

RECEIVED *sc*
SUPREME COURT
STATE OF WASHINGTON
Jul 08, 2015, 2:42 pm
BY RONALD R. CARPENTER
CLERK

NO. 89723-9

bj
RECEIVED BY E-MAIL

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

BF FOODS, LLC, FILO FOODS, LLC, ALASKA AIRLINES, INC., and
WASHINGTON RESTAURANT ASSOCIATION,
Respondents/Cross-Appellants,

v.

CITY OF SEATAC, KRISTINA GREGG, CITY OF SEATAC CLERK,
Appellants/Cross-Respondents,

and the

PORT OF SEATTLE,
Respondent,

and

SEATAC COMMITTEE FOR GOOD JOBS,
Appellant/Cross-Respondent.

**APPELLANT/CROSS-RESPONDENT SEATAC COMMITTEE
FOR GOOD JOBS' FIFTH STATEMENT OF SUPPLEMENTAL
AUTHORITY**

Dmitri Iglitzin, WSBA No. 17673
Jennifer Robbins, WSBA No. 40861
SCHWERIN CAMPBELL BARNARD IGLITZIN &
LAVITT, LLP
18 West Mercer Street, Suite 400
Seattle, WA 98119

 ORIGINAL

FIFTH STATEMENT OF SUPPLEMENTAL AUTHORITY

Appellant/Cross-Respondent SeaTac Committee for Good Jobs (“the Committee”) files this Fifth Statement of Supplemental Authority under RAP 10.8.

Attached as Exhibit A is a true and correct copy of the June 2, 2015, decision of the United States Ninth Circuit Court of Appeals in the case of *Calop Business Systems, Inc. v. City of Los Angeles*, No. 13-56992, 2015 WL 3463340 (9th Cir. June 2, 2015) (not selected for publication in West’s Federal Reporter), affirming *Calop Business Systems, Inc. v. City of Los Angeles*, 948 F.Supp.2d 981 (C.D.Cal. 2013), a decision cited by the Committee in its Reply Brief and Cross-Response Brief at pages 44, 45, 46 and 59, fn. 42, and holding, *inter alia*, (1) that the Plaintiff failed to present evidence that the City of Los Angeles’ Living Wage Ordinance (“LWO”) affects any air carriers’ “price, route, or service,” or “acutely interferes” with the forces of competition in the airline industry, as would be required for Airline Deregulation Act (“ADA”) preemption to apply, and (2) that the Railway Labor Act (“RLA”) does not preempt state and local laws that, like the LWO, impose minimum substantive requirements while permitting employers and unions to bargain around them.

This newly-issued decision is broadly pertinent to the discussion of ADA preemption contained in the Committee’s Reply Brief and Cross-

Response Brief, at pages 52-61, and the discussion of both ADA and RLA preemption contained in the Committee's Answer to *Amicus Curiae* Brief of Airlines For America, at pages 2-11 and 11-15, respectively, among other portions of various briefs filed by the parties.

RESPECTFULLY SUBMITTED this 8th day of July, 2015.



Dmitri Iglitzin, WSBA No. 17673
Jennifer Robbins, WSBA No. 40861
SCHWERIN CAMPBELL BARNARD
IGLITZIN & LAVITT, LLP
18 West Mercer Street, Suite 400
Seattle, WA 98119
Tel.: (206) 257-6003
Fax: (206) 257-6038
Iglitzin@workerlaw.com
Robbins@workerlaw.com

*Attorneys for Appellant/Cross-Respondent
SeaTac Committee For Good Jobs*

DECLARATION OF SERVICE

I, Jennifer Schnarr, declare under penalty of perjury under the laws of the State of Washington that on July 8, 2015, I caused the foregoing Appellant/Cross-Respondent SeaTac Committee For Good Jobs' Fifth Statement of Supplemental Authority to be filed via email with the Clerk of the Supreme Court, and a true and correct copy of the same to be delivered via email, and placed in the US First Class mail, per agreement of counsel, to:

Harry J. F. Korrell
Rebecca Meissner
Taylor Ball
Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
HarryKorrell@dwt.com
RebeccaMeissner@dwt.com
TaylorBall@dwt.com

Herman Wacker
Alaska Airlines
19300 International Boulevard
Seattle, WA 98188
Herman.Wacker@alaskaair.com

Cecilia Cordova
Pacific Alliance Law
601 Union Street, Suite 4200
Seattle, WA 98101
cecilia@cordovalawfirm.com

Wayne D. Tanaka
Ogden Murphy Wallace
P.L.L.C.
901 Fifth Avenue, Suite 3500
Seattle, WA 98164
wtanaka@omwlaw.com

Mary Mirante Bartolo
Mark Johnsen
City of SeaTac Attorney's Office
4800 South 188th Street
SeaTac, WA 98188-8605
mmbartolo@ci.seatac.wa.us
mjohnsen@ci.seatac.wa.us

Tim G. Leyh
Shane Cramer
Calfo Harrigan Leyh
& Eakes, LLP
999 3rd Ave, Suite 4400
Seattle, WA 98104-4022
Timl@calfoharrigan.com
Shanec@calfoharrigan.com

Frank J. Chmelik
Seth Woolson
Chmelik Sitkin & Davis P.S.
1500 Railroad Avenue
Bellingham, WA 98225
fchmelik@chmelik.com

Christopher Howard
Averil Rothrock
Virginia Nicholson
Schwabe Williamson & Wyatt
1420 5th Avenue, Suite 3400
Seattle, WA 98101-4010
choward@schwabe.com

Patrick D. McVey
James E. Breitenbucher
Riddell Williams P.S.
1001 Fourth Avenue, Suite 4500
Seattle, WA 98154
PMcVey@riddellwilliams.com
JBreitenbucher@riddellwilliams.com

Robert J. Guite
Sheppard Mullin
Richter & Hampton LLP
Four Embarcadero Center,
17th Floor
San Francisco, CA 94111-4109
RGuite@sheppardmullin.com

M. Roy Goldberg
Sheppard Mullin
Richter & Hampton LLP
1300 I Street NW
Suite 1100 East
Washington, DC 2005-3314
RGoldberg@sheppardmullin.com

Douglas W. Hall
Ford Harrison
1300 19th St. NW, Suite 300
Washington, DC 20036
dhall@fordharrison.com

Timothy O'Connell
Stoel Rives LLP
600 University Street, Suite 3600
Seattle, WA 98101-3197
Tim.OConnell@stoel.com

Kristopher Tefft
1401 4th Ave E, Suite 200
Olympia, WA 98506-4484
Kris.tefft@wsiassn.org

SIGNED in Seattle, WA, on July 8, 2015.

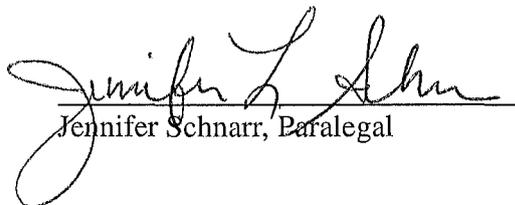

Jennifer Schnarr, Paralegal

Exhibit A

2015 WL 3463340

Only the Westlaw citation is currently available.

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3. United States Court of Appeals, Ninth Circuit.

CALOP BUSINESS SYSTEMS, INC., Plaintiff–Appellant,

v.

CITY OF LOS ANGELES, Defendant–Appellee.

No. 13–56992. | Argued and Submitted
May 6, 2015. | Filed June 2, 2015.

Attorneys and Law Firms

Juan Hong, Law Office of Juan Hong, Irvine, CA, for Plaintiff–Appellant.

Jeffrey Z.B. Springer, Jennifer T. Taggart, Demetriou Del Guercio Springer & Francis LLP, Los Angeles, CA, for Defendant–Appellee.

Appeal from the United States District Court for the Central District of California, Margaret M. Morrow, District Judge, Presiding, D.C. No. 2:12–cv–07542–MMM–RZ.

Before NOONAN, WARDLAW, and MURGUIA, Circuit Judges.

MEMORANDUM *

*1 The City of Los Angeles's Living Wage Ordinance (“LWO”), L.A. Admin. Code §§ 10.37–10.37.14, requires contractors who operate at the City's airports to pay their employees \$14.80 per hour, or \$10.30 per hour if the contractor provides health benefits. L.A. Admin. Code § 10.37.2(a). The City's Office of Contract Compliance found that Calop Business Systems, Inc., violated the LWO over a twelve-day period in January 2010, in which Calop paid its employees only \$11.55 per hour and made no health benefit contributions. Calop filed suit against the City, asserting that the LWO is unconstitutionally vague in

violation of the due process guarantees of the United States and California Constitutions. Calop also contends that the LWO is preempted by three federal statutes: the Employee Retirement Income Security Act (“ERISA”),¹ the Airline Deregulation Act,² and the Railway Labor Act.³ The district court granted summary judgment for the City on all of Calop's claims. We have jurisdiction under 28 U.S.C. § 1291, and affirm in part and dismiss in part.

I

The district court correctly held that Calop lacks standing to argue that the phrase “health benefits” is unconstitutionally vague. Calop paid its employees \$11.55 per hour without paying any health benefits at all, and therefore engaged in “conduct that is clearly proscribed” by the LWO. *See Hunt v. City of L.A.*, 638 F.3d 703, 710 (9th Cir.2011) (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 20 (2010)).

The district court also correctly held that Calop lacks standing to attack the LWO's supersession provision, which allows employers and unions to opt out of the LWO's minimum wage in a collective bargaining agreement. L.A. Admin. Code § 10.37.12. As the district court observed, because Calop has not shown that the City ever attempted to enforce that provision against it, Calop cannot show that it suffered an injury as a result of the LWO's supersession clause. In addition, the higher overtime rate that the LWO imposes on employers who do not pay health benefits does not confer standing on Calop because it is “fairly traceable” to the City's interpretation of the LWO's minimum wage term, not to any ambiguity in the minimum wage and supersession provisions. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). Calop therefore has not demonstrated that it has standing to argue that the minimum wage and supersession terms are unconstitutionally vague. *See id.*

We dismiss for lack of jurisdiction Calop's claim that the LWO is unconstitutionally vague.

II

ERISA preempts any state law that “has a connection with or a reference to” an employee benefits plan. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983). The district court properly held that the LWO does not fulfill either condition

of ERISA preemption. First, the LWO does not have a “reference to” employee benefits plans merely because it takes into account what health benefits employers offer in “calculating the cash wage that must be paid.” *See WSB Elec., Inc. v. Curry*, 88 F.3d 788, 793–94 (9th Cir.1996). Second, the LWO's provision for collecting reports on employee compensation from employers does not create a “connection with” employee benefits plans because the provision imposes no obligations on plans themselves. *See id.* at 794–96. Third, the LWO does not give rise to a “connection with” benefits plans merely by creating economic incentives to offer certain kinds of benefits, again because it imposes no affirmative obligation with respect to those plans. *See id.* at 795–96.⁴

III

*2 The district court correctly granted summary judgment for the City on Calop's claim that the Airline Deregulation Act preempts the LWO. Because Calop has produced no evidence that the LWO affects any airline's “price, route, or service,” *see* 49 U.S.C. § 41713(b)(1); *Air Transp. Ass'n v. City & Cnty. of S.F.*, 266 F.3d 1064, 1072 (9th Cir.2001), Calop has not demonstrated that the LWO “acutely interfer[es] with the forces of competition” in the airline industry, *see Californians*

for Safe & Competitive Dump Truck Transp. v. Mendonca, 152 F.3d 1184, 1189 (9th Cir.1998).

IV

Finally, the district court correctly granted summary judgment for the City on Calop's claim that the LWO is preempted by the Railway Labor Act. The Act does not preempt state and local laws that, like the LWO, impose minimum substantive requirements while permitting employers and unions to bargain around them. *See Firestone v. S. Cal. Gas. Co.*, 219 F.3d 1063, 1067–68 (9th Cir.2000).⁵

#

Calop's claim that the LWO is unconstitutionally vague, and its ERISA preemption claim to the extent it attacks section 10.37.3(a) of the Los Angeles Administrative Code, are **DISMISSED** for lack of jurisdiction. In all other respects, the judgment of the district court is **AFFIRMED**.

All Citations

--- Fed.Appx. ----, 2015 WL 3463340

Footnotes

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36–3.

1 29 U.S.C. §§ 1001–1461.

2 Pub.L. 95–504, 92 Stat. 1705 (1978) (codified as amended in scattered sections of 49 U.S.C.).

3 45 U.S.C. §§ 151–188.

4 Calop argues that ERISA preempts a provision of the LWO that prohibits employees from waiving their employers' health coverage under certain circumstances. *See* L.A. Admin. Code § 10.37.3(a). Calop lacks standing to challenge this provision because it has not shown that it offers a benefits plan, and therefore cannot show that the provision caused it any concrete injury. *See Lujan*, 504 U.S. at 560. To the extent that Calop argues that ERISA preempts the LWO's no-waiver provision, we dismiss the claim for lack of jurisdiction.

5 *Firestone* held that a state labor regulation that permitted employers and unions to opt out was not preempted by either the Labor Management Relations Act or the National Labor Relations Act. *See* 219 F.3d at 1067–68. Opinions addressing preemption by these statutes also bear on preemption by the Railway Labor Act. *See Air Transp.*, 266 F.3d at 1075–76.

OFFICE RECEPTIONIST, CLERK

To: Jennifer Schnarr
Cc: Dmitri Iglitzin; Jennifer Robbins; harrykorrell@dwt.com; RebeccaMeissner@dwt.com; taylorball@dwt.com; herman.wacker@alaskaair.com; cecilia@cordovalawfirm.com; wtanaka@omwlaw.com; mmbartolo@ci.seatac.wa.us; mjohansen@ci.seatac.wa.us; timl@calfoharrigan.com; shanec@calfoharrigan.com; fchmelik@chmelik.com; choward@schwabe.com; pmcvey@riddellwilliams.com; jbreitenbucher@riddellwilliams.com; rguite@sheppardmullin.com; rgoldberg@sheppardmullin.com; dhall@fordharrison.com; tim.oconnell@stoel.com; kris.tefft@wsiassn.org
Subject: RE: BF Foods, et al. v. City of SeaTac, et al. (No. 89723-9)

Received 7/8/2015.

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Jennifer Schnarr [mailto:schnarr@workerlaw.com]
Sent: Wednesday, July 08, 2015 2:32 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Dmitri Iglitzin; Jennifer Robbins; harrykorrell@dwt.com; RebeccaMeissner@dwt.com; taylorball@dwt.com; herman.wacker@alaskaair.com; cecilia@cordovalawfirm.com; wtanaka@omwlaw.com; mmbartolo@ci.seatac.wa.us; mjohansen@ci.seatac.wa.us; timl@calfoharrigan.com; shanec@calfoharrigan.com; fchmelik@chmelik.com; choward@schwabe.com; pmcvey@riddellwilliams.com; jbreitenbucher@riddellwilliams.com; rguite@sheppardmullin.com; rgoldberg@sheppardmullin.com; dhall@fordharrison.com; tim.oconnell@stoel.com; kris.tefft@wsiassn.org
Subject: BF Foods, et al. v. City of SeaTac, et al. (No. 89723-9)

Dear Supreme Court Clerk –

Please find attached for filing in the above-referenced matter, Appellant/Cross-Respondent SeaTac Committee for Good Jobs' Fifth Statement of Supplemental Authority. Should you have any trouble opening or viewing the attachment, please notify me immediately. Thank you.

Sincerely,

Jennifer L. Schnarr

**Jennifer L. Schnarr | Paralegal | Schwerin Campbell Barnard Iglitzin & Lavitt LLP | 206.257.6018 |
www.workerlaw.com | schnarr@workerlaw.com**

This communication is intended for a specific recipient and may be protected by the attorney-client and work-product privilege.

If you receive this message in error, please permanently delete it and notify the sender.