

What you may have missed on summer vacation

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This is a brief summary of some of the more interesting cases that were decided since the Employment Law section last met (excluding U.S. Supreme Court opinions).

I. Ninth Circuit

(a) *United States v. Nosal*, ___ F.3d ___ (9th Cir. 2011), Slip Op. 5517 (April 28, 2011)

Holding: employees who abuse an employer's computer access policy may be prosecuted under the Computer Fraud and Abuse Act (CFAA). A petition for review is still pending.

The CFAA prohibits, among other things, unauthorized computer access with an intent to defraud by which something of value is obtained.

David Nosal worked for an international executive search firm. He left his employer in 2004 under terms of a severance agreement that included a non-compete. Instead of staying away from the business, however, Nosal immediately solicited employees of his former employer to help him form his own competing business. He asked them to send him trade secrets and other forms of confidential information that were stored in the employer's computer system. The employees did so by using their user accounts.

The scheme came to light and was reported to the United States Attorney Office. The USAO indicted Nosal for violating the CFAA. Nosal moved to dismiss the indictment, arguing that the CFAA was aimed at computer hackers and trespassers, and that it did not apply to employees who had otherwise lawful access to their employer's computer databases and just happened to abuse their access rights. The district court agreed and dismissed the indictment. The United States appealed.

The Ninth Circuit reversed. The court held that employees who abuse an employer's computer access policies may be prosecuted under the CFAA. The court acknowledged that a relatively recent case, *LVRC Holdings v. Brekka*, had appeared to reach a different result. However, the court distinguished *Brekka* by explaining that the employer in that case had never adequately notified the employee of any computer use restrictions.

Here, in contrast, adequate policies were in place that restricted access and use of the employer's computer system. By exceeding the employer's computer use restrictions, the employees (and Nosal) had subjected themselves to potential liability under the CFAA because their access was unauthorized once they had gone beyond the limits placed by the employer.

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(b) *Conitz v. Teck Alaska*, Mem. Disp. Case No. 10-35195 (May 17, 2011)

Holding: summary judgment affirmed because plaintiff failed to establish a prima facie case by not showing that he was more qualified than person who was promoted.

Conitz worked at the Red Dog mine. He filed suit alleging that he was passed over for promotion because Teck Alaska applied NANA's shareholder preference policy. He argued that the policy constituted impermissible race discrimination because most shareholders are Alaska Natives. The lawsuit was substantially similar to a prior suit he filed making the same claims.

The district court held that the shareholder preference was not a racial preference but instead a political preference based on shareholder status. The court observed that non-Natives could be shareholders. Furthermore, the court concluded that Conitz was not as qualified for the promotion as the person who was promoted. Conitz appealed.

The Ninth Circuit affirmed in a brief unpublished decision. The court noted that the shareholder preference was only used as a tie-breaker between two equally qualified candidates, and that it did not favor Alaska Natives but instead shareholders. Therefore, the preference was not facially discriminatory and no direct discrimination could be found.

The court concluded that Conitz failed to establish a prima facie case under *McDonnell Douglas* because he did not show that he was more qualified for the position being sought than the person who was promoted. As with the prior case, the court did not need to reach the question whether the shareholder preference policy constituted racial discrimination in violation of Title VII because, by failing to establish a prima facie case, Conitz failed to show how the policy adversely affected him.

(c) *Probert v. FCS*, ___ F.3d ___ (9th Cir. 2011), Slip Op. 8605 (June 23, 2011)

The Ninth Circuit held that Family Care Services in Fairbanks was not a covered employer for purposes of the Fair Labor Standards Act. The court concluded that the homes were not "institutions" for purposes of the FLSA because the emotionally disturbed children who resided in the homes received most of their treatment outside the home, and the employees were not licensed medical or social service professionals.

(d) *Blatchford v. The Alaska Native Tribal Health Consortium*, ___ F.3d ___ (9th Cir. 2011), Slip Op. 6631 (May 19, 2011)

Holding: The Indian Health Care Improvement Act (IHCIA) does not provide a basis for a tribal health care organization to recover funds that an individual had received from her insurance company after the health care organization had provided medical care. Instead, tribal health care organizations are limited to seeking reimbursement from third parties or relying on state medical lien law.

The IHCIA provides health care services at no cost for eligible Native Americans. The Act authorizes the United States, an Indian tribe, or a tribal health care organization to seek reimbursement or indemnification of reasonable expenses for health care provided to an individual who received health care services.

Adrienne Blatchford was injured in a car accident. She was treated by the Alaska Native Tribal Health Consortium (ANTHC). ANTHC did not charge Blatchford, but filed a lien under state law to recover any funds that Blatchford received from any third parties related to the accident.

Blatchford recovered a “substantial settlement” from her insurance company. She filed suit seeking a ruling that her settlement was not subject to ANTHC’s lien. ANTHC filed a counterclaim arguing that Blatchford was obligated under the IHClA to reimburse it for the cost of medical services that had been provided. The district court granted ANTHC summary judgment. Blatchford appealed.

The Ninth Circuit reversed. The court held that IHClA only authorized reimbursement or indemnification from third parties *other* than the individual who had received medical care. The court applied the older version of the IHClA that was in effect before the 2010 amendments to the Act. However, the court stated that the same result would follow under either version of the Act.

The court interpreted IHClA as limiting recovery to third parties. This conclusion was based partly on the title of the subsection which specifically referenced “reimbursement from certain third parties,” and partly because the Act authorized recovery to the same extent that the concerned individual would be eligible to receive reimbursement or indemnification. The court reasoned that an individual would not be seeking reimbursement or indemnification from him or herself.

The court noted that IHClA only provided two ways by which tribal health care organizations could enforce their rights: they could join a civil action filed by the individual or they could file their own action against a third party. Beyond these options, the court confirmed that tribal health care organizations could still rely on state medical lien law.

II. Alaska Supreme Court

(a) *Smith v. State, DOT*, 253 P.3d 1233 (Alaska 2011)

Holding: summary judgment affirmed on employment discrimination claim because plaintiff never showed that any other employee outside his protected class received more favorable treatment. Summary judgment affirmed on implied covenant claim because investigation was reasonable.

Paul Smith worked for the State Department of Transportation and Public Facilities (DOT). He took a fuel stand without permission. At the same time 100 gallons of diesel fuel came up missing. Smith admitted taking the fuel stand, but denied stealing the fuel.

DOT asked Smith for permission to test fuel in his personal tanks, but Smith would not allow testing. DOT fired Smith for theft. Smith filed grievances through his union, exhausted those, and then filed administrative employment discrimination charges with the EEOC alleging race discrimination. The EEOC found no evidence of employment discrimination. Smith then filed suit alleging employment discrimination and breach of the implied covenant.

The Superior Court granted DOT summary judgment. On appeal, the Alaska Supreme Court affirmed.

Smith’s employment discrimination claim failed because he never showed that any other employees outside his protected class received more favorable treatment.

Smith’s implied covenant claim was based on the argument that DOT falsely accused him of theft. The court noted, however, that DOT’s investigation was not unfair or conducted in bad faith. Smith admitting taking the fuel stand. Smith denied taking the fuel, but would not allow testing that would have exonerated him. The court instructed that an employer may rely on its good faith interpretation of the facts when disciplining an employee. The fact that an employee denies wrongdoing is not sufficient on its own to preclude summary judgment.

(b) *Crowley v. State DHSS, OCS, 253 P.3d 1226 (Alaska 2011)*

Holding: affirming motion for involuntary dismissal for insufficient evidence, the court emphasized that employers may rely on reports from other employees, and that employers must act in good faith when conducting workplace investigations, but the mere fact that conclusions are factually inaccurate does not show that the employer acted in bad faith.

Karen Crowley worked as a social worker for the State Department of Health and Social Services, Office of Children's Services (OCS). Following an investigation with foster parents and co-employees, OCS terminated Crowley for poor judgment, ineffective and misleading communications, and incompetence.

In December 2004, she filed suit alleging claims for employment discrimination, retaliation, and breach of the implied covenant. The Superior Court granted OCS summary judgment. In December 2008, the Alaska Supreme Court affirmed dismissal of the employment discrimination claim, but reversed on the retaliation and implied covenant claims concluding that there were genuine issues of material fact that precluded summary judgment.

The case returned to the Superior Court for trial which was conducted in October 2009. At trial, the Superior Court granted OCS's motion for involuntary dismissal at the close of Crowley's case because she had not offered sufficient evidence to support her claims. Crowley appealed.

On the second round before the Alaska Supreme Court, it affirmed the Superior Court.

Crowley argued that the underlying workplace investigation had been conducted in bad faith. She contended that employees without firsthand knowledge of events had been interviewed and that a supervisor who wanted to retaliate against her for requesting a transfer had sat in during employee interviews (thereby supposedly tainting the investigation). However, the actual facts undermined this argument.

Crowley also argued that many of the allegations were simply not true. But the court noted that factual accuracy is not required. Instead, an employer may reject an employee's version of events in favor of reports from other employees. Even if it later develops that the employer's conclusions were factually inaccurate, that does not show that the employer acted in bad faith.

(c) *State v. PSEA, ___ P.3d ___ (Alaska 2011), Slip Op. No. 6586 (July 29, 2011)*

Holding: The court recognized a public policy exception to the enforcement of arbitration awards, but declined to apply the exception based on the facts of the case.

An Alaska State Trooper attended motorcycle training at an out-of-state facility. He engaged in horseplay with his training motorcycle. He denied any misconduct at first but then admitted his responsibility. Upon return to Alaska, the trooper was questioned about the incident but not disciplined. He returned to work. He received a favorable evaluation later in the year that recommended a merit pay increase.

Later, however, other complaints began to surface about the trooper. The trooper was disrespectful to a citizen, and denied being disrespectful until he was confronted with a tape of the incident. The trooper also delayed investigating a burglary. The trooper also failed to properly investigate a handful of different crimes, including vandalism at a school and different assaults.

The State terminated the trooper because of a "pattern of dishonest behavior," relying in part on the prior incident that occurred during the motorcycle training. The trooper grieved his termination to arbitration. The arbitrator concluded that the State lacked just cause to terminate the trooper because no pattern of dishonesty had been shown to exist. The arbitrator also emphasized that others had engaged in more serious forms of dishonest conduct, yet had not been terminated. In addition, the State had done nothing to restrict or limit the trooper's duties after he returned from the motorcycle training. The Superior Court affirmed.

On appeal, the State argued that public policy should preclude reinstating a trooper who had engaged in dishonest acts. The court agreed, and adopted a public policy exception to the enforcement of an arbitration award when doing so would violate an explicit, well defined, and dominant public policy. However, the court concluded that under the particular facts of the case before it the exception did not apply. The court concluded that there was no clear public policy that would prohibit reinstating a trooper for a “relatively minor act of dishonesty.”

The court observed that the case involved a minor act of dishonesty that was not directly related to the trooper’s public duties, it was not directed to the superiors in his chain of command, and did not arise as part of a formal investigation.

The court also laid out three guidelines for applying the public policy exception in any future cases involving labor arbitration disputes for public employees who occupy positions of public trust: (1) a statute or regulation compels the termination or prevents the hiring of an employee for the misconduct in question; (2) the inquiry should focus on whether the arbitrator’s decision to reinstate the employee violates public policy, and not whether the employee’s conduct violates public policy; and (3) whether or not the misconduct in question occurred in the performance of duties and was directed toward the public, thereby undermining public trust.

The court additionally rejected the State’s arguments that the arbitrator erred by applying a different “just cause” test than the one established under Alaska case law. The court noted that different just cause tests existed and that, in the absence of any specific test being established by the collective bargaining agreement, the arbitrator enjoyed discretion to select whatever test he or she deemed appropriate.

Finally, the court disapproved of the arbitrator’s apparent reasoning that the State’s past leniency to acts of dishonesty prevented the State from adopting more rigorous standards to improve ethical conduct. This, however, did not constitute gross error because the facts simply did not support the State’s avowed justification for terminating the trooper.

III. Other decisions of interest

(a) *Sullivan v. Oracle Corporation* (California Supreme Court)

California Supreme Court holds that state wage and hour law applies to nonresident employees who perform some work in California. Court also holds that state wage and hour law does not apply to work performed outside California.

(b) *Partee v. Evergreen Int’l Aviation, Inc.*, 3:10-cv-0208-HRH

Summary judgment granted to employer where claims related to subsidiary. Court notes that summary judgment is appropriate where plaintiff names the wrong defendant. There is a strong presumption that a parent company is not the employer of its subsidiary’s employees. The parent is not liable even if it performs some administrative functions for the subsidiary.

(c) *Horton v. State of Alaska Wildwood Correctional Center*, 3:10-cv-0264-HRH

Applying *Board of Trustees v. Garrett*, 531 U.S. 356, 360 (2001), the district court holds that plaintiff’s ADA claim against State is precluded based on Eleventh Amendment sovereign immunity grounds.

(d) *California Grocers Association v. Los Angeles* (California Supreme Court)

City ordinance that requires grocery store to retain existing workforce for 90 days after store is sold is upheld.