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

Ninth Circuit

Summary Judgment to Employer who Transferred SWAT Officer in Response to Facebook Comments Reversed Due to Factual Disputes on Pickering Balance

Plaintiff, a SWAT sniper, commented on Facebook that it was a shame a suspect who shot a police officer did not have any "holes" in him. He was transferred to another position with a loss of pay for his comments. He sued for violation of his First Amendment rights. The district court granted summary judgment finding that the officer's comments would cause the public to question the officer's fitness as an officer.

The Ninth Circuit reversed 2-1. The parties did not dispute that the speech addressed a matter of public concern, that the officer spoke as a private citizen, and that the comments caused the adverse action. The majority held there were factual disputes about the meaning of the officer's Facebook comment that had to be resolved before the court could determine whether the employer's interests outweighed the employee's. The officer claimed that his comments didn't advocate the use of deadly force. Instead, he claimed he was saying that the police officers should have filed defensive shots.

The majority also held that there was a factual dispute whether the employer had proved it reasonably believed the employee's comments would have caused disruption. The majority noted that there was no media coverage of his comments or public reaction. Nothing in the employee's profile suggested he was a SWAT sniper. The employee deleted his comment after two months. There was no evidence the department would be exposed to legal liability. Therefore, there were material disputed facts whether the officer's comment would likely disrupt the employer's workforce or harm its reputation.

Dissenting, Judge Berzon would have held the officer waived any argument about the meaning of the Facebook comment. In the district court, the officer had claimed the objective meaning of his comment was legally irrelevant. Under settled precedent, the department could rely on what it understood the comment to mean to impose discipline as long as its interpretation was reasonable. Moreover, courts should give deference to employer's reasonable predictions of disruption.

Moser v. Las Vegas Metropolitan Police Dep't, 984 F.3d 900 (9th Cir. 1/12/2021) (Lee, Siler (6th Cir.), Berzon).

Per Diem Payments to Travelling Clinicians Must Be Included in Regular Rate for FLSA Overtime

Verna Clarke and Laura Wittmann ("Plaintiffs") worked as clinicians for AMN Services, LLC ("AMN"). They were paid both a designated hourly wage and a weekly per diem benefit. On behalf of two certified classes of employees who have worked for AMN, they alleged that their weekly per diem benefits were improperly excluded from their regular rate of pay under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201–219, and the California Labor Code thereby decreasing their wage rate for overtime hours. AMN argued that Plaintiffs' per diem benefits were not wages but, instead, reasonable reimbursement for work-related expenses incurred while traveling on assignment and were therefore properly excluded under the FLSA exemption from the overtime rate calculation. *Id.* at § 207(e)(2).

The district court certified California-wide classes for the state law claims and conditionally certified

a nationwide FLSA collective. The parties then filed cross motions for summary judgment focusing on "the central question in the case: whether certain per diem payments to class member employees should be considered part of the employees' 'regular rate' and therefore considered when calculating overtime pay rates." The district court granted summary judgment in AMN's favor on the FLSA and state unpaid wages causes of action. The Plaintiffs appealed.

Generally, the regular rate of pay for FLSA purposes includes "all remuneration for employment paid to, or on behalf of, the employee." 29 U.S.C. § 207(e). Non-exempt employees who work more than 40 hours in a week must be paid overtime for hours worked over 40 at an hourly rate of at least one-and-a-half times their regular rate. *Id*.§ 207(a)(1). But the FLSA provides for exemptions, allowing employers to exclude certain payments from the regular rate of pay and so from the rate of overtime pay. *See id.* § 207(e)(2). FLSA exemptions are construed under "a fair (rather than a 'narrow') interpretation."

A payment's function controls whether the payment is excludable from the regular rate under § 207(e)(2). In determining a payment's function, the tie between payments and time worked is relevant but not determinative in assessing whether those payments are properly excludable. Although payments not tied to hours worked may function as compensation for work, whether payments increase, decrease, or both based on time worked provides an important indication as to whether the payments are functioning as compensation rather than reimbursement.

In the context of per diem payments in particular, the function test requires a case-specific inquiry based on the particular formula used for determining the amount of the per diem. Along with the monetary relationship between payment and hours, other relevant—but certainly not dispositive—considerations include whether the payments are made regardless of whether any costs are actually incurred, and whether the employer requires any attestation that costs were incurred by the employee. In some cases, the amount of the per diem payment relative to the regular rate of pay may be relevant to whether the purported per diem functions as compensation or reimbursement. The function analysis may also consider whether the payments are tethered specifically to days or periods spent away from home or instead are paid without regard to whether the employer is away from home.

The Ninth Circuit emphasized that the analysis of whether the payment functioned as compensation was case-specific. "We hold the record establishes that the contested benefits functioned as compensation for work rather than as reimbursement for expenses incurred, and that the per diem benefits were thus improperly excluded from Plaintiffs' regular rate of pay for purposes of calculating overtime pay.

Clarke v. AMN Services, *LLC*, 987 F.3d 848 (9th Cir. 2/8/2021) (Berzon, Baldock (10th Cir.), Collins).

Washington Supreme Court

Private Law Firm Performing Independent Investigation for Government Employer is Entitled to Immunity from Suit Under Anti-SLAAP Statute.

Plaintiff was employed as chief legal advisor to Western Washington University. He developed serious medical conditions which he disclosed to his employer. He claims his employer denied his request for reasonable accommodations and a supervisor made homophobic remarks. During a meeting with the supervisor, the employee became angry when accused of faking his disability. The employee submitted a formal complaint of sexual orientation discrimination. The University retained a law firm to conduct an independent investigation into both the employee's complaint and his workplace misconduct. The law firm investigation sided with the employer and the employee was terminated.

The employee first sued the employer. They reached a settlement. He then sued the law firm and the lawyer who had conducted the investigation for negligence, negligent misrepresentation, fraud, discrimination, and violations of the consumer protection act. The Superior Court granted the law firm's motion for immunity under RCW 4.24.510, the anti-SLAAP statute. The court of appeals reversed holding that government contractors, when communicating to a government agency under the scope of their contract, are not persons within the meaning of the act.

The Supreme Court reversed the court of appeals in an opinion by Justice Montoya-Lewis on behalf of four Justices. "Person" in the general definitions section of the RCW potentially embraces organizations. The text of the SLAAP suit statute unambiguously includes organizations. The majority held the fact that the law firm and lawyer were paid under contract with the government had no bearing on the application of the anti-SLAAP statute. The majority also found support for its conclusion in the statutory and legislative history. The majority distinguished government contractors from government agencies. The majority awarded the law firm and lawyer their attorneys' fees per the statute.

Concurring in the judgment, Justice McCloud would have held that the law firm and the lawyer were not agents of the government bur rather outside counsel. Accordingly, Justice McCloud's opinion limits the holding of the case to government contractors who are not agents of the government.

Dissenting on behalf of four Justices, Justice Madsen would have held that government contractors fulfilling their contractual obligations are not "persons" within the meaning of the anti-SLAAP statute. Moreover, the anti-SLAAP statute does not include an investigation on behalf of a government agency as a form of protected petitioning. The law firm and the lawyer did not engage in advocacy. It was fulfilling a contractual obligation. It was not exercising its constitutional rights. Grants of immunity in derogation of the common law should be narrowly construed.

Leishman v. Ogden Murphy Wallace, PLLC, --- Wn.2d ---, 479 P.3d 688 (1/28/2021).

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.

Hardeep S. Rekhi hardeep@rekhiwolk.com
Events Chair (206) 388-5887

Blanca Rodriguez blancar@nwjustice.org
(509) 574-4234

Ada Wong ada@akw-law.com
(206) 259-1259

Janelle Chase Fazio janelle@bcglawyers.com
(253) 289-5136

2021 Non-Board Officers

Andrea Schmitt andreaschmitt@columbialegal.org
Legislative Committee Co-Chair (360) 943-6260

Jesse Wing jessew@mhb.com
Legislative Committee Co-Chair (206) 622-1604