Washington Case Law Update

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Travis Wise, et al., v. Governor Jay Inslee, et al., 2021 WL 4951571.

- Plaintiffs requested a TRO/Preliminary Injunction re Governor Inslee's Proclamation 21-14.1, which requires mandatory COVID-19 vaccinations for educators, healthcare workers, state employees, and state contractors.
- **Religious Freedoms:** Plaintiffs argued that the Proclamation was facially neutral but created an "unlawful faith-based barrier to gainful employment," which essentially was a free exercise claim.
- **ADA:** Plaintiffs alleged failure to provide reasonable accommodations, but the Court noted that "it is unclear which Plaintiffs are alleging disability discrimination" and that only one Plaintiff pled any facts regarding this claim.
- **Contract Clause:** Plaintiffs argued that the Proclamation violates the Contract Clause because it was a "substantial modification of contracts" that "imposed a new qualification for employment and a new job requirement." But the Court noted that the Plaintiffs had "not provided copies of collective bargaining agreements at issue or stated material provisions that had allegedly been modified."

Wise (con't).

- **Holding:** Judge Rice concluded that the Plaintiffs were not entitled to a TRO or preliminary injunction.
- The court reasoned that "it is well settled that loss of employment does not constitute irreparable harm."
- The court also reasoned that "the balance of equities tips in favor of Defendants and that the public interest would not be served by enjoining the Proclamation."
- Note: The court found that the Proclamation was "narrowly tailored" to "specific sectors." This could be a point of distinction from OSHA's ETS.

Port of Tacoma v. Sacks, 495 P.3d 866 (Wash. Ct. App. 2021).

- **Facts:** The Port asked two employees to take two trips to China (and other miscellaneous trips to places like Houston) to observe the manufacturing of new marine cranes.
- The Port booked all aspects of the trip for the employees and instructed the employees to arrive at the airport three hours prior to their flight's departure.
- During the flight, both employees spent some time reviewing materials in anticipation of observing the manufacturing, although the Port did not require them to do so. The rest of the travel time was spent on activities unrelated to work.
- The Port did not have a policy in place concerning compensation for this type of travel, so it negotiated with the workers' union to reach an agreement in wages.
- The agreement provided that the hourly employees would be paid ***a maximum*** of eight hours a day, straight time, for travel to, from, and within China. As a result, the Port did not pay the employees for all time spent travelling.
- The employees filed wage claims with the Department of Labor and Industries, which investigation and issued a citation and notice of assessment to the Port. The Port appealed the decision.

Port of Tacoma (con't).

- **Holding:** Nonexempt employees must be compensated for all travel time for out-of-town work assignments—including all travel to and from the airport, all time spent at the airport, and all time spent in flight because it is considered "out of town travel."
- WAC 296-126-002(8) defines compensable "hours worked" as "all hours during which the employee is authorized or required by the employer to be on duty on the employer's premises or at a prescribed workplace." The Department of Labor and Industries interpreted this to include travel where the instrumentality of travel is dictated by the employer.
- The Court agreed with L&I's interpretation and noted that L&I was entitled to great deference in interpreting its own regulations.
- The Court distinguished between "hours worked" within the context of an employee's daily commute (which is largely not compensable) and this case which dealt with employees' out-of-town travel.
- The decision does not change the rules regarding compensation for regular or local travel and commuting during the workday.

Takeaway

- Ensure that internal policies comply with the holding in *Port of Tacoma* and that employers are compensating employees accordingly.

Maner v. Dignity Health, 9 F.4th 1114 (9th Cir. 2021).

- **Facts:** From 1999-2008, male employee worked in a lab with two other coworkers. One of the coworkers was in a long-term romantic relationship with the lab owner.
- When the lab was relocated to a different state, male employee was permitted to work remotely because he pled guilty to a crime involving sexual assault and could not leave the state.
- Once employee began working remotely, his performance deteriorated, and he received negative performance evaluations. His position was eliminated soon thereafter, both due to his poor performance and funding issues.
- Male employee brought a Title VII claim against his employer, alleging sex discrimination and retaliation. He stated that the female employee in the long-term romantic relationship had not been terminated due to funding issues when he had been, which he attributed to her relationship. In other words, he argued that the lab engaged in sexual discrimination arising under the paramour preference theory, which posits that an employer engages in unlawful sex discrimination whenever a supervisor's relationship with a sexual or romantic partner results in an adverse employment action against another employee.

Maner (con't)

- **Holding:** An employer does not violate Title VII's prohibition on discrimination of an individual's sex by favoring a supervisor's sexual or romantic partner over another employee.
- In other words, there is no Title VII violation where a supervisor exercises "paramour preference" for one employee over another because of a workplace romance.
- The court reasoned that Title VII does not prevent employer from favoring employees because of personal relationships, as long as such favoritism is not based on an impermissible classification.
- "Courts must focus on the casual relationship between an individual employee's sex and the employer's decision to take an adverse employment action against that individual." Here, the employee attributed the decision to terminate him not to his sex, but to a preferential relationship, which is not prohibited under Title VII.
- The retaliation claim also fails because the male employee did not engage in any protected activity (i.e., complaining of the romantic relationship) until after he had already been terminated.

Takeaway

- Romantic relationships in the workplace can be very messy for employers to navigate.
- Ensure that employee handbooks contain reporting procedures for complaints.
- Although “paramour preference” does not constitute discrimination, it is still advisable to minimize workplace romantic relationships.

Robertson v. Valley Commc'ns Ctr., 18 Wash. App. 2d 122, 490 P.3d 230

- **Facts:** 911 operator employees of a dispatch center were required to use a biometric hand scanner to "clock in" for their shift.
- Employees were expected to be seated at their console and ready to work one second past the top of the hour. In order to be ready at that time, the employees had to perform nine tasks, including signing up for breaks, plugging in their headsets, gathering and assembling guidebooks, gathering ergonomic equipment, and logging onto computer equipment.
- Employees were not strictly compensated for the time spent performing these tasks. They brought a minimum wage claim against the Communications Center in state court.

Robertson (con't.)

- **Holding:** The ***trial court*** ruled that some of the tasks did not meet the definition of "work" and that others were "de minimis."
- The Court of Appeals clarified that the "de minimis" doctrine does not apply to claims arising under Washington's Minimum Wage Act ("MWA"). The "de minimis" doctrine is recognized under the Fair Labor Standards Act (FLSA), which is the federal counterpart to the MWA. There is no state authority for applying the doctrine to MWA claims.
- The Court of Appeals also held that while the time that employees spent locating ergonomic equipment was not "hours worked," the time that employees spent signing up for breaks could be considered "hours worked."
- In sum, the Court of Appeals held that a fact-based analysis is needed to determine which tasks are considered "hours worked," and that not all pre-shift tasks are automatically considered "hours worked."

Takeaway

- This case raises interesting questions about compensable time for Washington employers, especially given the fact that many employers are uncertain about whether they will be required to pay employees for time spent getting tested for COVID-19, if the OSHA ETS comes into effect.
- Employers should conduct a fact-based analysis to determine which pre and post employment tasks may be considered “hours worked.”

Christian v. Umpqua Bank, 984 F.3d 801 (9th Cir. 2020).

- **Facts:** Female bank employee was harassed by a bank customer for whom she opened an account.
- The customer sent her notes, asked her out on dates, and told her that "they were meant to be together."
- Bank employee showed her supervisor the notes, who warned her to "be careful."
- The customer also went into other bank branches to talk about the employee and sent her flowers and a card.
- The employee told her supervisor that she did not want the customer to be allowed to return to the branch.
- Instead, the supervisor told the employee to call the customer and tell him that the conduct was inappropriate, which she did.
- The customer did not stop and escalated to the point where he would come into the bank and sit in the lobby for up to 45 minutes staring at her.
- The employee reported the conduct to a regional manager, who promised to fix the situation. Yet, the employee's direct supervisor instructed to her "just hide in the break room" if the customer returned.
- Employee eventually sued the bank for sexual harassment.

Christian (con't.)

- **Holding:** The Ninth Circuit reversed the trial court's decision to grant summary judgment for the bank, explicitly holding that incidents of workplace harassment were required to be evaluated together in deciding a hostile work environment claim.
- The court held that even indirect actions could be construed as creating a hostile work environment, including sending the employee flowers and talking about her at other branches. Although she did not directly witness those interactions, the court noted that "[s]he heard his message loud and clear."
- Although Umpqua contended that it took prompt and remedial action by having the employee call the customer and telling him to stop, the court concluded that this was insufficient because Umpqua did not take any other action to end the harassment and asking the employee to contact her own harasser was "ineffective" because the harassment did not end.
- "Umpqua's response [was] unreasonable because it placed the bulk of the burden on Christian herself."

Takeaway

- Take reports of harassment seriously and take prompt and corrective action to stop the harassment.
- Washington employers should already be doing this, given the Washington Supreme Court's decision in *Floeting v. Grp. Health Coop.*, 192 Wash. 2d 848, 434 P.3d 39 (2019).
- The 9th Circuit also doubled down on this, reaching a similar conclusion in *Fried v. Wynn Las Vegas* (9th Cir 11/18/2021).

Associated Gen. Contractors of Washington v. State, 494 P.3d 443 (Wash. Ct. App. 2021).

- **Facts:** Public works contractors must pay prevailing wages as required by state law. Twice a year, the industrial statistician for L&I sets the prevailing wages that are used to determine the wages for employees on public works projects.
- SB 5493 (enacted in 2018) altered the method for how the Washington State Department of Labor and Industries' industrial statistician sets the prevailing wages for employees on public works projects.
- Prior to the enactment of SB 5493, the industrial statistician set prevailing wages for each trade on a county-by-county basis based on either the majority or average wage rate in that specific county.
- Following SB 5493's enactment, the industrial statistician was required to adopt the prevailing wage rate for a county ***solely*** based on collective bargaining agreements (CBAs) for that trade. If a trade had more than one CBA in a county, the highest wage rate would prevail.
- The Associated General Contractors sued, challenging the constitutionality of the lawsuit under the non-delegation doctrine. *Reminder: the non-delegation doctrine essentially prohibits a legislature from delegating legislative powers to other entities.*

Contractors (con't.)

- **Holding:** SB 5493 is unconstitutional because it violates the non-delegation doctrine.
- The court explained that delegation by the legislature is proper if two elements are met: "[f]irst, the legislature must provide standards or guidelines which indicate in general terms what is to be done and the administrative body which is to do it. Second, ***adequate procedural safeguards must be provided***, in regard to the procedure for promulgation of the rules and for testing the constitutionality of the rules after promulgation." (emphasis added).
- SSB 5493 required the industrial statistician to adopt the wage rate from a CBA in a county, or the highest wage rate if more than one CBA in a county existed. This resulted in the possibility of prevailing wage rates being set by CBAs not yet in existence, unsigned or expired CBAs, and pre-hire CBAs, ***as well as the potential for collusion with no procedural safeguards***.
- The court reversed the trial court's decision to grant summary judgment to the State and remanded the case for further consideration.

Takeaway

- The prevailing wage rates will once again be set based on the majority or the average wage rates for each county, or at least until the appeals process is completed.

EEOC Trends

- In 2020, the EEOC received 67, 448 charges of workplace discrimination. This is actually a drop from years prior.
- The agency increased its merit factor resolution rate to 17.4 percent from 15.6 percent the prior year. Merit resolutions refers to charges that are resolved in the agency's administrative process (pre-litigation) in favor of the charging party.
- Any guesses on the most cited claim?

EEOC Trends (con't).

- Retaliation: 37,632 (55.8 percent of all charges filed)
- Disability: 24,324 (36.1 percent)
- Race: 22,064 (32.7 percent)
- Sex: 21,398 (31.7 percent)
- Age: 14,183 (21.0 percent)
- National Origin: 6,377 (9.5 percent)
- Color: 3,562 (5.3 percent)
- Religion: 2,404 (3.6 percent)
- *Some charges allege multiple bases.*

What about the Washington Human Rights Commission?

- We have seen more cases recently involving discrimination on the basis of gender identity/gender expression.
- Watch out for WAC 162-32-040, which provides as follows:

(2) Prohibited conduct. Prohibited conduct may include, but is not limited to, the following:

(a) Asking unwelcome personal questions about an individual's sexual orientation, gender expression or gender identity, transgender status, or sex assigned at birth;

(b) Intentionally causing distress to an individual by disclosing the individual's sexual orientation, gender expression or gender identity, transgender status, or sex assigned at birth against his or her wishes;

(c) Using offensive names, slurs, jokes, or terminology regarding an individual's sexual orientation or gender expression or gender identity;

(d) The deliberate misuse of an individual's preferred name, form of address, or gender-related pronoun (except on legally mandated documentation, if the individual has not officially obtained a name change);

(e) Posting offensive pictures or sending offensive electronic or other communications;

(f) Unwelcome physical conduct.

- WAC 162-32-050 provides that "[c]overed entities cannot require an individual to dress or groom in a manner that is not consistent with that individual's gender expression or gender identity."

WSHC (con't).

- The WSHRC recently expressed support for SB 5027, which required employers to comply by October 23, 2021.
- SB 5027 requires that televisions that are in public areas within places of public accommodation must have closed captioning in most circumstances.
- This includes bars, restaurants, salons, visitor areas in hospitals, and waiting rooms in vehicle maintenance shops.
- There is an exception if the television receiver is not technologically able to display closed captioning, or where there are multiple televisions (up to 50% do not have to have closed captioning but they must clearly show that they are on mute).
- Violations are counted on a per business, per day basis.
- Failure to comply could lead to a disability discrimination in a place of public accommodation claim.


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