

Employment Law Seminars

2007-2008

Spring 2008 Employment Law Update

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Pacific Northwest Labor and
Employment Law Departments

Bellevue, Washington
10885 NE 4th Street, Suite 700
Bellevue, WA 98004-5579
Phone: 425.635.1400

Portland, Oregon
1120 NW Couch Street, Tenth Floor
Portland, OR 97209-4128
Phone: 503.727.2000

Seattle, Washington
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000

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Seattle, Washington

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Our Presenters

Paul E. Smith, a partner in the firm's Labor & Employment practice, focuses on employment litigation defense, education law, public and private sector employment and labor relations, non-compete agreements, and other employee agreements. He has served as lead attorney in a number of trials in employment cases. His clients include Boeing, Snohomish School District, Genie Industries and Leisure Care.

Chelsea Dwyer Petersen focuses her practice on labor and employment law, including defense of class action claims, defense of discrimination, harassment and wrongful discharge claims, advising employers on personnel policies and employee handbooks. She regularly responds to EEOC and other agency charges of discrimination, and has investigated and assisted in the resolution of complex harassment and discrimination claims.

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I. LEGISLATIVE AND REGULATORY DEVELOPMENTS

A. FEDERAL DEVELOPMENTS

1. FMLA AMENDED TO ADD TWO NEW TYPES OF LEAVE FOR EMPLOYEES WITH FAMILY IN THE MILITARY

On January 28, 2008, President Bush signed into law an amendment to the Family and Medical Leave Act ("FMLA"). The amendment creates two new types of leave under the FMLA.

The first new type of leave is called Servicemember Family Leave and is available to employees who are related to injured members of the armed forces. This new type of leave differs from any of the existing types of FMLA leave in several respects:

Employees are eligible for Servicemember Family Leave when their qualified family member in the armed forces is undergoing medical treatment, recuperation or therapy, or is otherwise in outpatient status, for an illness or injury sustained in the line of duty that renders the family member medically unfit for duty. Although this definition is similar to the concept of "serious health condition" used in other parts of the FMLA, it is not entirely the same.

Servicemember Family Leave is available if the employee is the spouse, son, daughter, parent *or next of kin* of the ill or injured member of the armed forces. The term "next of kin" is new to the FMLA and is defined under the amended statute as meaning the nearest blood relative to the employee.

Servicemember Family Leave may last for up to 26 *weeks* during a single 12-month period, not the 12 weeks of leave available under other parts of the FMLA.

The existing 12-week limit on other types of FMLA leaves remains in place, and the combined total of all types of FMLA leaves, including Servicemember Family Leave, cannot exceed 26 weeks in a single year. Employers may require that an employee seeking to use Servicemember Family Leave provide a medical certification from the servicemember's health care provider. The amendments to the FMLA adding Servicemember Family Leave went into effect immediately.

The second new type of leave is for employees who need time off from work because of a "qualifying exigency" arising out of the fact that the employee's spouse, son, daughter, or parent is on active duty in the armed forces or has been notified of an impending call to active duty. Military Exigency Family Leave is subject to the same 12-week limit as other types of leave currently available under the FMLA. The statute does not define the term "qualifying exigency," but instead directs the U.S. Department of Labor ("DOL") to define the term in regulations. The statute also leaves it to the DOL to determine through its regulatory authority the time and manner of notification that an employee must give to use Military Exigency Family Leave.

Because there are no new FMLA regulations at this time, the parameters of Military Exigency Family Leave are not entirely clear. However, it appears to be intended to cover nonmedical situations of an urgent nature that may arise when an employee has a close family member in the military. The DOL has stated that the amendments to the FMLA concerning Military Exigency Family Leave are not effective until the DOL issues final regulations defining "qualifying exigency," that it is working "expeditiously" to prepare such regulations and that, in

the interim, the DOL encourages employers "to provide this type of leave to qualifying employees."

Both of these new types of FMLA leave may be taken intermittently or on a reduced-schedule basis. In other respects, they operate like existing types of FMLA leave. General FMLA requirements, such as the employee having been employed for at least 12 months, having worked at least 1,250 hours with his or her employer during the prior 12 months and being located at a worksite where at least 50 employees are employed within a 75-mile radius, all apply to these two new types of leave.

The FMLA requires that its provisions be incorporated into an employer's leave policies. Employers are advised to update their leave policies as soon as possible to incorporate the provisions of the new Servicemember Family Leave. Revisions to leave policies to reflect the new Military Exigency Family Leave should await further guidance from the DOL.

2. DOL PROPOSES OVERHAUL OF FMLA RULES

The DOL has recently issued a comprehensive set of proposed new regulations under the FMLA. This is the first comprehensive update to the FMLA rules since they were first issued in 1995 following passage of the FMLA in 1993. The DOL accepted public comment on the proposed rules until April 11, 2008, and plans to issue *final* new rules by the end of the year.

The DOL's proposal would replace all the existing FMLA rules with a new set of rules with new titles, revised wording and somewhat different numbering. Many of the proposed changes involve fairly subtle refinements to or clarifications of the existing FMLA rules. However, several of the proposed changes could have significant operational impact on employers and have already attracted comments, both positive and negative, from members of Congress. Some of the more notable changes proposed by the DOL are:

- Currently, one scenario that qualifies as a "serious health condition" under the FMLA is a period of incapacity for more than three days, combined with receiving treatment from a health care provider on two or more occasions. Courts have had differing interpretations of *when* the two or more treatments must occur. The proposed rules would require that the two or more treatments occur *within 30 days* of the start of the period of incapacity, unless extenuating circumstances exist.
- Currently, another scenario that qualifies as a "serious health condition" is a chronic health condition that requires "periodic visits" to a health care provider. The proposed rules would require that the employee visit a health care provider *at least two times per year* in connection with the chronic condition.
- The existing rules allow an employee taking FMLA leave for an unforeseen reason to give notice to the employer up to two days *after* the leave starts. In the case of leave used on an intermittent basis for partial-day or single-day absences, this means that the employee can take such leave on an unscheduled basis without notifying the employer that the absence is an FMLA leave until after he or she returns to work. Under the proposed rules, employers could require employees taking unscheduled intermittent leave to follow generally applicable reporting requirements for absences, such as requiring notice of the need for

leave *at least prior* to the start of the work shift in all but the most extraordinary circumstances.

- The existing rules provide that only a health care provider working for the employer (not a member of management or human resources) may contact the employee's health care provider to authenticate or obtain clarification of a medical certification. The proposed rules would allow *any* representative of the employer to make such contact and would require the employee to give permission to his or her health care provider to talk directly to the employer.
- The existing rules bar an employer from requiring a fitness-for-duty exam for employees taking intermittent leave. The proposed rules would allow an employer *to require a fitness-for-duty exam* for an employee taking intermittent leave where reasonable safety concerns exist regarding the employee's ability to perform his or her job duties based on the employee's serious health condition.

It is important to keep in mind that the revisions proposed by the DOL are just that, mere proposals, and that the 1995 rules remain in effect for now. The final rules that will emerge at the end of the year may be significantly different from these proposals. However, employers may want to consider how these proposed rules, along with the new FMLA leaves created for employees with family members in the military, will impact their employee leave practices and begin planning for changes.

3. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION—FINAL RULE ISSUED ON RETIREE BENEFITS

The Equal Employment Opportunity Commission ("EEOC") has issued a final rule under the Age Discrimination in Employment Act ("ADEA") that allows employers to coordinate retiree health benefits with Medicare eligibility.

In 2000, the Third Circuit issued its controversial decision in *Erie County Retirees Ass'n v. County of Erie, Pennsylvania*, 220 F.3d 193 (3d Cir. 2000). In the case, a group of retirees challenged the county's retiree medical plan for alleged ADEA violations. The county, like many other employers at the time, provided fewer and less-desirable health plan options for retirees who were eligible for Medicare than for those who were not.

Because Medicare eligibility is attained when a person turns 65, discontinuing or reducing health benefits offered to Medicare-eligible retirees results in older retirees receiving less-favorable benefits than younger ones. In the *Erie* case, the court said that was discriminatory under the ADEA.

The EEOC's final rule comes after an appeals court decided it was within the commission's authority to issue regulations allowing employers to reduce the health benefits they offer to retirees once they become eligible for Medicare. The court recognized that such an approach was necessary to prevent the erosion and eventual extinction of retiree health benefits in this country.

The new rule allows employers that provide retiree health benefits to continue the practice of coordinating those benefits with Medicare, regardless of whether Medicare-eligible retirees receive benefits that are equal to those provided to younger retirees.

As always, you are under no legal obligation to provide retiree health benefits. But if you do provide such benefits, you have several options. Here are the most common:

- offer all retirees the same health benefits regardless of age or Medicare eligibility;
- provide "bridge" coverage to retirees until they are old enough to qualify for Medicare and then discontinue their coverage;
- provide Medicare-eligible retirees coverage that supplements their Medicare benefits; or
- provide bridge coverage plus supplemental coverage.

The new rule is being challenged in court, but for now, the EEOC's final rule is in effect, and you may rely on it in implementing and administering retiree health benefits. It is available on the EEOC's Web site at www.eeoc.gov/policy/regs/index.html.

B. WASHINGTON STATE DEVELOPMENTS

The 2008 Washington Legislature has passed, and the governor has signed into law in the past few weeks, two new types of employee leaves that all Washington employers, regardless of size, will be required to provide. The two types of leave are Family Military Leave and Domestic Violence/Sexual Assault Leave. For both types of new leaves, the Washington Department of Labor and Industries is granted enforcement authority. Also, employees have the right to directly sue employers in court for violations of both new leave laws.

1. FAMILY MILITARY LEAVE

Washington's new Family Military Leave is similar to the leaves for family of members of the armed forces recently added to the federal FMLA. Under the new Washington law, an employee whose spouse is being called into active duty for the armed forces or who will be, or is, deployed during a period of military conflict, is entitled to up to 15 days of unpaid leave of absence from work. The employee may take the 15 days of leave before the deployment of the military spouse or when the military spouse is on a leave from the deployment. For each new deployment of the military spouse, the employee may take another Family Military Leave of up to 15 days.

The employee must give notice to his or her employer of the intent to take Family Military Leave within five business days of receiving official notice of the call or order to active duty or deployment, or within five business days of official notice of the military spouse's upcoming leave from the deployment. To be eligible, the employee must work an average of at least 20 hours per week for the employer. Family Military Leave is only available during a period when Congress has declared war, the President has declared war by executive order, or when military reserves have been called to active duty. The Family Military Leave law goes into effect June 11, 2008.

Of note to public employers, this same law also extended the length of paid leave available to public employees who serve in the Washington National Guard, the armed forces reserves or the armed forces. These public employees are now entitled to 21 days (increased from 15 days) of paid leave each year, which must be in addition to any vacation or sick leave available to the employee, for military training or other active duty.

2. DOMESTIC VIOLENCE/SEXUAL ASSAULT LEAVE

The second new type of leave is Domestic Violence/Sexual Assault Leave. The law creating this leave was signed by the governor on April 1, 2008, and takes effect immediately. This leave is available to employees who are victims of domestic violence, sexual assault or stalking. It is also available to employees with a family member (child, spouse, parent, parent-in-law, grandparent or person with whom the employee has a dating relationship) who is a victim of domestic violence, sexual assault or stalking. The leave may be taken in blocks or intermittently, and the amount of leave that an employee may make take is restricted to a "reasonable" amount, but is not specifically limited as to time or length under the law.

Domestic Violence/Sexual Assault Leave may be taken for the following purposes:

- To seek law enforcement or legal assistance or to prepare for or participate in any legal proceeding related to domestic violence, sexual assault or stalking;
- To seek health care treatment for physical or mental injuries from domestic violence, sexual assault or stalking or to attend to such health care treatment for a family member;
- To obtain (or assist a family member in obtaining) services from a domestic violence shelter, rape crisis center or other social services;
- To obtain (or assist a family member in obtaining) mental health counseling related to domestic violence, sexual assault or stalking; or
- To participate in safety planning, to temporarily or permanently relocate, or to take other actions to increase the safety of the employee or family member relating to domestic violence, sexual assault or stalking.

Employees must give notice to their employers of the need for this leave no later than the end of the first day the employee takes the leave. Employers may require verification to support the need for the leave, which can take the form of police reports, court documents or the employee's own written statement of the need for the leave.

Existing leave policies and practices may not provide for these new types of leave. Employers are advised to update their leave of absence policies as they apply to Washington-based employees to incorporate the provisions of the new Family Military Leave and Domestic Violence/Sexual Assault Leave laws.

3. CHANGES TO WASHINGTON EMPLOYEE RIGHTS POSTER

The Washington Employee Rights poster has been updated with information regarding pregnancy disability leave under Washington's Family Leave Act. An additional Web site and toll-free number were also added to the poster. State law requires all Washington employers to post these changes.

Copies of the new poster (Publication F700-074-909) may be obtained from the Washington State Department of Labor and Industries.

C. IMMIGRATION DEVELOPMENTS

1. ENFORCEMENT OF LEGAL ARIZONA WORKERS ACT BEGINS

Shortly after Arizona's employer sanctions law—known as the Legal Arizona Workers Act or the Fair and Legal Employment Act ("Act")—was passed in July 2007, several lawsuits were filed raising a variety of challenges to the law under both the U.S. and Arizona constitutions.

On February 7, 2008, the trial court in Arizona issued a lengthy order upholding the Act against a variety of constitutional challenges. The business and civil rights groups seeking to have the law declared invalid immediately filed appeals with the Ninth Circuit Court of Appeals and also asked that court to issue an emergency injunction preventing the Act from being enforced while the appeals were pending. On February 28, the Ninth Circuit denied the request for an injunction.

Although the Ninth Circuit will consider the appeals on an expedited basis, briefing will not be completed until at least mid-May, and oral argument will not occur until sometime this summer. In the meantime, the Ninth Circuit's denial of an injunction means that the county attorneys in Arizona may now begin enforcing the Act.

Under these circumstances, to comply with the Act, employers who anticipate hiring new employees in Arizona in the coming months, but who have not yet enrolled in E-verify, should do so. Registration is available on the E-verify Web site. In addition, Arizona employers should also strongly consider auditing their Form I-9s to ensure that the forms have been completed and retained properly.

The Act requires that as of January 1, 2008, every Arizona employer is required to use the federal government's E-Verify Program (referred to in the statute by its former name, the Basic Pilot Program) to verify the employment eligibility of all newly hired employees. E-Verify cannot be used to check the employment eligibility of employees hired before the employer's registration date, nor may it be used to prescreen applicants or re-verify employees who already have temporary work authorization.

Participation in E-Verify requires online registration, where the employer must accept an electronic Memorandum of Understanding ("MOU") that sets forth the responsibilities of the federal government and the employer. Although only one person needs to accept the MOU on behalf of an employer, each person who will use E-Verify to perform employment verification inquiries must complete a Web-based tutorial. Employers using E-Verify must also post two notices that will be supplied by the Department of Homeland Security following registration. More information about E-Verify, including how to register, can be found at the Web site for the Department of Homeland Security.

2. U.S. CITIZENSHIP AND IMMIGRATION SERVICES UNVEILS NEW FORM I-9

On November 26, 2007, U.S. Citizenship and Immigration Services announced in the Federal Register that as of December 26, 2007, employers must use the new version of the Form I-9 when verifying the employment eligibility of new hires. The amended form must also be used for any re-verification of employment authorization conducted after December 26, 2007. The amended Form I-9 has a revision date of June 5, 2007, and is available online at

www.uscis.gov. A newly revised "Handbook for Employers: Instructions for Completing the Form I-9" (Form M-274) is also available online at www.uscis.gov.

The main difference with the form is that five documents have been removed from List A of the List of Acceptable Documents. Additionally, the instructions now indicate that the employee is not obligated to provide the Social Security Number in Section 1 of the Form I-9, unless he or she is employed by an employer who participates in E-Verify.

3. DOL PROPOSES RULES TO ALLOW MORE IMMIGRANT FARM WORKERS

The DOL has proposed new rules that would expand the number of foreign farm workers allowed in U.S. fields through the H-2A program.

A shortage of temporary and seasonal farm workers that has forced some farmers to plow under crops is being blamed on the recent crackdown against illegal immigrants. "This issue must be addressed now or our country will see eroding competitiveness in its agricultural sector, crops being left to rot in the fields, and increasing shifting of domestic food production to overseas," Labor Secretary Elaine L. Chao said in announcing the proposed rules. "These proposed changes to the H-2A program will provide farmers with an orderly and timely flow of legal workers and increase protections for both U.S. and foreign workers." The proposed rule is available at www.doleta.gov.

4. FEDERAL "NO-MATCH" REGULATIONS

In August 2007, the Department of Homeland Security ("DHS") issued a final rule, "Safe-Harbor Procedures for Employers Who Receive a No-Match Letter," that required action by employers when they receive a "no match" letter from the DHS or the Social Security Administration. Although the regulation was to become effective on September 14, 2007, a federal district court in California enjoined the federal government from sending, until further notice, no-match letters that include the DHS's guidance threatening criminal and civil sanctions if employers fail to follow the regulation's safe-harbor procedures. *Am. Fed. of Labor v. Chertoff*, 2007 WL 2972952 (N.D. Cal. Oct. 10, 2007). The court subsequently stayed further proceedings in the litigation to allow for further rulemaking by the DHS. On December 4, 2007, the government appealed the trial court rulings to the Ninth Circuit Court of Appeals.

On March 26, 2008, in an effort to address the issues raised by the court in its preliminary injunction order, the DHS revised the August 2007 final rule. The DHS's "Supplemental Proposed Rulemaking for the No-Match Rule" was open for public comment until April 25, 2008. The supplemental rulemaking does not alter any of the steps or time frames, called safe harbor procedures, employers can take in response to receiving a no-match letter, but instead: (1) clarifies the DHS's policy on no-match letters; (2) alters the regulation's antidiscrimination language; and (3) provides an initial regulatory flexibility analysis.

II. CASE LAW DEVELOPMENTS

A. SEX DISCRIMINATION

1. CLAIMS REINSTATED FOR FEMALE ELECTRICIAN WHO WORKED IN “A MAN’S WORLD”

In *Davis v. Team Electric Co.*, 2008 WL 819885 (9th Cir. Mar. 28, 2008), the Ninth Circuit reinstated the discrimination and retaliation claims of a female electrician who alleged that her male coworkers isolated her and made sexist remarks.

Christie Davis is a journeyman electrician who was hired by Team Electric Co. in May 2000. Her initial assignment was on the construction of Clackamas County (Oregon) High School. She was the only female electrician at the site when she started.

After a few months on the job, Davis complained to project foreman Lyle Loughary that she was experiencing neck pain because of an extended assignment on ceiling work. Loughary said that he would transfer Davis to the electrical room to work with a male employee who “need[ed] a girlfriend.” Loughary also supposedly made repeated references to his wife as “astrobitch.”

Davis began to keep a journal in which she recounted daily work events and her reactions. She alleged that she felt “left out” of meetings, that when donuts were brought to the worksite a male coworker told her that “the donuts are for the guys,” that she did not initially receive a radio to communicate with others on the worksite and that she was given work gloves and vest that were of a lower quality than those provided to male coworkers. She also alleged that when she voiced concerns over child-care, her supervisor allegedly said, “[T]his is a man's working world out here, you know.”

Davis repeatedly complained about her work assignments and alleged that a disproportionate number of her tasks entailed working with Monokote, a hazardous material. When she commented to a supervisor about the assignments, he allegedly replied that “[w]e don’t mind if females are working as long as they don’t complain.”

After Davis had worked at the site for about nine months, she claimed that she was repeatedly reprimanded by Loughary for trying to enter Team’s construction trailer at the worksite and told not to bother their supervisor with her work issues. When another foreman told Davis that he “felt uncomfortable” around her, she responded that she felt uncomfortable around people who made her feel “not welcome (like I shouldn’t be there),” but that she was “getting over it.”

From Team's perspective, electricians were assigned to many jobs at the worksite that were more hazardous and strenuous than those given to Davis and men were assigned to work side by side with Davis on her tasks, such as those involving use of Monokote. According to Team, Davis was given work assignments based on her knowledge and experience and men received assignments that were equally or more arduous. And, like other workers, Davis was included in meetings and communications on an as-needed basis.

Davis continued to complain to Team's management. She claimed that the site superintendent told her that if she did not like the work she should “get out of the trade.” Shortly

thereafter, Davis filed a complaint with the Oregon Bureau of Labor and Industries ("BOLI") and the EEOC. BOLI dismissed the complaint based on lack of evidence.

After filing her administrative complaints, Davis continued to voice various additional concerns. She noted that a male coworker had made the comment, "Lips and assholes, that's all women are good for," and that coworkers had attempted to give her a "sexual call name." She recorded in her log that she was in physical pain from a prolonged assignment on piping work, while male electricians were given more varied tasks.

Team undertook a number of efforts to assist Davis such as accommodating her child-care needs through shift and site assignments, responding to her complaints, and transferring two other female electricians to her worksite to reduce her feeling of isolation.

Within a few months, Team's workload slowed and its electricians were subject to layoffs. Three days after the EEOC dismissed her complaint, Davis was laid off in the second round of three reductions in force. She filed another BOLI complaint, alleging retaliation, and also filed a lawsuit in federal court.

At the trial court level, the magistrate judge assumed that the elements of Davis's disparate treatment claim was met, and focused on the employer's proffered legitimate nondiscriminatory reasons for its actions.

The trial court found that Davis had failed to raise sufficient evidence to go to trial on her claims and dismissed her case. Davis appealed.

The Ninth Circuit reversed the dismissal of all Davis's claims.

With regard to her disparate treatment claim, the court held that Davis had met the initial requirements: (1) she belonged to a protected class; (2) she was qualified for her position; (3) she was subject to an adverse employment action; and (4) similarly situated individuals outside her protected class were treated more favorably. In order to survive summary judgment, however, Davis was required to show that Team's explanation that work was assigned based on who was available and who needed the least amount of training was pretextual.

The court noted that Davis had presented a variety of anecdotal evidence, including the comment by a foreman that he "felt uncomfortable" around Davis, discussions of her child-care needs, a comment that "this is a man's working world," Loughary's assignment of Davis to work with a male electrician who "need[ed] a girlfriend," the comment that donuts were for "the guys," and the observation that women would be tolerated at the worksite if they "don't complain." Significantly, the court also noted that the absence of female supervisors was circumstantial evidence of pretext.

On Davis's claim of a hostile environment, the court acknowledged that she could not prevail if her evidence showed simple teasing, offhand comments and isolated incidents of offensive conduct. But the Ninth Circuit found that the judge who granted summary judgment to Team did not give proper weight to some significant facts because the judge improperly said they were "tainted with paranoia." The Ninth Circuit held that although the incidents Davis described as creating a hostile work environment fell short of "physical abuse or aggressive sexual advances," they repeatedly occurred over her employment and that "we believe that a reasonable woman could have a reaction similar to Davis's."

Moreover, given the timing of Davis's layoff relative to the dismissal of her administrative discrimination charges, the court also concluded that her retaliation claim should go to trial. While a number of male employees had also been affected by the layoff, the court said that if liability could be avoided simply by laying off other employees, an employer might cover up a retaliatory motive by including a complainant in with a group of other employees targeted for layoff.

2. ANECDOTAL EVIDENCE IS ENOUGH TO SUPPORT DISCRIMINATION JUDGMENT IN DUTY OF FAIR REPRESENTATION CASE

In *Beck v. United Food & Commercial Workers Union, Local 99*, 506 F.3d 874 (9th Cir. Nov. 2007), scant anecdotal evidence of different treatment was enough for the Ninth Circuit to support a discrimination judgment—even without any evidence of actual animus.

Cheryl Beck was employed as a scanning coordinator by Fry's Food Stores in Arizona. Her job was in a bargaining unit represented by Local 99 of the United Food and Commercial Workers Union. The collective bargaining agreement between Fry's and the union prohibited employees from using "profane, abusive or threatening language" toward coworkers.

On April 13, 2001, Beck was in a Fry's parking lot talking with Bob Evans, a coworker and former boyfriend. He recently had been promoted, and she implied that it was due to favoritism rather than merit. The conversation became heated, and Evans later complained to Fry's management that Beck had used profanity. Upon receiving the complaint, the company suspended her pending further investigation.

Fry's reportedly told Barbara Cleckner, a union field representative, that it planned to fire Beck because of her "history of a foul mouth" even though she had not previously been disciplined for profanity. Beck provided Cleckner with her version of the conversation with Evans and denied using profanity. She also pointed out that she should not be subject to discipline because the exchange took place when she was off-duty. In the end, Fry's did not discharge Beck but instead issued a "Final Written Warning" letting her know that any further use of profanity would result in her termination.

Beck was concerned about the warning and asked the union to file a grievance on her behalf. Cleckner promised—but failed—to do so. Three months later, Beck was involved in an argument over a pay error with Cecil Carr, the store secretary at Fry's. Carr told management that Beck used profanity during the argument. Despite Beck's denial, Fry's credited Carr's version of the incident and fired Beck.

The union filed a grievance over the discharge. In response, Fry's provided the union with its investigative notes and records in support of its action. After reviewing the materials, the union contacted its attorney to get advice on whether it was obliged to press Beck's claim to arbitration. The lawyer said that while an arbitrator probably would view a single incident of profanity as insufficient to justify discharge, the result would be different if—as in Beck's case—the discharge followed a written warning and a second incident involving profanity. Based on that advice, the union decided it would not pursue Beck's discharge in arbitration and let her grievance drop.

Beck was unhappy about her discharge and the union's failure to challenge it through arbitration. She filed a lawsuit against the union asserting two claims. First, she said the union had failed in its duty under federal labor law to fairly represent her interests. In addition, she

claimed that it did not pursue her case because of sex discrimination in violation of Title VII. She supported her Title VII claim with evidence that the union had aggressively challenged Fry's discipline of two of her male coworkers but had not done so for her or another female employee.

At trial, the federal judge hearing the case agreed with Beck. He ruled against the union, assessing nearly \$200,000 in damages. The union appealed the judgment.

On appeal, the Ninth Circuit first reviewed the union's alleged breach of its duty of fair representation. That duty does not require a union to exercise perfect judgment in deciding whether to pursue a member's grievance. But a union must "serve the interests of all members without hostility or discrimination toward any, . . . exercise its discretion with complete good faith and honesty, and . . . avoid arbitrary conduct."

Applying the standard to Beck's case, the court concluded that Cleckner's failure to file a grievance over the final written warning—despite Beck's request and Cleckner's promise to do so—violated the union's duty to the employee. The union's attorney had said that a discharge for use of profanity would likely be upheld if it came after a written warning followed by a repeat incident. Had Cleckner filed a grievance over the written warning and the warning been rescinded, there would have been a far stronger chance that Beck's discharge could have been successfully challenged in arbitration. Since the union had failed to take that first step, events were set in motion for a discharge that would then be difficult, if not impossible, to overturn. Cleckner's omission established the union's failure to properly represent Beck's interests.

The court also concluded that Beck's evidence of the union's differing efforts in pursuing grievances of male and female employees was sufficient to support the sex discrimination judgment in her favor. The trial judge had been unable to attribute the disparity in the union's approach to any motive other than discrimination. The union argued that Beck's evidence about the experience of just three other employees besides herself was too small to support a finding of discrimination. The court disagreed, finding that anecdotal comparisons were sufficient. The judgment against the union was affirmed.

3. FAILURE TO HIRE PREGNANT APPLICANT WITH MEDICAL RESTRICTIONS VIEWED AS SEX DISCRIMINATION, NOT FAILURE TO ACCOMMODATE

In *Hegwine v. Longview Fibre Co.*, 162 Wn. 2d 340 (2007), the Washington Supreme Court held that the failure to hire claim of a pregnant applicant with medical restrictions was for gender discrimination, not failure to accommodate.

Stacy Hegwine applied for a job as a customer service clerk/order checker at Longview Fibre Company. The newspaper advertisement for the job did not mention any lifting requirements, and no description existed at the time the job was advertised. When Hegwine was interviewed, however, she was told that the job required the ability to lift up to 25 pounds.

Hegwine was offered the job contingent on her successful completion of a physical examination. In response to a medical questionnaire (part of the exam), she revealed that she was pregnant. Fibre's corporate medical director, Dr. James Ostrander, informed her that she would need medical clearance from her personal physician, Dr. Daniel Herron, before she could begin work.

On March 1, 2001, Hegwine attended an orientation session with Carlene Cox of Fibre's HR department. When Cox learned that Hegwine was pregnant, she contacted Ostrander

about Hegwine's physical exam. Ostrander reported that Herron had not cleared her to work. Cox sent Hegwine home pending receipt of the information from her doctor.

The medical clearance form that Herron completed stated that Hegwine could lift up to 20 pounds overhead—and up to 30 pounds to waist level—for up to two hours per day. The doctor testified at trial that those were conservative estimates. He did not know the job's lifting requirements at the time.

Hegwine called Herron and told him that the job required the ability to lift 25 pounds. She asked him to clear her to lift heavier weights. When the doctor asked for more information, Hegwine contacted Ostrander's office. She was told that the lifting requirement was 40 pounds, which she reported to Herron. He cleared her to lift up to 40 pounds for up to two hours daily. He testified that if he had known the job required lifting even heavier weights, he might have cleared her to do so, depending on the nature and frequency of the lifting. But no one—including Fibre—knew the actual lifting requirements at that point.

Fibre asked its equal employment opportunity coordinator to analyze the essential job functions of the order checker position. She concluded that "an order checker must be able to lift boxes weighing up to 60 pounds, carry them 15 to 30 feet and down three or four steps, load them onto the back of a small Daihatsu truck, drive them to another building, unload them onto a hand truck, and pull them to another location." *Hegwine v. Longview Fibre Co.*, 132 Wn. App. 546 (2006).

Based on Hegwine's clearance to lift only 40 pounds, Fibre rescinded its conditional job offer. On March 16, Cox told Hegwine that the job offer was withdrawn because Hegwine's "availability" prevented her from performing the job.

Employer Wins at Trial

Hegwine sued, alleging that she was discharged because of her gender and pregnancy in violation of the Washington Law Against Discrimination ("WLAD"). She argued that because she alleged pregnancy discrimination, the question of whether Fibre could have reasonably accommodated her lifting restrictions was irrelevant. For its part, the company "insisted that the issue of accommodation was essential to protect employers from having to hire temporarily disabled persons and then immediately put them on leave."

The trial court analyzed Hegwine's claim as a reasonable accommodation issue. In a nonjury trial, the court concluded that (1) lifting 60 pounds was an essential job function that Hegwine could not perform, and (2) the company could not have accommodated her lifting restrictions. The court ruled in Fibre's favor.

Appeals Court Reverses

The court of appeals reversed the lower court's decision, finding that Fibre was liable for pregnancy discrimination, and ordered a new trial solely on the issue of damages.

Washington law provides that a failure to hire because of "pregnancy" is a form of gender discrimination. The regulations define "pregnancy" to include "pregnancy-related conditions," which, in turn, is defined to include related "medical conditions." Hegwine's lifting restriction resulted solely from her pregnancy, and she had never asked for an accommodation.

Thus, the court held that her claim was for gender discrimination, *not* failure to accommodate a disability.

With reasonable accommodations no longer an issue, the critical question in Hegwine's case was reduced to whether Fibre had rescinded her job offer because of her pregnancy. The court found that the company had done so. The court also held that the medical questionnaire violated a separate regulation that prohibits prehire questions about "pregnancy, and medical history concerning pregnancy and related matters."

Washington Supreme Court Agrees

The Washington Supreme Court emphatically upheld the court of appeals.

First, the supreme court made it clear that pregnancy discrimination claims should be viewed as "matters of sex discrimination and are not subject to an accommodation analysis like that utilized in the disability context." Of course, the court noted, a pregnant employee may *also* be entitled to an accommodation. The court noted that "[s]hould an employer hire a pregnant employee, [she] is to receive the same treatment as any other employee with similar physical limitations."

Moreover, the court conceded, an employer need not hire a pregnant applicant who cannot perform the essential job functions, but only upon a strict showing that those functions are bona fide occupational qualifications or business necessities—difficult showings for an employer to make under the best of circumstances.

Second, the court affirmed the finding that Fibre made illegal preemployment inquiries by conditioning Hegwine's job offer on a medical exam that included a pregnancy inquiry.

The supreme court noted that the outcome might have been different, however, if:

- the employer had correctly determined—before advertising the job—that lifting 60 pounds was an essential function;
- with full information about the job's requirements, Hegwine's doctor would not medically clear her to lift 60 pounds when she applied for the job; and
- instead of using the euphemism "availability" when explaining to Hegwine why it had rescinded the job offer, the employer had made clear that the problem was her apparent inability to perform an essential job function.

4. COURT RECOGNIZES COMMON-LAW SEXUAL HARASSMENT CLAIM

The WLAD prohibits sexual harassment, but the WLAD only applies to employers of eight or more employees. A Washington court of appeals recently held that an employee of a smaller employer can sue for sexual harassment under a theory of wrongful discharge in violation of public policy. *Wahl v. Dash Point Family Dental Clinic, Inc.*, 2008 WL 1723935 (Wash. Ct. App. Apr. 15, 2008).

Candace Wahl was an employee of a small dental clinic. She claimed, and the trial court found, that the owner of the clinic had sexually harassed her. The harassment included graphic sexual comments, invitations to have sex, and, finally, an incident in which the owner

masturbated in a darkroom in which he was ostensibly teaching Wahl how to develop x-rays. Wahl quit, and sued for sexual harassment.

The employer argued that Wahl could not bring a claim for sexual harassment, pointing out that the WLAD only applies to employers with eight or more employees. The clinic had fewer than eight employees. The court rejected the employer's argument, holding that Wahl stated a common-law claim for wrongful discharge in violation of public policy.

The court of appeals observed that discriminatory discharge claims can be asserted against small employers under a public policy theory. A wrongful discharge claim can be asserted based either on the employer's affirmatively discharging an employee or on a "constructive discharge," which occurs when the employer deliberately makes the conditions of employment so intolerable that a reasonable person would feel forced to quit. The court found that Wahl established that she was constructively discharged.

Thus, the court held, the question was whether the discharge violated public policy. The Washington Supreme Court has held that sex discrimination violates a clear mandate of public policy. Sexual harassment is a form of sex discrimination. Thus, the court of appeals in Wahl's case held that the public policy against sex discrimination was jeopardized by the employer's conduct. The court held that the sexual harassment caused Wahl to quit. And the court held that the employer could not prove any justification for the owner's actions. Accordingly, the damages award in favor of the plaintiff was upheld.

This case makes clear that sexual harassment is illegal regardless of the size of the employer—at least where the harassment results in the employee's actual *or constructive* discharge.

Of interest to larger employers: Typically, in order to hold an employer liable for sexual harassment, the employee must notify the employer of the harassment (or the employer must, in some other way, be on notice of the harassment). In this case, the trial court held that "[w]hen the person you are to report a sexual harassment claim to is the harasser and there is no higher person, there is no requirement to complain." The employer challenged that conclusion of law, but the court of appeals implicitly rejected the challenge. In other words, sexual harassment from the highest levels of management may be even riskier than sexual harassment lower down in the organization.

B. RACE DISCRIMINATION

1. CLAIMANT CLEARS EEOC RIGHT-TO-SUE PROCEDURAL HURDLE, BUT LOSES ON THE MERITS

In Surrell v. California Water Service Co., 518 F.3d 1097 (9th Cir. Mar. 2008), the employer lost its procedural argument that the claimant had not obtained a proper right-to-sue notice from the EEOC, but it won on the issue of race discrimination. The claimant simply did not have evidence to undercut the employer's legitimate nondiscriminatory reasons for its actions.

Facts Leading to Claims

In 1997, Rosetta Surrell, an African-American woman, began working for California Water Service Co. as a customer service representative. Cal Water is a private company and

Surrell's job was in a bargaining unit represented by the Utility Workers Union of America, AFL-CIO.

Under the union agreement, most job openings at Cal Water were posted for bid and filled based on seniority. Temporary positions that would not last more than 120 days could be filled at management's discretion without regard to seniority. The agreement also permitted Cal Water to require employees to submit to drug testing if they appeared to be impaired.

In the spring of 2001, Surrell was in an automobile accident. Her injuries prevented her from lifting her hands above her head and from doing routine household tasks. She was prescribed Vicodin during this period. Cal Water granted her request for medical leave, first for a few months and then for the remainder of the year. Surrell was still on medical leave in early 2002 when she learned that her supervisor had announced her intention to retire from her position as Office Manager. The job was posted, and, after the top two candidates declined the position, Cal Water sought outside applicants. At this point, Surrell requested to be considered for the job.

Surrell returned to work in April 2002, while her application for the Office Manager job was still pending. Although she had been cleared to work without restriction, she was still taking numerous prescription drugs. Surrell requested but was denied cross-training for a Head Cashier position that was to be available for five days while the incumbent was on vacation. She subsequently learned that another employee—a younger Caucasian woman with less seniority—was being cross-trained instead. The union filed a grievance on Surrell's behalf, but did not press the matter to arbitration.

In July 2002, Cal Water hired Regina Coe, a younger Caucasian female, for the position of Office Manager. Coe was a trained accountant with a B.S. in Business Administration and five years of management and accounting experience.

Approximately one month later, Cal Water required Surrell to submit to drug testing. She was continuing to take prescription medication and had slurred speech at work. She tested positive for prescription medications as well as for cannabinoids, compounds that are present in marijuana. Under the union agreement, Surrell could choose either to be discharged or to enter a treatment program. She chose the latter. Following treatment, she returned to work in October 2002.

Tragically, not long after Surrell's return, her son was murdered. She took additional time off work, coming back again in January 2003. When coworkers asked about her son, she became upset and suffered a migraine headache. She took prescription medications, including Vicodin. Based on her apparently impaired state, Cal Water again required Surrell to submit to a drug test, and she again tested positive. At that point, she went out on a paid administrative leave for 10 months. During this period, she filed discrimination charges against Cal Water with the California Department of Fair Employment and Housing. The agency issued Surrell a right-to-sue letter and provided instructions on how she could obtain a federal right-to-sue letter from the EEOC.

In December 2003, Surrell informed Cal Water that she was unable to work due to her medical condition. Seven months later, she filed suit in California state court, claiming that Cal Water had discriminated against her based on race, sex and age in violation of both state and federal law. Cal Water moved the case to federal court and obtained a dismissal of all claims. Surrell appealed.

Failure to Obtain EEOC Right-to-Sue Letter Does Not Bar Claims

Cal Water argued that Surrell could not pursue her federal claims because she had never received a right-to-sue notice from the EEOC. Title VII requires that, before filing a lawsuit, claimants must file a timely discrimination charge with the EEOC and then obtain a right-to-sue letter. In many states, the EEOC has a work-sharing agreement with its state counterparts under which a charge filed with a state agency counts as a charge filed with the EEOC. The charge Surrell filed in the California agency satisfied one aspect of the required procedure.

The California agency had issued a state right-to-sue notice and had given Surrell information about how to obtain a federal notice from the EEOC. However, she never sought a federal notice from the EEOC. Cal Water argued that this failure blocked her right to pursue claims under Title VII.

The Ninth Circuit noted that failure to obtain a federal right-to-sue letter is not an absolute bar to a Title VII claim. Although there is a general requirement, most courts reviewing the issue have decided that once a claimant is *entitled* to receive a right-to-sue letter, it will not be fatal to a lawsuit if she does not actually obtain it. The Ninth Circuit concluded that this was a reasonable approach. Since Surrell *could* have received a federal right-to-sue letter from the EEOC, the right-to-sue notice from the state agency was sufficient to permit her claims to go forward.

Claim Dismissed on the Merits

Surrell faced a more daunting task on the merits of her claims. She asserted that Cal Water had discriminated against her by failing to promote and cross-train her, retaliated against her and subjected her to a hostile work environment.

Once Surrell presented the basic elements on her claims of discrimination, Cal Water presented the reasons for its actions. On the promotion issue, Cal Water presented evidence that Coe had skills, experience and education superior to those of Surrell. Although Surrell contended that she had strong qualifications because of her knowledge of the policies and job duties of the office, the court found that she clearly lacked management experience equal to that of Coe. The court also rejected Surrell's submission of unauthenticated notes purporting to present a statistical analysis of Cal Water's failure to promote minority candidates and her statement that she had never seen any black people promoted to office management positions. This was insufficient to overcome Cal Water's legitimate reasons for promoting Coe.

As to the cross-training issue, the court similarly concluded that Cal Water had a legitimate reason for denying Surrell the opportunity that was provided to another employee. The other employee had already performed a portion of the cashier position, and it made more sense to give her the limited additional training that would enable her to fill the Head Cashier job for the brief five-day period for which coverage was needed. Again, despite Surrell's urgings, the court found that she had not overcome Cal Water's stated reasons.

Surrell's retaliation claim was based on the fact that she had been subjected to drug testing *after* she had complained that the denial of cross-training was discriminatory. Cal Water's evidence showed that it had tested Surrell only as allowed under the union agreement, namely, that she appeared impaired at work. The court found that Surrell's evidence did not undermine the stated reason. In fact, Surrell admitted that she had taken prescription drugs and

appeared to be impaired on the job. Under the circumstances, her retaliation claim had also been properly dismissed.

Finally, the court considered the hostile work environment claim. Surrell contended that her supervisor had confronted her with occasional comments about her performance in front of a customer and a coworker. Even assuming that the comments had been made, Surrell had no evidence suggesting that they were motivated by her race rather than the supervisor's observations of her performance. In addition, under all the circumstances, the comments were not sufficiently severe or pervasive to establish a hostile environment.

Thus, although Surrell prevailed on the procedural question of the adequacy of her right-to-sue letter, she failed to present evidence to support the merits of her claims. The trial court's dismissal was affirmed in all respects.

2. ONE SERIOUS INCIDENT FOUND NOT TO MEET HOSTILE WORK ENVIRONMENT STANDARD

The single use of a racial epithet in a verbal attack was held not to meet the legal standard for a hostile environment in *Johnson v. Riverside Healthcare System, LP*, 516 F.3d 759 (9th Cir. Feb. 2008).

Christopher Lynn Johnson is a physician who worked as a member of the medical staff at Riverside Community Hospital in California from 1999 to early 2002. He is African-American and bisexual, and he thought others at the hospital mistakenly believed he suffered from HIV/AIDS. Johnson claimed that he was harassed by other physicians, nurses and staff members. He said that some nurses refused to participate in surgeries with him.

Specifically, Johnson said he discovered that another physician had neglected to review a patient's CT scan and thus failed to realize that the patient was suffering from a skull fracture and brain concussion. As soon as he recognized the problem, he admitted the patient and performed a necessary surgical procedure. He claims that the other physician was furious about being caught in a mistake. According to Johnson, the physician "charged" into the room where he was standing and "screamed . . . 'You f___ing n___ — why did you do that to me?'"

Johnson's arrangement at the hospital was under a professional services agreement that designated him as a "contractor" rather than an employee. The agreement required that he retain his membership and medical privileges with the medical staff. In February 2002, he failed to pay staff membership fees, and his staff privileges were cancelled as a result. He was told that he would have to seek readmission as a new applicant, including a hearing with the medical staff credentials committee. When he did so, his application was denied. He then filed administrative complaints and eventually filed a lawsuit in federal court claiming that he had been subjected to race and sexual orientation discrimination.

The trial court dismissed Johnson's entire lawsuit. He appealed, claiming that he at least had a viable claim for a racially hostile work environment.

The Ninth Circuit began its analysis by framing the standard for a hostile work environment under federal law. An individual must present evidence that

- he was subjected to verbal or physical conduct because of his race;

- the conduct was unwelcome; and
- the conduct was sufficiently severe or pervasive to alter the conditions of his employment and create an abusive work environment.

The environment must be perceived as abusive both objectively and subjectively. All circumstances should be taken into account, including the frequency of the conduct, its severity, whether it was physically threatening or humiliating (as opposed to a mere offensive utterance), and whether it interfered with the employee's work performance.

The court focused on the one particularly serious incident in which Johnson claimed he was verbally attacked by another physician. Johnson said that the doctor used a racial epithet and moved as if to strike him. His account of the incident unquestionably provided evidence of race discrimination. But the court concluded from the record that it was the one and only such incident to which he was exposed. Although Johnson had several other complaints about interactions with others at the hospital, there was no evidence that they were motivated by racial animus.

Johnson also claimed that the hospital's medical staff residency committee had refused to consider an African-American candidate and that the committee stated that Johnson would not be considered because of his race and because he might be gay. The court found that this particular allegation had not affected Johnson since he himself had not heard the claimed discriminatory comments.

Although an isolated incident *may* be enough if it is "extremely serious," the single racially motivated confrontation during Johnson's more than two years of work at the hospital fell short of the "severe and pervasive" standard and the court affirmed the dismissal of Johnson's claims.

C. AGE DISCRIMINATION

1. ONE FARM WORKER MAY PURSUE AGE CLAIM; THREE OTHERS MAY NOT

In a recent case from the Ninth Circuit, the court considered the age discrimination claims of four laid-off farm workers. The case had been dismissed by the trial court. On appeal, one of the four was able to turn that result around, permitting him to take his claim to trial. *Diaz v. Eagle Produce Ltd. P'ship*, 2008 WL 901677 (9th Cir. Apr. 4, 2008).

Layoffs Part of Agricultural Employment

Eagle operates a commercial broccoli and melon farm in Aguila, Arizona. The seasonal nature of farming these crops creates a fluctuating need for laborers, corresponding to periods of soil preparation, crop planting and harvest. Eagle periodically hires new workers and transfers existing employees to meet operational needs. Its need for workers drops dramatically during the winter, to less than half of the more than 700 workers employed in the summer.

In the winter of 2002, Abel Ruiz Diaz, Ubaldo Moreno, Piedad Renteria and Alejandro Mancilla, each over age 40, were among the workers laid off by Eagle. All but one worked on a tractor crew known as Crew 94 that was responsible for preparing the soil for planting. Due to Eagle's increased use of plastic mulch in its cantaloupe fields, soil preparation required

significantly less labor that year. The hours spent by Crew 94 to prepare Eagle's melon fields dropped by nearly half from 2001 to 2002.

In May 2001, Eagle hired Owen Brandt as a new co-supervisor for Crew 94. In December 2001, Brandt became the sole supervisor, and he was responsible for the layoff decisions in early 2002. Brandt considered job performance, attitude, attendance, work ethic and ability to work with others in selecting employees for layoff. He asserted that he did not consider length of employment with Eagle, or age.

But Was Age a Factor?

Each of the four claimants alleged that he was laid off because of his age, in violation of the federal Age Discrimination in Employment Act (ADEA). Each presented a different work history.

Diaz was first hired by Eagle in August 1997 at the age of 51. He had approximately seven years of previous farm work experience. He drove a tractor and, during the harvest season, drove a truck that sprayed water on the ground to reduce dust problems. He was not qualified to drive a planting tractor, a job that requires a certain level of technical expertise. Other than missing work approximately once a month due to a drinking problem, Diaz adequately fulfilled his duties at Eagle. Brandt offered Diaz a temporary transfer rather than layoff in 2002, but Diaz declined because the job was more physically demanding, offered fewer hours and was temporary.

Moreno began working at Eagle at age 65 as a Crew 94 tractor and water truck driver. He came to work dependably but had a history of damaging Eagle property, including an irrigation ditch and a tractor. In early 2002, he was driving a tractor that broke down, requiring \$10,000 in repairs. He was laid off the next day.

Renteria worked for Eagle for many years as a tractor driver on Crew 94, among other duties. He also operated his own check-cashing business at the farm in violation of an express policy that prohibited solicitation on Eagle property. On paydays, he would park his truck in front of the farm office and cash checks for coworkers in exchange for a fee. Although Renteria had carried on this business for years without being told to stop, Brandt warned him about it once he learned of the activity. Renteria understood the warning but resumed his business nonetheless. He was 65 years old when Brandt told him he had been selected for layoff.

Mancilla was hired by Eagle to test GPS equipment on farm tractors. Brandt also utilized him to drive a water truck. In that capacity, Mancilla accidentally broke the bottom of a chemical trailer in early 2002. He had also been warned about his failure to wear safety equipment. These were considerations in his selection for layoff, although he was eligible for rehire. Mancilla was 63 when he lost his job.

The trial court concluded that there was not sufficient evidence that age had been a factor and dismissed the claims. The four workers appealed.

Ninth Circuit Finds Enough Evidence on One Claim

In reviewing the case, the Ninth Circuit reviewed the analysis for proof of claims of age discrimination. The workers must first present a basic case by showing that they were over the age of 40, performed their jobs satisfactorily, lost their jobs and either were replaced by younger

employees or let go under circumstances suggesting age discrimination. At that point, Eagle would be required to state its nondiscriminatory reasons for the layoff decisions. Then the workers could prevail only if they could show that Eagle's reasons were a pretext, or excuse, for discrimination.

The court first decided that Renteria could not even meet the requirements of the basic case. He had continued to engage in his cash-checking business even after Brandt warned him to stop. That meant he could not show that he was performing satisfactorily, and his claim failed there.

Even though the other three workers had some performance issues, the court found that these were minor deficiencies. Accordingly, the court examined the evidence to see if there was anything about the circumstances that suggested age had been a factor. The workers pointed out that the average age of the 16 workers laid off from Crew 94 during 2001 and 2002 was 48.4. The average age of workers hired for the crew during the same period was 38.75. Since many workers (including all four claimants) were hired at Eagle when they were well over 40, the court did not find that this statistical picture indicated age bias.

But the court took a closer look at the hires made after Brandt took over as supervisor. Before Brandt came into the picture, the average age of hires for Crew 94 was 44.29 years. Once he became the sole decision maker, the average age of hires dropped to 35.28. Isolating just the period when Brandt alone controlled the layoff decisions, the average age of laid-off workers rose to 51.1. This information might persuade a jury that age had been a factor for Brandt, as was the fact that he had chosen to retain several much younger, less-experienced workers.

The court was satisfied that Eagle had legitimate, nondiscriminatory reasons for laying off Moreno and Mancilla because of the damage that each had done to company property. There was no similar individualized explanation for inclusion of Diaz among those affected by the layoff. And, Eagle's evidence clearly showed that there was a seasonal slowdown.

The workers presented three arguments to show that Eagle's reasons were not legitimate. First, they asserted that the seasonal slowdown did not reduce the need for tractor workers. Second, they claimed that Eagle had offered inconsistent reasons for the layoffs (i.e., first, a seasonal slowdown, and later, individualized performance issues). Finally, they said that the Eagle handbook required length of service to be considered as a factor in layoffs, and Brandt admittedly had not considered it.

Of these arguments, the court found that only Brandt's failure to follow policy regarding length of service might be viewed as suggesting bias. Even so, Moreno and Mancilla showed nothing indicating that, in their particular cases, Brandt had been motivated by anything other than the damage they had caused on the job. But for Diaz, the court found that a question lingered as to Eagle's motivation for letting him go. There was no clear performance issue in his work record. Accordingly, the court decided that Diaz could proceed to trial with his claim, while the dismissal of the claims of Renteria, Moreno and Mancilla was affirmed.

2. U.S. SUPREME COURT REVIEWS FIVE AGE CASES

The U.S. Supreme Court took on five cases this term involving allegations of workplace age bias. Rulings are out on two of the cases.

In *Sprint/United Management Co. v. Mendelsohn*, 128 S. Ct. 1140 (2008), the Court ruled that an employee suing her employer could not use "me, too" evidence—testimony from employees who had different supervisors. But such evidence is not always out of bounds; decisions must be made case by case.

In *Federal Express Corp. v. Holowecki*, 128 S. Ct. 1147 (2008), the Court decided what constitutes a charge filed with the EEOC under the ADEA. FedEx claimed that since the EEOC did not treat the documents it received alleging bias like a charge, the suit should have been dismissed. The Court disagreed, saying the employee's right to sue does not depend on the EEOC's taking action. It just requires that a charge be filed.

In *Kentucky Retirement Systems v. EEOC*, the Court is to decide whether a benefit plan discriminates against older workers by denying disability payments to employees eligible for retirement. In *Gomez-Perez v. Potter*, the Court will decide whether federal employees claiming age discrimination are protected from retaliation. Finally, *Meacham v. Knolls Atomic Power Lab* explores a dispute over who bears the burden of proof, the workers or the employer, which claimed layoffs were unrelated to age.

D. DISABILITY DISCRIMINATION

1. DOES HEARING REQUIREMENT VIOLATE ADA?

The Ninth Circuit's decision in *Bates v. United Parcel Service, Inc.*, 511 F.3d 974 (9th Cir. Dec. 2007), addresses the question of whether an employer can—without violating the Americans with Disabilities Act (ADA)—impose a hearing standard for safety reasons in circumstances outside those in which a government standard applies.

UPS Wants Drivers to Meet DOT Standards

United Parcel Service ("UPS") has a uniform approach to hiring package-car drivers. When there is an opening for a driver, UPS contacts the individual at the specific location who has the most seniority and has submitted a bid for a driver position. If that person is not interested, it continues down the seniority list until it finds an interested employee. To qualify as a driver, the employee must then:

- complete an application;
- be at least 21 years old;
- possess a valid driver's license; and
- have a "clean" driving record.

If all those requirements are met, the candidate must then pass both the UPS road test and a U.S. Department of Transportation ("DOT") physical examination, which is required for those who drive commercial vehicles over 10,000 pounds. Most UPS package cars exceed the 10,000-pound limit. Some weigh less, however, and the DOT physical standards, including a hearing requirement, are not mandated for individuals operating the lighter vehicles.

Several UPS employees filed a class-action lawsuit against UPS claiming that the imposition of the DOT hearing standard when it was not required by law constituted discrimination against them in violation of the ADA.

UPS defended its requirement that *all* package-car drivers pass the DOT hearing test on the grounds that package cars—even those weighing less than 10,000 pounds—are far more similar to heavier commercial vehicles than typical passenger cars. Accordingly, UPS argued that it should be able to impose the same standard the DOT mandated for drivers of heavier vehicles.

The federal trial court determined that class treatment was appropriate and put UPS to a difficult test. In essence, the trial court said UPS could prevail only by showing that the hearing standard met the requirements for a bona fide occupational qualification (BFOQ). The BFOQ test is difficult to satisfy, and UPS failed to persuade the trial court. The court concluded that the UPS policy operated as a blanket exclusion of deaf individuals and that since the company could not show a BFOQ, it had failed to satisfy its burden of showing a business necessity for the requirement. UPS then appealed to the Ninth Circuit.

But Does the Requirement Violate the ADA?

The Ninth Circuit stated at the outset that the trial court had been led astray in its analysis by an earlier Ninth Circuit ruling that would be modified by this new decision. The correct approach would be to determine whether the workers could show that they were "qualified" persons with disabilities (as the ADA requires) and, if so, whether UPS could establish that a business necessity supported its imposition of the DOT hearing standard on drivers of *all* package cars.

The ADA protects only "qualified" individuals against discrimination. A qualified individual is one who has a disability and "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." The ADA recognizes that employers may impose qualification standards for particular jobs, but if the standards screen out persons with disabilities, they must be job-related for the position in question and consistent with business necessity. When a group of individuals challenges a qualification standard, they can proceed only if they are qualified—i.e., they can perform the essential functions of the job with or without accommodation.

The would-be package-car drivers claimed that they could meet all essential functions, including being "safe" drivers, even without passing the hearing test. UPS argued that their inability to pass the hearing test meant they could not meet an essential function of the job, namely, DOT certification to drive *all* commercial vehicles. UPS claimed that hearing at a level sufficient to pass the DOT test should be deemed either a stand-alone essential job function or part and parcel of being a safe driver.

The Ninth Circuit tried to disentangle the seeming conundrum by requiring the workers to first show that they were *qualified* to perform the essential function of safely driving a package car. It then imposed on UPS the burden of showing that safely driving a package car requires hearing at the DOT level and that safe performance cannot be achieved through reasonable accommodation. The workers could show that they were qualified with evidence that they met the basic qualifications for the job (seniority, 21 years old, and a valid driver's license) and could drive a package car safely, including having a clean driving record and passing the UPS driving test. The trial court had not followed that analysis in determining whether they met those tests.

The Ninth Circuit then looked at what UPS would need to do to prove business necessity in support of the hearing requirement. The ADA itself recognizes that employers may have a business-necessity defense in some circumstances. In evaluating UPS's defense, however, the trial court again had used an incorrect standard by imposing BFOQ requirements. The Ninth Circuit said that under the correct standard, an employer first must establish that its rule is "job-related" with a showing that the standard fairly and accurately measures an individual's ability to perform the essential functions of the job. In evaluating a disputed standard, considerations affecting the necessity of the standard should include both the magnitude of possible harm if it is not followed as well as the probability that harm would occur. Finally, the employer must show that no reasonable accommodation currently available would cure the performance deficiency or that accommodation would pose an "undue hardship."

UPS argued that the DOT hearing standard was evidence that a certain level of hearing is necessary for driving all vehicles, even if not specifically required for lighter trucks. The Ninth Circuit agreed in principle. The fact that the DOT did not impose the hearing standard in some circumstances did not undercut its relevance as a safety measure. By the same token, however, the workers would be entitled to point out the lack of a specific DOT hearing requirement for lighter vehicles in support of their argument that it was not necessary to public safety.

With that framework, the Ninth Circuit sent the case back to the trial court to decide the issues presented under the proper ADA standard.

E. WAGE AND HOUR LAW

1. LAG IN OVERTIME PAYMENT NOT A VIOLATION

Washington law requires you to pay your employees their wages on regular paydays at least monthly. In *Champagne v. Thurston County*, 163 Wn. 2d 69 (2008), the court addressed whether delay of overtime pay and additional payments that have not been calculated by the regular payday is a violation.

Thurston County pays its employees their regular pay once a month, on the last business day of the month. Many employees are also entitled to overtime, specialty pay, supervisory pay, holiday pay, or other forms of additional compensation. The county pays those additional amounts on the *next* regular payday, i.e., the final business day of the following month.

Gene Champagne and several other corrections officers employed by the county filed a class lawsuit alleging that the delay of additional pay until the following month violated state wage laws. They asked for damages equal to twice the amount of the "delayed" wages as well as their attorneys' fees and costs. The trial court dismissed the claim on procedural grounds, and the corrections officers appealed.

The court of appeals affirmed the dismissal on a different basis, holding that the availability of double damages for failure to pay wages applies only if an employer fails to pay *any* compensation, not for delaying payment. In the situation presented, the county had eventually paid all wages due. Thus, there was no damages claim. Unhappy with that result, the corrections officers appealed the decision to the Washington Supreme Court.

The court began by noting the protections afforded to Washington workers and the policy underpinning three different statutes that penalize employers for the following:

- willfully withholding wages (the Wage Rebate Act, or WRA);
- failing to pay the state minimum wage (the Minimum Wage Act, or MWA); or
- failing to pay wages due upon termination of employment (the Wage Payment Act, or WPA).

An MWA regulation requires Washington employers to pay all wages due on regular paydays at least monthly. According to the corrections officers, the county's practice of delaying payment of overtime and other add-ons to regular pay until the following monthly payday violated the regulation in place when the lawsuit was filed. That regulation, which has since been amended, expressly allowed an employer to implement a payroll system in which only pay for up to the last seven days of the pay period could be delayed and included on the next paycheck. The amended version of the regulation, which took effect while this lawsuit was pending, permits employers to establish a separate date for payment of overtime that is no later than the next regular payday.

The court concluded that the county's practice of delaying additional pay violated the earlier version of the regulation but was in compliance with the updated version. So the question then became whether the county's violation of the earlier regulation amounted to a *willful* withholding of wages that ran afoul of the WRA. Willful withholding of wages carries with it exemplary damages that are double the amount wrongfully withheld.

The court found that the county's practice complied with its applicable collective bargaining agreements and that there was no suggestion of bad faith or animus. And the wages due were paid in full, even if not until the next month's payday. Under those circumstances, the withholding was not willful under the WRA.

Champagne and his colleagues argued that they also had claims under the WPA and the MWA. The MWA provides that employees are entitled to attorneys' fees incurred in a lawsuit against an employer that has failed to pay them the wages they are owed. The court concluded that the MWA does not apply when the employer has paid all wages actually due, even though some portion was delayed until the following payday.

As for the WPA claim, the court noted that this statute addresses wage payment requirements at the termination of employment. Further, the WPA defers to collective bargaining agreements that contain different provisions. The claims asserted against the county did not involve pay due at termination, and a collective bargaining agreement expressly allowed the delayed payment of overtime and additional wages. Thus, the WPA claim also failed, and the judgment in the county's favor was affirmed.

F. EMPLOYEE STATUS

1. DIRECTORS AND VOLUNTEERS ARE NOT EMPLOYEES

The number of employees is often the definitive factor in determining whether a particular employment law applies to a particular employer. And for an employer that is close to

the threshold level for coverage, the question of who counts as an employee can be important. That was the issue in *Fichman v. Media Center*, 512 F.3d 1157 (9th Cir. 2008).

Fred Fichman was employed for about a year and a half as the executive director of The Media Center, a nonprofit corporation that operates community access cable channels in Reno and Sparks, Nevada. When his employment ended in December 2003, he sued in federal court, claiming that his discharge violated the ADEA and the ADA.

During Fichman's employment, The Media Center (except for a single two-week period) had fewer than 15 paid employees. The ADA covers employers only if they have 15 or more employees, and the ADEA applies only if there are at least 20 employees. As a consequence, the trial court threw out Fichman's claims because the statutes did not apply. Fichman appealed, arguing that The Media Center had enough employees to be covered by the statutes if the court counted its directors and the volunteer producers that provided public-access programming.

For guidance, the Ninth Circuit looked at a 2003 U.S. Supreme Court decision on whether an individual should be deemed an "employee." In that case, the Court described six factors for determining the issue:

1. whether the organization can hire or fire the individual or set the rules and regulations of the individual's work;
2. whether and, if so, to what extent the organization supervises the individual's work;
3. whether the individual reports to someone higher in the organization;
4. whether and, if so, to what extent the individual is able to influence the organization;
5. whether the parties intended for the individual to be an employee, as expressed in written agreements or contracts; and
6. whether the individual shares in the organization's profits, losses and liabilities.

Using those six factors, the Ninth Circuit concluded that the trial court had correctly ruled that The Media Center's directors are not employees. The organization does not hire or fire the directors. The board selects its own members, and each has a full-time job independent of The Media Center. They are not compensated, and reimbursement for board travel and the provision of food at meetings do not amount to wages. The principal rewards for directors are personal satisfaction and professional status, typical of volunteer work. Directors are not supervised by The Media Center and instead operate under their own set of bylaws. The directors clearly influence organization policies, but there is no intent for them to be considered employees. Since the organization is a nonprofit entity, the final factor did not apply. Bottom line: The directors are not employees.

With regard to the producers who submit video programming for broadcast on the public-access stations, they pay The Media Center for classes through which they become certified to use the station's facilities. They also sign a contract to indemnify The Media Center against any liability for their programming. They are not hired or fired, and The Media Center does not exert

any control over them. Thus, the Ninth Circuit held that the trial court was correct in excluding the volunteer producers from the employee category at The Media Center.

For Fichman, the exclusion of directors and volunteer producers meant that The Media Center did not have enough employees to be covered by either the ADA or the ADEA and the trial court's decision rejecting his claims therefore was affirmed.

G. LABOR LAW

1. TAXI DRIVERS ARE EMPLOYEES, NOT INDEPENDENT CONTRACTORS

The case of *NLRB v. Friendly Cab Co.*, 512 F.3d 1090 (9th Cir. 2008), addressed the question of whether taxi drivers are independent contractors or employees in the eyes of the National Labor Relations Board ("NLRB"). Friendly Cab Company operates from a facility in Oakland, California. It has approximately 80 taxicabs, 50 of which are designated as airport cabs. Friendly leases its cabs to drivers who operate them out of the Oakland International Airport and in surrounding communities. Under lease agreements, cabs are rented out for seven days at a time, with an automatic renewal at the end of the period. The cabs are in service six days out of seven and in maintenance the remaining day each week. Drivers pay a fee, or "gate," ranging from \$450 to \$600 per week at Friendly's discretion. Drivers then retain all the fares they collect. The leases state that drivers are not employees of Friendly.

Friendly reserves the right to assign drivers to particular taxicab types and models and to affiliated taxi companies. It has a policy manual and standard operating procedures that govern all drivers and cover safety and nondiscrimination. They also instruct drivers on how to operate the taxicabs (e.g., smooth acceleration, no abrupt stops, and avoiding stops next to obstacles such as signs, trees or fire hydrants). The manual also includes a dress code that requires all drivers to maintain good personal hygiene and dress appropriately and professionally. A Friendly "road manager" checks for compliance.

In addition to telling drivers how to dress and drive, Friendly restricts driver activity in other ways. All passenger service calls must be conducted through the company's system. Individual drivers may not provide prospective passengers with their personal contact information or business cards. Drivers must respond to Friendly's dispatchers, accept credit cards and provide service required under Friendly's contracts with large customers. In some instances, compensation for service under Friendly's contracts is less than the drivers would receive based on standard fares. Drivers cannot sublease their cabs, and Friendly requires them to attend annual training classes at their own expense.

Tension developed between Friendly and its drivers, many of whom designated the East Bay Taxi Drivers Association as their bargaining representative. The union filed a petition with the NLRB asking to be declared the official representative of Friendly's drivers. Friendly responded with the contention that the drivers were independent contractors and thus were not entitled to the collective bargaining rights the National Labor Relations Act ("NLRA") provides for employees.

After examining all the facts, the NLRB concluded that Friendly's drivers should be deemed employees with bargaining rights. The union requested that Friendly enter into negotiations. When it refused, the union filed an unfair labor practice charge, which was sustained by the NLRB. Friendly was ordered to engage in bargaining with the union and

attempt to reach an agreement on the terms and conditions of the drivers' employment. Instead, Friendly appealed the order to the Ninth Circuit.

On appeal, the court found the issue straightforward. Were the Friendly drivers employees and thus entitled to bargain collectively under the NLRA? Or were they, as the company argued, independent contractors who had no bargaining rights? The answer depended on the facts of the specific relationship between Friendly and its drivers.

The court noted that the NLRB had given Friendly the benefit of the inference that the drivers should be considered independent contractors because they paid a fixed rental rate in exchange for keeping all fares. But even that strong inference would be overcome if Friendly's control of the drivers suggested that they should be deemed employees.

In analyzing the matter, the court noted that the ability of workers to operate an independent business and develop entrepreneurial opportunities is a significant factor in deciding whether they are properly considered independent contractors or employees. Friendly's drivers were permitted to use their leased cabs only to respond to the company's dispatchers, not for their own pursuit of business. Drivers had Friendly business cards and telephone numbers. They could not accept calls for service on personal phones. Rather than developing their *own* businesses, the drivers were expected to act in a manner that protected *Friendly's* goodwill with passengers. In short, they did not have the opportunity to operate and develop their business independently.

Friendly also controlled the means and manner of its drivers' performance. They were subject to dress and driving codes and were required to attend company training. Their leased cabs carried advertisements for which Friendly—not the drivers—received revenue. Drivers had no choice in the taxi model to which they were assigned or even for which affiliated company they would be required to drive. They were subject to discipline for breaches of Friendly's requirements as monitored by the company's road manager. According to the court, the control Friendly exerted far exceeded the control of taxi drivers who are independent contractors.

The Ninth Circuit concluded that the NLRB had come to the right decision. Friendly's drivers were properly classified as employees and thus entitled to union representation.

2. HOSPITAL CANNOT REQUIRE FLU SHOTS IF UNION OBJECTS

In *Virginia Mason Hospital v. Washington State Nurses Association*, 511 F.3d 908 (9th Cir. 2007), the Ninth Circuit considered the question of whether a hospital may require flu shots of its nurses without bargaining the issue with the union representing the nurses. Virginia Mason Hospital is a 336-bed acute care facility in Seattle. It employs between 600 and 700 registered nurses, who are represented by the Washington State Nurses Association. Virginia Mason's elderly and immune-compromised patient population is at high risk for contracting the flu and for suffering severe, even fatal, consequences if infected. Studies have shown that staff-to-patient flu transmission is prevalent in hospitals and other health care facilities because about half of those infected are asymptomatic and as many as 70 percent of health care workers continue to go to work even when they experience symptoms. For that reason, the hospital has long recommended that all employees receive the flu vaccine annually to reduce the chances of transmitting the virus to patients.

Beginning in 1998, Virginia Mason offered its staff free flu shots. A cart with the vaccine made rounds to nursing stations, the hospital cafeteria, conference rooms and other locations

where employees gathered. Still, the staff immunization rate was only about 55 percent. In 2004, Virginia Mason decided to make flu shots mandatory as a "fitness for duty" requirement. Any employee who could not show proof of vaccination by a specified date faced possible termination.

The union had not been consulted about the vaccination requirement and filed a grievance. While it recognized that "receiving [the] influenza vaccine is a good choice for most nurses, it is just that — a choice." From the union's perspective, receiving medical treatment, including a flu shot, is a matter that should be left to the individual.

Under the collective bargaining agreement, the grievance proceeded through the steps to binding arbitration. The parties authorized the arbitrator to decide whether Virginia Mason had a right to impose its flu-shot policy unilaterally without bargaining with union representatives. In reaching his decision, the arbitrator focused on the agreement's preamble and recognition clause. The arbitrator concluded that the hospital was obliged to bargain with the union over all terms and conditions of employment. Because the flu-shot policy was incorporated as a "fitness for duty" requirement, it was a condition of both initial and continued employment. That made it a subject over which the hospital had to bargain with the union. The hospital's management rights extended only to "operational decisions," the arbitrator found, not to terms and conditions of employment.

Virginia Mason challenged the arbitrator's ruling in federal district court. The hospital contended that the arbitrator had failed to take into account *all* relevant portions of the collective bargaining agreement and that his decision ran afoul of public policy. The trial judge upheld the arbitrator's award, and the hospital appealed.

With a nod to Virginia Mason's "commendable desire to protect its vulnerable patients from infection with the flu," the Ninth Circuit focused its analysis on traditional labor-law principles to determine the validity of the arbitrator's ruling. The hospital argued that the arbitrator had failed to take note of a patient care priority clause in the bargaining agreement as well as a management rights clause (reserving certain decisions to management) and a zipper clause (providing that the parties waived bargaining on subjects not expressly addressed). If an arbitrator ignores the plain language of a bargaining agreement, that may be a basis for setting aside his decision. In this case, however, the arbitrator had expressly addressed the management rights and zipper clauses and had noted that the flu-shot policy would only indirectly implicate patient care. Thus, he had not ignored those portions of the agreement. The court found his interpretation of the agreement plausible and reasonable.

The arbitrator had inferred Virginia Mason's duty to bargain over the flu-shot requirement largely from the agreement's preamble and union recognition clause. His conclusion reflected a basic tenet of collective bargaining, namely, the duty to bargain over terms and conditions of employment. The court found that also was within the arbitrator's authority.

Finally, Virginia Mason argued that the arbitrator's decision violated public policy. The court noted that an arbitrator's award will not be set aside on public-policy grounds unless it violates an "explicit, well-defined, and dominant" public policy established through legal authority. The hospital pointed to a state-law requirement that hospitals "develop and implement an infection control program" and policies consistent with such a program and another statute that prohibits nurses from professional contact with the public while suffering from a contagious disease. The court did not accept the hospital's argument, however.

While mandatory flu shots might enhance disease control, Virginia Mason presented no evidence that bargaining with the union over the issue would undermine that goal. The court concluded that the public policy favoring infection control was trumped by the labor-law policy of requiring bargaining over terms and conditions of employment. Therefore, the decision upholding the arbitrator's ruling was affirmed.

3. NLRB DECISION CREATES 45-DAY PERIOD AFTER EMPLOYER VOLUNTARILY RECOGNIZES UNION FOR ANTIUNION EMPLOYEES TO ATTEMPT TO DECERTIFY THE UNION

Back in 2003, two employers recognized a union under card-check and/or neutrality agreements. (Neutrality agreements require employers to remain neutral during union organizing campaigns; card-check agreements require employers to recognize unions after they show that a majority of the employees want the union.) But 22 days later, more than half of the employees at one of the companies signed a petition asking the NLRB to decertify the union.

A smaller percentage of the other employer's workers asked for decertification 34 days later. In both cases, NLRB regional directors denied the request, citing a previous NLRB decision—in effect for 40 years—that said employees could not try to decertify a voluntarily recognized union until a "reasonable time" had elapsed after recognition. The objective was to give the union a chance to do what those who signed the cards wanted, that is, represent employees in collective bargaining and address their concerns.

The "reasonable time" is not defined but has been described as anywhere from six months to a year after recognition. Therefore, under the previous NLRB rule, antiunion bargaining unit employees had to live with the union, without an election, for at least a few months.

But the NLRB's recent 3-2 decision in *Dana Corp.*, 2007 WL 2891099 (N.L.R.B. Sept. 29, 2007), available at www.nlr.gov/shared_files/Board%20Decisions/351/v35128.pdf, creates a 45-day cooling-off period after an employer voluntarily recognizes a union. During that time, the employer must still bargain with the union, but antiunion employees may gather signatures for a petition for a decertification election.

If the antiunion employees obtain signatures from at least 30 percent of the employees in the bargaining unit, there will be a decertification election. If they do not, the union is protected from decertification efforts for a reasonable time.

The NLRB majority says that this procedure better balances employees' freedom of choice with the policy of promoting stable bargaining relationships. The previous rule, the majority said, did not give enough weight to the will of employees.

Two NLRB members dissented, saying that the decision makes it less likely employers will ever voluntarily recognize unions and less likely that any meaningful collective bargaining will occur during the 45-day period during which decertification petitions can be filed. In addition, if unions cannot bargain effectively in their first 45 days, employees may be more likely to become dissatisfied and sign cards to decertify, putting the unions in a Catch-22 position.

4. NLRB RULING ON EMPLOYEE USE OF COMPANY E-MAIL

The NLRB recently issued a significant decision that will affect workplace e-mail policies for both union and nonunion employers. Ending years of uncertainty, the NLRB held, in *Guard Publishing Co., d/b/a The Register-Guard*, 2007 WL 4540458 (N.L.R.B. Dec. 16, 2007), that employees do not have a statutory right under the NLRA to use an employer's e-mail system for union communications or other "concerted activity." The NLRB also modified its approach for determining whether an employer's e-mail policy unlawfully discriminates against protected activity. Such discrimination remains unlawful, but the NLRB's new standard gives employers more leeway to permit limited personal use of e-mail while still restricting the use of e-mail to solicit on behalf of outside organizations.

The employer's written policy prohibited use of e-mail for "non-job-related solicitations." The policy stated:

Company communication systems and the equipment used to operate the communication system are owned and provided by the Company to assist in conducting the business of The Register-Guard. Communications systems are not to be used to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations.

Suzi Prozanski was a Register-Guard employee and the local union president. She received two written warnings for sending three union-related e-mails in violation of this policy. The first e-mail clarified facts related to a recent union rally; Prozanski composed this e-mail on her break and sent it from her workstation. The second and third e-mails solicited employee support for upcoming union activities; Prozanski sent these e-mails from a computer in the union office, located off the employer's premises, to multiple unit employees at their work e-mail addresses.

A central question in the case was whether the employer's policy, on its face and as applied, was an overbroad no-solicitation rule that unlawfully restricted employees' "Section 7" rights. Section 7 of the NLRA grants employees the right "to engage in . . . concerted activities for the purpose of collective bargaining and other mutual aid or protection." The NLRB general counsel alleged that the employer violated the NLRA by simply maintaining the written policy, as well as by issuing the written warnings to Prozanski.

In a close 3-2 decision, the NLRB majority concluded that employees have no statutory right to use an employer's e-mail system for Section 7 matters. Analyzing the issue under a property rights framework, the majority reasoned that e-mail use is governed by NLRB decisions dealing with the use of an employer's equipment. In these decisions, the NLRB has consistently held that employees have no statutory right to use employer-owned property (including bulletin boards, telephones and televisions) for Section 7 communications so long as the restrictions are nondiscriminatory. The majority found that *Republic Aviation Corp v. NLRB*, 324 U.S. 793 (1945), in which the U.S. Supreme Court held that a general ban on solicitation in the workplace during nonworking time was unlawful absent special circumstances, was inapplicable because the policy at issue regulated use of the employer's communication equipment and not traditional face-to-face solicitation. Because the employer's no-solicitation policy on its face did not discriminate against Section 7 activity, maintenance of the policy did not violate the NLRA.

Turning to the question of discriminatory application, the NLRB adopted a new standard, overruling several prior NLRB decisions. The majority announced that "discrimination under the NLRA means drawing a distinction along Section 7 lines." In doing so, it adopted the reasoning of the Seventh Circuit Court of Appeals in cases involving use of employers' bulletin boards. Those cases distinguished between personal nonwork-related postings (such as for-sale notices and wedding announcements) and "group" or "organizational" postings, including union materials. The NLRB concluded that the Seventh Circuit's analysis, "rather than existing Board precedent, better reflects the principle that discrimination means unequal treatment of equals." Thus, unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7 protected status.

Applying its new standard, the NLRB found that, although the employer had permitted a variety of personal nonwork-related e-mails, it had not permitted e-mails soliciting support for groups or organizations. Because Prozanski's second and third e-mails were solicitations to support the union, the employer did not discriminate along Section 7 lines by applying its policy to those e-mails. The first e-mail was not a solicitation, but rather a clarification of facts surrounding a recent union event. Accordingly, the NLRB held that enforcement of the policy with respect to that e-mail was unlawful.

In a sharply worded dissent, two NLRB members argued that because e-mail has revolutionized communication and has become "the natural gathering place" for employees to communicate in the workplace, "one cannot reasonably contend . . . that an e-mail system is a piece of communications equipment to be treated just as the law treats bulletin boards, telephones, and pieces of scrap paper." The dissenters rejected the majority's property rights analysis and argued that, under *Republic Aviation*, the NLRB's duty is to balance employees' Section 7 right to communicate with the employer's right to protect its business interests. According to the dissenters, where an employer gives employees access to e-mail in the workplace for regular and routine use, a ban on nonwork-related solicitations should be deemed unlawful absent a showing of special circumstances. Because no proof of special circumstances was demonstrated here, the dissenters would have found that maintenance of the policy violated the NLRA.

This decision is important to both union and nonunion employers. Under it, employees do not have a statutory right to use their employer's e-mail system for union activities, and no-solicitation e-mail policies are permissible, but only if they do not discriminate along Section 7 lines. The NLRB majority provided several examples to illustrate this proposition, noting that an employer may draw a line between charitable solicitations and noncharitable solicitations, between solicitations of a personal nature (e.g., a car for sale) and solicitations for the commercial sale of a product (e.g., Avon products), between invitations for an organization and invitations of a personal nature, between solicitations and mere talk, and between business-related use and nonbusiness-related use. Employers that adopt a no-solicitation e-mail policy must remember that consistent enforcement is essential to prevent and defend against discriminatory enforcement charges. Moreover, even facially neutral distinctions may be held unlawful if the employer's motivation for the line drawing is antiunion. (One member of the majority would permit an inference of antiunion motive where line drawing that effectively prohibits Section 7 communications is not based on any reasonable employer interest.)

A final word of caution. *Register-Guard* was one of several significant 2007 NLRB decisions decided by a 3-2 vote. Such close decisions are vulnerable to change because, by long-standing tradition, the composition of the five-member NLRB has split in favor of the party occupying the White House. Thus, the results of the upcoming presidential election may affect

the NLRB's ideological balance and could lead to the modification or reversal of the rule announced in *Register-Guard*.

H. EMPLOYEE BENEFITS

1. RULING EXPANDS ERISA REMEDIES FOR INDIVIDUAL EMPLOYEES

The U.S. Supreme Court has ruled that the Employee Retirement Income Security Act ("ERISA") allows an employee to sue his employer only for fiduciary breaches that result in losses to the entire plan. The Supreme Court disagreed. Generally, it ruled that unlike a defined benefit pension plan, ERISA allows employees to recover for an employer's breach of fiduciary duties with regard to a 401(k) plan regardless of whether it diminishes plan assets payable to all participants or only to one individual.

I. ALTERNATIVE DISPUTE RESOLUTION

1. COURT DECLINES TO ENFORCE ARBITRATION AGREEMENT

In *Rodriguez v. Windermere Real Estate/Wall Street, Inc.*, 142 Wn. App. 833 (2008), the Washington Court of Appeals addressed the situation of whether an agreement requiring employees to arbitrate certain employment disputes, rather than go to court, was enforceable. Under the particular facts of this case, the court held that procedures under the arbitration agreement were one-sided and would not be enforced. The employee was free to go to court rather than arbitrate.

Roberto Rodriguez went to work in 2003 as a real estate agent for Windermere Real Estate/Wall Street, Inc. Under his broker/sales associate agreement, he was required to submit any dispute about sales commissions to binding arbitration under Windermere's prescribed procedures. The procedures are modified from time to time and posted on an intranet site.

Rodriguez generally listed homes jointly with Sara Thompson, another Windermere agent. When a jointly listed property sold, Rodriguez and Thompson would split the commission equally between them. The two agents jointly listed a property that sold in January 2005, just a few months before Windermere terminated Rodriguez's employment. The sale closed after his final date of employment, but he anticipated that he would receive his half of the listing agent's commission. To his surprise, Windermere initially told him that he would receive only 20 percent of the commission. In the end, the entire listing agent commission was paid to Thompson.

To recoup his share of the commission, Rodriguez had his attorney send a letter to Windermere requesting binding arbitration before an independent arbitrator. Windermere did not respond. Rodriguez then filed a lawsuit in King County Superior Court. He asserted a variety of claims based on the withholding of the commission. Faced with a lawsuit, Windermere asked the court to require arbitration of the claims under its posted procedures.

A key feature of the Windermere arbitration process was that claims were to be heard by a three-person arbitration panel selected by Windermere from agents and employees at its offices other than the one where the claimant was or had been employed. Rodriguez argued to the trial court that he should not be required to resolve his claims through a process in which the arbitration panel was selected exclusively by Windermere and thus potentially biased. The trial court agreed and refused to require him to arbitrate. Windermere appealed.

The court of appeals first recognized the strong public policy favoring arbitration. Thus, arbitration agreements are generally enforced in Washington unless there is a good reason they should not be. The party opposing arbitration has the burden of showing such a reason.

In this case, the court took note of Windermere's procedures specifying a three-person arbitration panel selected from Windermere owners, brokers, managers and sales associates. Although the panel would be selected from offices other than the Wall Street location where Rodriguez worked, he argued that the fact that Windermere would select the panel members "violates the spirit of neutrality" required by the Washington arbitration statute.

In reviewing Windermere's appeal, the court noted that three-person arbitration panels may permissibly include members who are not neutral. Arbitration procedures commonly call for three-member panels, with each side designating one member and the two partisan members in turn selecting a neutral third member. But when all members are selected by one party to the dispute, the other party is excluded entirely from the selection process. According to the court, such a procedure conflicts with fundamental notions of fairness.

Windermere argued that its procedures allowed Rodriguez a voice in the selection process because he could strike proposed panel members for "cause." He was also permitted to strike one member without a particular reason. The court found those protections inadequate. Ultimately, the decisions on panel members and on "cause" for removing them were made internally by Windermere. Since all potential arbitrators were part of the Windermere "family," all of them potentially had an interest in the outcome of the dispute.

The court concluded that despite state policy in favor of arbitration, the Windermere arbitration procedures did not provide the assurance of neutrality that underlies the policy. Rodriguez therefore was not required to arbitrate his claim.