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ALERT

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Ninth Circuit

Private Arbitration Agreement Does Not Bar Secretary of Labor from Court Suit to Recover Wages for Employees Who Signed the Agreement

The question before the court was whether a private arbitration agreement binds the Secretary of Labor when bringing an FLSA enforcement action that seeks relief on behalf of one party to the arbitration agreement against the other party. The district court ruled that the answer was "no" and the circuit court affirmed.

The panel reasoned that the U.S. Supreme Court's decision in *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), which ruled that arbitration agreements are enforceable only as to the parties and not against the EEOC, was equally applicable to the Secretary of Labor. The panel rejected the argument that the Secretary was in privity with the workers because recoveries are secured "on behalf of" and "paid directly to the employee." The court reasoned actions by the Secretary to recover individual sums also vindicate a broader public interest. Moreover, just as with the EEOC, the employee does not control the government's decision to prosecute the case. The administrative differences between the agencies were immaterial.

Walsh v. Arizona Logistics, Inc. 998 F. 393 (9th Cir. 5/18/21) (Hunsaker, Fletcher, Miller)

Defendant Not Signatory to Arbitration Agreement Between Plaintiff and Employer Can Invoke Arbitration Where Employee's Claims are Inextricably Intertwined with Employment Contract

Plaintiff was a nurse for a staffing agency. She had signed an agreement requiring the arbitration of all disputes that arose out of or were related to her employment. She was later assigned to work at a hospital. The contract for the assignment between her and her employer required arbitration of all disputes. There was however no contract between her and the staffing hospital nor a contract between the hospital and her employer. The hospital had a contract with a service provider that had a contract with the plaintiff's employer. That contract required the plaintiff's employer to pay its employees for all missed meal periods among other employment obligations.

Plaintiff brought a class and collective action against the hospital for missed meal breaks and off the clock work. The district court granted the hospital's motion to compel arbitration on the grounds that those claims were "intimately founded in and intertwined with" the plaintiff's contract with her employer. The Ninth Circuit affirmed.

The court recognized that parties who have not agreed to arbitration cannot generally be compelled to arbitrate. But California law allows a non-signatory to invoke arbitration under the doctrine of equitable estoppel for claims based on the same facts and inherently inseparable from arbitrable claims against signatory defendants. A prior California intermediate appellate court decision had found an employee's claims against a non-signatory client of his staffing agency-employer were "intimately founded in and intertwined with" his employment contract with the staffing agency.

The court rejected the plaintiff's argument that statutory claims are not subject to this rule because they do not arise out of or require interpretation of the employment agreement.

The panel recognized that no Ninth Circuit case had ever allowed a non-signatory defendant to invoke equitable estoppel against a signatory plaintiff. The panel had two responses. The first was that Ninth Circuit law had not foreclosed this possibility even though it hadn't been allowed on the specific facts presented. The second, and more persuasive, response was that federal courts were bound to follow state contract law principles regarding the scope of arbitration agreements.

The panel then held it made no difference that in the prior California case the plaintiff had sued both his employer and the non-signatory while here the plaintiff had sued only the non-signatory. What mattered for equitable estoppel purposes was the substance of the plaintiff's claims. The court ruled that the substance of the claims were inextricably intertwined with her agreements with her employer. The court put particular reliance on the fact that her employer was responsible for paying for missed meal periods and for making her available for the time she alleges she was not paid. Moreover, plaintiff's proof of damages depended on wage information in her assignment contract with her employer.

Franklin v. Community Regional Medical Center, 998 F.3d 867 (9th Cir. 5/21/2021) (Bennett, Wallace, Bea)

Washington Court of Appeals

Plaintiff's Lawsuit Dismissed Where Employer Made Repeated Efforts to Accommodate

Elliot Gibson, Plaintiff, worked on the production floor of the Costco Optical Lab (Lab) in Auburn starting in 2008. In December 2013, Gibson presented Costco with medical documentation indicating that he was unable to work around loud noises. Costco granted Gibson's requested accommodation and also transferred him to a position which is generally quieter. On November 3, 2014, Gibson presented Costco with medical evidence that he was "[un]able to be around people [or] loud noises." Costco again granted the requested accommodation and allowed an absence from work for two days a month for a year.

Shortly thereafter Gibson admitted that there were no jobs where he would not be around people and Costco placed him on a nine week leave of absence with instructions to get clarifications from his doctor. While on medical leave Gibson repeatedly requested additional accommodations including less time at work, pushing and pulling restrictions, and that he not be required to stand or sit continuously for more than 30 minutes. Costco responded by offering Gibson temporary assignments which he accepted. At the conclusion of the temporary assignment, Gibson was granted more medical leave and a reduced work schedule upon his return.

From February 16, 2016, until July 25, 2018, Gibson presented numerous accommodation requests at least some of which were granted. Costco continued to communicate with Gibson about his medical condition and need for accommodations and eventually informed him that they were unable to accommodate his additional restrictions and he was placed on medical leave until October 31 or until his restrictions changed, which ever came first.

On July 26, 2018, Gibson filed a charge with the EEOC and on October 8, 2018 filed suit alleging a violation of the Washington Law Against Discrimination ("WLAD"). Even after Gibson filed suit discussions about possible accommodations continued. It was determined that Gibson would be allowed to come back to work on a trial basis and was to notify managers when he took breaks so they could be logged. Gibson returned to work on January 2, 2019. But he continued to require additional accommodations and was frequently absent from

work. Gibson was placed on still another medical leave on October 10, 2019. It was undisputed that Gibson is still an employee of Costco.

As the interactive process continued so did the lawsuit. Costco's motion for summary judgment was granted and Gibson appealed.

Gibson argued that Costco failed to accommodate or engage in the interactive process. After a lengthy fact intensive analysis, the Court of Appeals rejected these arguments. It held that "viewed in the light most favorable to Gibson, the evidence fails to raise a genuine issue of material fact as to whether Costco reasonably accommodated him or engaged in an interactive process with him, or whether he would have been able meet the essential functions of his position with reasonable accommodation. He fails to make a prima facie case under WLAD. The trial court did not err in granting summary judgment for Costco."

Gibson v. Costco Wholesale, Inc., --- Wn. App. 2d --, 488 P.3d 869 (5/10/2021) (Applewick, Hazelrigg, Dwyer)

Trial Court Properly Excluded Survey that Mistakenly Asked Prospective Class Members about Time Spent "Per Shift" rather than Time Spent "Pre-Shift."

Valley Communications Center (VCC) is a regional 911 center that provides 24-hour emergency communication services to south King County. The appellants are a class of employees in two positions at VCC: call receivers and dispatchers.

VCC employees are paid hourly. The employees were allowed to hand punch in up to 30 minutes before the start of their shift and could hand punch out up to 15 minutes before the end of their shift (grace periods). Regardless of the precise time that an employee hand punches in or out during a grace period, they are paid from their scheduled start time to their scheduled end time. If an employee is required to stay past their scheduled end time, they are paid based on a rounding rule to the nearest fifteen-minute increment. Employees are expected to be seated at their console and ready to begin work by one second past the top of the hour.

In order to be ready at the start time, employees have to perform a variety of nine preparatory tasks. The employees brought suit alleging this requirement violated the Washington wage and hour laws, RCW 49.48 and the Washington Minimum Wage Act (MWA), RCW 49.46. The VVC motion for summary judgment was granted in part. The trial court found that two of the tasks—signing up for breaks and locating ergonomic chairs and equipment—were not "work" because they were not in the control of or for the benefit of the employer. It ruled that six of the nine tasks (including the first two) were not compensable under the de minimis doctrine. The trial court denied summary judgment on the remaining three tasks: (1) gather/assemble guidebooks/resource materials, (2) review/clear messages from the CAD system, and (3) (for dispatchers) receive briefing from the outgoing dispatcher.

The employees hired an expert who sent a survey to the class which requested the time spent working on certain tasks *per shift* as opposed to *pre-shift*. The trial court excluded the survey and expert testimony because this discrepancy was misleading and would cause the jury to be confused. Indeed, some respondents had provided answers in excess of the total amount of time they were in the building prior to their shift. Without this testimony, the employees conceded that they could not prove damages, the court granted summary judgment for VCC, and the employees appealed.

The Court of Appeals ruled that "'time spent conducting preparatory tasks is considered hours worked. . . . Compensable preparatory tasks are those which are 'integral' or necessary to the performance of the job.' When an employee does not have control over when and where preparatory activities can be made, the activities are considered hours worked." Applying this standard, the Court ruled that the selection of ergonomic equipment was not "work," but that the requirement to sign up for breaks prior to the shift was "work" since it was authorized even if it wasn't required. "This includes 'all work requested, suffered, permitted, or allowed.'" Citation omitted. The court rejected the application of the federal de minimis doctrine which allows otherwise compensable work to be uncompensated. They concluded that adoption of the federal rule would not advance the legislature's intent to protect employee wages and assure payment.

The Court of Appeals ruled that the exclusion of the expert survey was proper. The Court adopted the federal rule for the admissibility of surveys: "Technical inadequacies in [a] survey, including the format of the questions or the manner in which it was taken, bear on the weight of the evidence, not its admissibility." *Fortune Dynamic, Inc. v. Victoria's Secret Stores Brand Mgm't, Inc.*, 618 F.3d 1025, 1037-38 (9th Cir. 2010). Nevertheless, the trial court found not that there was a technical error but that survey was fundamentally flawed. That decision was not manifestly unreasonable given the significant distinction between pre-shift and per shift time to the facts of this case.

Without the expert survey, the employees could not prove damages for the remaining eight tasks (those which were "work" and not de minimis), and the case was properly dismissed.

Robertson v. Valley Communications Center, --- Wn. App. 2d, --- P.3d --- (6/28/2021) (Applewick, Bowman, Mann)

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