. The dissent explicitly rejected the trial court's determination that there is a right to work or earn a wage.

The dissent also rejected the equal protection argument. The dissent would have applied rational basis review and assumed facts upholding the exemption. The dissent noted that there was no evidence of discriminatory purpose on the part of the Washington legislature. The dissent recognized there was evidence of current discriminatory impact but found it

constitutionally insufficient under rational basis review.

Justice Johnson wrote a separate four-Justice dissent asserting that the majority's ruling should be applied prospectively only. Courts will apply a decision only prospectively if the decision established a new rule, retroactive application would impede the objectives of the new rule, and retroactive application would produce a substantially inequitable result. The dissent considered it inequitable to apply the rule retroactively but did not explain how retroactive application would impede the objectives of the new rule.

Martinez-Cuevas v. DeRuttyer Bros. Dairy, Inc., -
- Wn.2d --, 475 P.3d 164 (11/5/2020)

Washington Court of Appeals

Coach Could be Compelled to Arbitrate Claims in New York Even Though Agreement Also Provided that Actions Related to the Agreement Would Be Litigated in Washington

Seattle Rugby, LLC, owns and operates Seattle's United States Major League Rugby team, the Seattle Seawolves. Adrian Balfour is the CEO of Seattle Rugby. In September 2017, Balfour and Seattle Rugby hired Anthony Healy, a Canadian citizen residing in Victoria, British Columbia, to serve as head coach of the Seawolves. Balfour, in his capacity as CEO of Seattle Rugby, presented Healy with an employment agreement that included an arbitration clause which provided for an *arbitration in New York* of all claims arising under the agreement. The agreement also required construction under Washington law and *litigation only in the State of Washington*.

Healy was terminated from employment, after several months, when he was unable to acquire a O-1 work visa. Healy filed a complaint in King County Superior Court against Seattle Rugby and Balfour, alleging breach of contract, failure to pay wages, and willful withholding of wages. Balfour filed a counterclaim alleging breach of the

agreement by failure to repay a personal loan of \$7,500. The parties disputed whether the payment of \$7,500 was a “personal loan” or for work performed.

The Defendants filed a motion to compel arbitration in New York. The superior court granted Seattle Rugby and Balfour’s motion to compel arbitration and stayed proceedings pending the completion of arbitration in New York. Plaintiff was granted discretionary review solely on the issue of whether the superior court erred by compelling arbitration in New York in light of an apparent conflict between the arbitration and governing law clauses of the agreement.

Despite the limited bases for granting review, the Court of Appeals found that the intent of the parties was clear. The term “litigation” is broader than “arbitration” and the two words did not conflict. The Court therefore affirmed the order granting arbitration.

The Court of Appeals also found that because venue is not a gateway issue, the issue must be resolved by the arbitrator and not the court. The Court ruled that the superior court’s order must be modified to order that venue will be determined by the arbitrator.

Healy v. Seattle Rugby, LLC, -- Wn. App. 2d ---, 476 P.3d 583 (Div. I. 11/23/2020). (Dwyer, J. Mann, Chun).

Member Victories and Defeats

Andrea Schmitt, Lori Isley, Marc Cote, and Anne Silver won in *Martinez-Cuevas*.

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