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CONTENTS

I.	CONSTITUTIONAL RIGHTS	1
A.	When the Constitutional Rights of an Employee Are at Stake, Courts Have Recognized, at Least in Some Circumstances, That Employers' Own Interests May Trump Those of the Employee.	1
B.	State Statutes and Regulations That Chill an Employer's Right to Free Speech in Union Organizing Campaigns Are Preempted by the Federal National Labor Relations Act.	2
II.	HIRING	2
A.	Job Offers Can Be Contingent Upon the Applicant Passing a Medical Examination Only If the Applicant Has Met All the Nonmedical Conditions First.	2
III.	WAGE AND HOUR LAW	4
A.	Commercial Truck Drivers Hauling Produce Are Not Exempt From Overtime Compensation Where They Do Not Work Directly for the Farmers Growing the Produce.	4
B.	Washington's Overtime Law Applies Only to Hours Worked in the State.	4
C.	Commissioned Managers at Retail Sales Businesses May Be Exempt From Overtime Pay.....	5
D.	Dual Function Paramedics, Who Are Trained in Both Fire Suppression and Advanced Life Saving, Are Not Exempt From Federal Overtime Regulations Under the Fire Protection Exemption.	6
IV.	EMPLOYEE BENEFITS	7
A.	Employees Must Follow Their Employee Welfare Benefit Plan Procedures in Order to Guarantee Recovery of Benefits Under the Employee Retirement Income Security Act.....	7

B.	Stock Options May Be Deemed Wages Under Some States’ Employment Laws—but Washington Courts Have Not Yet Directly Decided This Issue.....	8
C.	Employer Contributions to Trust Funds Should Not Be Included in the Time Loss Compensation Calculations for Workers Compensation Claimants.	9
D.	ERISA Fiduciary Had and Obligation to Provide Timely Notification of Long Term Disability Coverage Plan Cancellation, But a Breach of that Duty Has No Actionable Remedy For the Employee.....	9
V.	EMPLOYMENT CONTRACT CLAIMS.....	10
A.	To Make a Successful Breach of Contract Claim, an Employee Must First File Within the Time Frame Mandated by the Contract.....	10
B.	Employment Contract Was Not Formed Where Oral Offer of Employment Was Made Over the Phone, and Rescinded One Day Later.....	11
VI.	ARBITRATION AND ALTERNATIVE DISPUTE RESOLUTION	12
A.	Arbitration Clauses That Are Not Contained in, or Explicitly Referenced in, an Agreement Between the Employer and Employee Are Unenforceable.....	12
B.	An Employer Who Forces an Employee to Submit to Mandatory Arbitration of State Court Claims May Face Both Substantive and Procedural Unconscionability Challenges to Their Ability to Enforce Arbitration.....	13
VII.	FAMILY AND MEDICAL LEAVE.....	14
A.	Employees Are Entitled to Leave Under the Family and Medical Leave Act Only If They Are Actually Present and Participating in the Care of the Sick Family Member.	14
VIII.	UNEMPLOYMENT COMPENSATION	14

A.	Unless an Employer Announces a Layoff in Writing and Then Retains the Discretion to Approve or Reject Applications for Voluntary Layoffs, the Employer and its Employees Cannot Consider Unemployment Benefits in Assessing the Impact of the Layoff.	14
IX.	SOCIAL SECURITY AND DISABILITY	15
A.	An Individual Must Show More Than Symptoms to Prove a Disability Under the Social Security Act.....	15
X.	SEX DISCRIMINATION	16
A.	Employers Can Make Tough Business Decisions That Negatively Affect Employees as Long as the Stated Reasons Are Legitimate, Make Sense, and Are Not Discriminatory.	16
B.	Employers May Be Liable Under Title VII Even If They Have a Legitimate Reason for Their Employment Decisions, as Long as an Illegitimate Reason Was a Motivating Factor.	17
C.	A Pattern of Abuse in the Workplace Directed at One Gender, Whether Motivated by a Discriminatory Intent or Not, Can Violate Title VII If the Effect of the Abuse Is to Disadvantage One Gender Over the Other.	18
XI.	RACE DISCRIMINATION	19
A.	Emotional Distress Awards Are Unpredictable—There Is a Risk of Large Noneconomic Damages Award Even Where Little Evidence of Emotional Distress.	19
B.	Forcing an Employee of Non-American Heritage to Go by a Western Name May Be Discrimination.....	20
XII.	NATIONAL ORIGIN DISCRIMINATION	21
A.	Discrimination Difficult to Prove Where the Same Actor Responsible for the Adverse Employment Action Also Was Responsible for a Positive One.....	21
XIII.	AGE AND RELIGIOUS DISCRIMINATION.....	22

A.	Employers Can Strengthen Their Defense of Employee Discrimination Claims If They Have Documentation of Employee Performance Problems.....	22
XIV.	DISABILITY DISCRIMINATION	23
A.	An Employee With Heart Disease Who Was Restricted From Performing Strenuous Activity Could Not Sustain a Prima Facie Case of Disability Discrimination or Wrongful Discharge Against Former Employer.	23
XV.	PRIVACY RIGHTS	24
A.	Employers Should Rigorously Protect the Confidentiality of Employees' Medical and Disability Information.	24
XVI.	UNION EMPLOYEES.....	25
A.	Employers, Who by Their Own Actions Create Disputes Over Jurisdiction of Work Between Unions, Must Use Means Other Than Intervention by the National Labor Relations Board to Resolve the Disputes.	25
B.	Union Members Allowed to Speak Out Against Nonunion Contractors by Flying Banners Near Companies Doing Business With Them.....	26
XVII.	PUBLIC EMPLOYERS	27
A.	Due Process May Require a Pretermination Hearing Before a Public Employee Can Be Unconditionally Terminated From Their Job.	27
B.	State Government Employees Must Receive Equal Pay for Equal Work.....	28
XVIII.	EMPLOYER LIABILITY	29
A.	Scope of Insurance Coverage for Employers Is Narrowed Under Washington Law.....	29

Fall 2005 Employment Law Update

by

Phil Thompson and Julie Lucht

I. CONSTITUTIONAL RIGHTS

A. **When the Constitutional Rights of an Employee Are at Stake, Courts Have Recognized, at Least in Some Circumstances, That Employers' Own Interests May Trump Those of the Employee.**

Public employees have a constitutional right to associate with others and speak out as citizens on matters of public interest. That right is not without limits, however, if their public employer has good reasons for restrictions. In *Hudson v. Craven*, 403 F.3d 691 (9th Cir. 2005), the United States Court of Appeals for the Ninth Circuit (the federal appellate court that covers Washington) affirmed the dismissal of a community college instructor who orchestrated a field trip for her students to the 1999 World Trade Organization (WTO) protests in Seattle. In 1999, Barbara Hudson, an economics professor at a public community college in Vancouver, Washington, suggested that her class attend a public rally and march opposing the WTO. Hudson thought it would be a good idea to expose her students to differing points of view. Other faculty in Hudson's department did not agree, and the lead tenure professor stated his absolute opposition to the trip, in part because of concerns over student safety. He threatened to fire her if she went ahead with her field trip, but was not opposed to her or other students attending the WTO rally independently. The vice president of the college eventually issued several guidelines for attendance to insulate the college from the appearance of supporting the protest. Hudson went ahead with her plans.

Following the protest, the lead professor for Hudson's department recommended nonrenewal of Hudson's contract. Hudson filed suit claiming a violation of her First Amendment rights to free speech and association. The Ninth Circuit found Hudson's activity was part speech and part association—a "hybrid" for constitutional purposes. The court found guidance from the U.S. Supreme Court that the interests of a teacher as a citizen, commenting on matters of public concern, must be balanced against the concerns of the employer in promoting the efficiency of the public services it performs through its employees. Applying that standard, the court recognized that the WTO protests were matters of public concern. The court found Hudson's interests in associating with her students to attend the protest were outweighed by the college's interest in student safety and

pedagogical oversight, especially where the college merely limited Hudson's use of the de facto auspices of the college. The court affirmed dismissal of Hudson's lawsuit on those grounds.

The court here recognized that even when constitutional rights are at stake, employers have a legitimate interest in carrying out their mission and activities.

B. State Statutes and Regulations That Chill an Employer's Right to Free Speech in Union Organizing Campaigns Are Preempted by the Federal National Labor Relations Act.

In *Chamber of Commerce of United States v. Lockyer*, 422 F.3d 973 (9th Cir. 2005), the Ninth Circuit preempted a California statute that barred employers from spending state funds on union-related speech. The California statute prohibited a "recipient of a grant of state funds" from "us[ing] the funds to assist, promote, or deter union organizing." It also barred private employers receiving more than \$10,000 in state funds in a calendar year from "us[ing] any of those funds to assist, promote, or deter union organizing." On appeal by the AFL-CIO and State of California, the Ninth Circuit affirmed the lower court's ruling that the statute was preempted. The court found the statute undermined the "delicate balance established by Congress [in the National Labor Relations Act (NLRA)] as between labor unions and employers." The court stated that the statute forced the employers to a position of neutrality, "which in turn help[ed] facilitate union organizing."

The court looked to the "exacting compliance burdens, strict accounting requirements, the threat of lawsuits, and onerous penalties" to determine that the statute had a chilling effect on employer speech. The court found the statute implicated the strongest of preemption doctrines in ruling that state law must yield to the NLRA in this case.

II. HIRING

A. Job Offers Can Be Contingent Upon the Applicant Passing a Medical Examination Only if the Applicant Has Met All the Nonmedical Conditions First.

In *Leonel v. American Airlines, Inc.*, 400 F.3d 702 (9th Cir. 2005), the Ninth Circuit recently held that an airline's conditional offer of employment to three prospective flight attendants who were infected with HIV may run afoul of the medical examination requirements of the Americans with Disabilities Act (ADA). This was so even where the applicants deliberately withheld the information as a part of the airline's medical screening process.

Walber Leonel, Richard Branton, and Vincent Fusco each applied to become a flight attendant with American Airlines (AA). AA flew each candidate to Dallas for an interview, and after the interviews, made conditional offers of employment to each candidate. The offers were, by their terms, conditioned on each applicant's successful completion of both a background check and a medical examination. Rather than wait for the completion of the background checks, AA immediately sent each applicant to its on-site medical department for exams. The exams included a questionnaire about their medical history and the taking of a blood sample. Each applicant failed to disclose that they were HIV positive, despite questions that would have required disclosure of such information. AA subjected each applicant's blood sample to a complete screening test, whereupon it learned that the applicants were HIV positive. Following that discovery, AA immediately withdrew offers of employment from the applicants on the grounds that they had deliberately withheld their condition. After their offers were rescinded, the applicants filed a claim against AA alleging violations of the ADA and California's Fair Employment and Housing Act. The trial court dismissed their claims.

The Ninth Circuit, however, focused on the timing and sequence requirements for medical exams contained in the ADA and reversed the trial court's dismissal. The court found that as a practical matter, the ADA's hiring sequence requires an employer first to collect and evaluate all relevant nonmedical information regarding an applicant before collecting and evaluating medical information. The court reasoned that the sequence of the hiring process serves the important functions of (1) keeping applicants' medical information confidential until they are assured they have the skills to perform the job; and (2) informing the applicants whether they were rejected because of their disability. The fact that the applicants had deliberately withheld information was not relevant, according to the court. Instead, the court said that when a medical examination is unlawfully premature in the hiring process, the employer cannot "penalize" an applicant "for failing to disclose" medical information. The court's decision reinforces the purpose of the ADA in protecting individuals from having to share sensitive medical information until after they have been given "real" job offers. In this case, because AA's job offers were contingent on both medical and nonmedical components, the Ninth Circuit ruled that the offers were not "real," and that AA "was not entitled to get the [medical] information at all until it had completed the background checks, unless it [could] demonstrate it could not reasonably have done so before initiating the medical examination process."

III. WAGE AND HOUR LAW

A. **Commercial Truck Drivers Hauling Produce Are Not Exempt From Overtime Compensation Where They Do Not Work Directly for the Farmers Growing the Produce.**

The Washington Minimum Wage Act (WMA) exempts farm employers from paying overtime compensation, in some circumstances, to specific categories and types of employees. At issue here is an exemption for individuals employed on a farm to transport goods to market. In *Cerrillo v. Esparza*, 126 Wn. App. 723, 109 P.3d 475 (2005), Division Three of the Washington Court of Appeals addressed whether a commercial carrier who has contracted to haul produce from farms to various processors qualifies for an overtime exemption under the WMA. The truck drivers sued their employer for overtime compensation connected with picking up produce from various Washington farmers for delivery to processors. The employer acknowledged that the drivers worked over 40 hours per week without receiving overtime compensation. The Yakima County Superior Court entered a judgment in favor of the drivers.

The court of appeals agreed that the commercial truck drivers were not agricultural employees within the meaning of the overtime exemption. The court reasoned that the spirit of the WMA is “plainly employee-protective” and requires a narrow construction of overtime exemptions. Moreover, the court showed great deference to the Department of Labor and Industries’ (L&I) interpretation of the statute because it fell within the agency’s expertise. L&I declared that a trucking company transporting agricultural products that it had not itself grown and produced would be required to pay overtime.

B. **Washington’s Overtime Law Applies Only to Hours Worked in the State.**

Section 13(b) of the Fair Labor Standards Act (FLSA) provides an overtime exemption for truck drivers who are subject to the maximum-hour regulations of the secretary of transportation. The Supreme Court, in 1947, concluded that interstate truck drivers subject to those regulations under the Motor Carrier Act were not also subject to the overtime rules under the FLSA. Washington’s overtime law (WMA) does not contain a similar exemption for truck drivers, and in 1988, the Washington Supreme Court ruled that the state law was not preempted by the federal restrictions. Therefore, the state overtime wage requirements apply to interstate truck drivers—even if they were exempt under the federal FLSA.

In *Bostain v. Food Express Inc.*, 127 Wn. App. 499, 111 P.3d 906 (2005), Division Two of the Washington Court of Appeals addressed whether an interstate trucker who drove more than 48 hours a week, but less than 40 in the state of

Washington, was entitled to overtime pay. Bostain was employed as an interstate truck driver for Food Express at its Vancouver, Washington terminal. Food Express hauls food and chemicals in California, Nevada, Idaho, Arizona, Oregon, Utah and Washington. The majority of its hauling is intrastate, but some interstate hauling occurs between California and the other states. Bostain began and ended his runs at the Vancouver terminal. Logs kept by Food Express showed that Bostain drove out of state 60 percent of the time. After Bostain was terminated for insubordination, he filed suit claiming he was owed overtime wages. The trial judge ruled in Bostain's favor and Food Express appealed.

The court of appeals applied the "plain meaning rule" to the overtime statute. Under that rule the court examined the ordinary meaning of the statutory language, the underlying legislative purposes, and any closely related statutes to arrive, ultimately, at a harmonious statutory scheme. Under this test the court found that the Department of Labor and Industries regulation defines the "overtime" rate as the amount of compensation paid for hours worked *within the state* in excess of 40 hours per week. The court gave deference to the department's interpretation that overtime is not owed to a truck driver unless he works more than 40 hours within the state. The court of appeals reversed the lower court's decision and found that the overtime law did not apply to work performed outside the state. This case highlights that employment practices of companies with operations in more than one state must comply with both federal and state law in each state where they operate.

C. Commissioned Managers at Retail Sales Businesses May Be Exempt From Overtime Pay.

Federal law exempts from overtime pay certain commissioned employees of retail and service establishments. In *Gieg v. DDR, Inc.*, 407 F.3d 1038 (9th Cir. 2005), the Ninth Circuit addressed the question of whether the exemption extends to commissioned managers of an automobile dealership, where those managers were engaged in selling insurance policies, not cars. The court considered the question of whether these managers were exempt as commissioned employees of a retail establishment. The district courts that had originally considered the claims concluded that automobile dealerships were indeed retail establishments. They nonetheless found the employees were entitled to overtime pay because their job was not part of the dealership's retail activities. The Ninth Circuit disagreed.

The Ninth Circuit noted that the exemption to the overtime requirement for sales employees was designed to acknowledge the commission-based compensation systems that are driven by the success of employees in selling "big ticket items." The court reasoned that the exemption was concerned more with the compensation to the employee than with the nature of the goods and services sold. In this case

the dealerships were clearly retail establishments. In addition, each of the employees earned compensation at a level exceeding one and one-half times the minimum wage, and that compensation was comprised primarily of commissions. The court then determined that the Fair Labor Standards Act did not draw fine distinctions between the retail product sold and after-sale products and services (such as insurance policies) for purposes of the exemption to overtime pay. The court concluded that the managers were exempt from overtime pay because the after-sale insurance policies they sold were an “integral part” of the dealership’s retail business.

D. Dual Function Paramedics, Who Are Trained in Both Fire Suppression and Advanced Life Saving, Are Not Exempt From Federal Overtime Regulations Under the Fire Protection Exemption.

The Fair Labor Standards Act (FLSA) requires the payment of overtime compensation at a rate of one and one-half times the regular rate when an employee works more than 40 hours in a seven-day period. There is an exemption for law enforcement and fire protection employees. Under the exemption, an employer must pay overtime to fire protection employees only if they work more than 204 hours within a 27-day period. In *Cleveland v. City of Los Angeles*, 420 F.3d 981 (9th Cir. 2005), the Ninth Circuit was presented the question of whether dual function paramedics, who are trained in both fire suppression and advanced life saving, are exempt from overtime pay under the fire protection exemption.

Plaintiffs in this case were 119 dual function paramedics assigned to work as paramedics on ambulances. They were dispatched to fire scenes on average one or two times per year. They did not perform, and were not equipped to assist with, fire suppression activities at fire scenes. The Ninth Circuit examined these facts and the specific language of the overtime exemption to determine that the dual function paramedics were not exempt from overtime regulations. The regulations defined a fire protection employee as someone who (1) is trained in fire suppression; (2) has the legal authority and responsibility to engage in fire suppression; (3) is engaged by a fire department; and (4) is either engaged in the suppression of fires or dispatched to emergency situations where life, property, or the environment are at risk. The court focused its attention on whether the dual function paramedics had the “responsibility” to suppress fires. On the basis of several factors that militated against the ability of even dual trained paramedics to assist with fire suppression (lack of equipment and protective gear for one), the Ninth Circuit held that the paramedics did not have responsibility for fire suppression while employed as paramedics. Because the dual function paramedics were not responsible for fire suppression duties, they were entitled to overtime pay under the FLSA.

IV. EMPLOYEE BENEFITS

A. **Employees Must Follow Their Employee Welfare Benefit Plan Procedures in Order to Guarantee Recovery of Benefits Under the Employee Retirement Income Security Act.**

In *Abatie v. Alta Health & Life Insurance Co.*, 421 F.3d 1053 (9th Cir. 2005), a widow sued an insurer serving as the administrator of her deceased husband's welfare benefit plan regulated by the Employee Retirement Income Security Act (ERISA) after the insurer denied her claim for life insurance benefits following her husband's death. The employee, Dr. Joseph Abatie, was employed until November 1992, when he took medical leave and applied for disability benefits. The life insurance policy at issue was part of an employee welfare benefit plan (the plan) provided by Dr. Abatie's employer and was subject to ERISA. The plan provided that to be eligible for coverage, one must be in active, full-time work. In the event that an employee became totally disabled, the policy provided that he or she could continue to be covered, even without a premium charge, upon approval of a "waiver of premium application." But even if the waiver of premium application was granted, the coverage would end when the insured was no longer totally disabled or failed to provide proof of continued disability.

The employer wrote to the insurer and administrator, Alta Health & Life Insurance Company ("Alta"), to ask for payment of life insurance benefits following Dr. Abatie's death, but admitted that it had *never* filed the paperwork for waiver of the premium when Dr. Abatie's disability began. Alta therefore denied payment of the claim for life insurance benefits, and Dr. Abatie's widow sued Alta. After reviewing the supplemented record, Alta issued its final determination, denying coverage because Dr. Abatie never submitted a waiver of premium application. Alta also added that there was insufficient proof that Dr. Abatie was totally disabled from all occupations until his death as a second reason for denying the claim. At trial, the district court held that the abuse of discretion standard of review applied, and that Alta did not abuse its discretion in denying the claim.

On appeal, the Ninth Circuit explained that if a benefit plan gives the plan administrator discretionary authority to determine eligibility of benefits or to construe the terms of the plan, then an administrator's denial of benefits challenged under ERISA is reviewed for an abuse of discretion. The Ninth Circuit reasoned that a plan must unambiguously give an administrator authority, power, or discretion to determine eligibility, but it need not use the term "discretion," and held that Dr. Abatie's plan unambiguously granted discretion to the administrator to interpret the plan and determine eligibility of benefits. Therefore, Alta's denial of benefits was reviewed for an abuse of discretion. Dr. Abatie's widow argued that Alta's role as administrator of the plan and funding source gave rise to a

conflict of interest. The Ninth Circuit reasoned that although there was an apparent conflict, an actual “serious conflict of interest” had to be shown to give a less deferential standard of review. The court then considered and discarded various factual arguments to support such a conflict. Then, not finding that Alta abused its discretion, the court affirmed the denial of benefits.

B. Stock Options May Be Deemed Wages Under Some States’ Employment Laws—But Washington Courts Have Not Yet Directly Decided This Issue.

A terminated employee sued his employer and the administrator of a stock-based incentive plan, alleging that they violated Idaho’s wage laws and public policy by terminating him in retaliation for petitioning to exercise stock options in *Paolini v. Albertson’s, Inc.*, 418 F.3d 1023 (9th Cir. 2005). Bruce Paolini worked for Albertson’s for 17 years. He eventually attained the position of senior vice president of labor relations and employment law. During his time at Albertson’s he was granted several thousand stock options. When he attempted to exercise the options, the administrator of the plan denied his request, claiming that necessary circumstances had not yet occurred. Paolini’s employment with Albertson’s then ended, though the reason for the termination was disputed. Paolini claimed that he was fired for trying to exercise his stock options. He claimed that the stock options were part of his pay, and that his futile attempt to cash them in amounted to a complaint about his pay and violated Idaho law, which prohibits employers from firing or retaliating against employees who complain about improper payment of wages. Albertson’s claimed that he quit or, in the alternative, that he was legitimately fired.

At trial, Paolini’s claim was dismissed. On appeal, the Ninth Circuit considered that the Idaho law defines wages as “compensation for labor or services rendered by an employee, whether the amount is determined on a time, task, piece or commission basis.” The Idaho Supreme Court had not previously decided whether that definition would include stock options. The Ninth Circuit determined that in order to decide the appeal, it needed the Idaho Supreme Court to answer (1) whether stock options were within the definition of wages under Idaho law and (2) whether a complaint about nonpayment of wages would fall within the scope of wrongful discharge in violation of public policy as recognized by Idaho courts. It therefore certified those questions to the Idaho Supreme Court and suspended ruling until receiving answers.

This case serves as a reminder that resolution of certain employment law issues is based on state law and will vary from state to state. This issue has not yet been directly addressed in Washington.

C. Employer Contributions to Certain Trust Funds Are Not “Wages” and Therefore Should Not Be Included in the Time-Loss Compensation Calculations for Workers Compensation Claimants

In *Gallo v. Department of Labor & Industries*, ___ P.3d ___, 2005 WL 2386586 (Wash. Sept. 29, 2005), the Washington Supreme Court upheld the conclusion of the Department of Labor and Industries (L&I) that employer contributions to retirement trust funds, apprenticeship training trust funds, the Laborers-Employers Cooperation and Education Trust (LECET), and life insurance and disability insurance trust funds should *not* be included in time-loss compensation calculations for workers compensation claimants, because those payments did not come within the definition of “wages” under the Washington Industrial Insurance Act (the Act).

According to the Act, time-loss and loss of earning power compensation rates are determined by reference to a worker’s wage at the time of injury. The term “wages” is defined by the Act to include “the reasonable value of board, housing, fuel, or other consideration of like nature received from the employer as part of the contract of hire.” To apply that definition, the Washington Supreme Court has developed a test—“the reasonable value of board, housing, fuel or other consideration of like nature “means “readily identifiable and reasonably calculable in-kind components of a worker’s lost earning capacity at the time of injury that are critical to protecting workers’ basic health and survival.” In applying the test, the court concluded that the claimants had not shown how the employer contributions were critical to their “basic health and survival” at the time of their injury. Thus, the court held that the employer contributions should not be included in the employees’ time-loss compensation calculation. Additionally, the court held that to the extent employer-provided wages, whether in the form of money, board, housing, fuel, or health care coverage, continue during temporary total disability, time-loss compensation should be reduced accordingly.

D. ERISA Fiduciary Had an Obligation to Provide Timely Notification of Long Term Disability Coverage Plan Cancellation, but a Breach of That Duty Has No Actionable Remedy for the Employee.

In *Peralta v. Hispanic Business, Inc.*, 419 F.3d 1064 (9th Cir. 2005), the Ninth Circuit recently decided that while an employer had a fiduciary duty under ERISA to notify its employees of the cancellation of their long term disability coverage (LTD), ERISA offered no remedy to an employee who sued to enforce that duty. Carmen Peralta was hired in 1998 by Hispanic Business, Inc. (HBI), a publisher of business magazines. In an effort to enhance its benefits package, HBI introduced a new LTD policy at no cost to its employees, including Peralta. In 2000, HBI’s then-HR manager sent a letter to the LTD policy carrier canceling the policy.

Three months later, unaware of the cancellation, Peralta suffered serious injuries in an automobile accident. She made a claim for LTD benefits but later learned she no longer had any coverage. At around the same time, HBI's new HR manager was reviewing the company's benefits package when she discovered cancellation of the LTD plan. She immediately notified all of HBI's employees. Peralta, however, was still in the hospital and did not receive notification until after she returned to work. Peralta sued HBI, alleging a breach of their fiduciary duty under ERISA and seeking a monetary remedy. HBI defended on the grounds that it had complied with timing requirements set forth in ERISA regarding changes to covered plans. Moreover, the company asserted that the remedy sought by Peralta was not permitted under ERISA. The trial court dismissed Peralta's claim, and she appealed.

The Ninth Circuit agreed with Peralta that HBI owed her a fiduciary duty to notify her of the cancellation of the LTD. The court went so far as to suggest that the employer may have even owed a duty of pretermination notification. HBI's claim of compliance with ERISA's notification requirements for changes to the LTD plan failed as a defense. The court expressly addressed this defense and found that termination of the plan was significantly different than making changes to the plan. To hold otherwise, the court noted, would be to thwart the fiduciary obligations that ERISA places on an employer. After finding a fiduciary duty, however, the court was faced with a more difficult problem. While HBI owed a duty to Peralta, the court held that ERISA offered no remedy for the sort of procedural violation of that duty that HBI had committed here. Monetary remedies, the court noted, were only available for procedural violations of ERISA that are egregious. There was no evidence that HBI's actions were deliberate or misleading. Rather, HBI acted promptly once the LTD's cancellation had been discovered. The court concluded that "[w]hile the ERISA fiduciary had an obligation to provide timely notification to the participants . . . no remedy is available here" for a breach of that violation.

V. EMPLOYMENT CONTRACT CLAIMS

A. To Make a Successful Breach of Contract Claim, an Employee Must First File Within the Time Frame Mandated by the Contract.

In *Thorman v. American Seafoods Co.*, 421 F.3d 1090 (9th Cir. 2005), the Ninth Circuit upheld dismissal of a fisherman's breach of contract claim because he could not justify filing suit after the six-month time limit elapsed. Philip Thorman worked as an on-board fish processor for American Seafoods for several seasons between 1996 and 2000. Under the crew member contracts, Thorman's wages were based on American Seafood's preseason estimate of the sale prices rather than the prices for which the fish was actually sold. American Seafoods then

multiplied the predetermined price by each crew member's share to determine individual compensation. Thorman sued American Seafoods for violation of his fishing contract, asserting that American Seafoods did not contract in good faith because it underestimated the gross prices it expected to receive from selling the fish and further reduced those estimates by excessive deductions for costs.

Importantly, however, each relevant contract included a "Time for Claims" clause that limited claims arising out of the contract to six months from when the contract was completed or terminated. Thorman sued well past the six-month time limit. In order to overcome filing after the expired time limit, Thorman would need to show either fraudulent concealment—proof of affirmative conduct by American Seafoods that would lead a reasonable person to believe that he did not have a claim for relief—or that American Seafoods owed him a fiduciary duty to disclose the information. The trial court dismissed Thorman's claim as time-barred. The Ninth Circuit agreed that there was no fraudulent concealment, reasoning that American Seafoods had disclosed to Thorman the terms under which he was to be paid and he understood them. The court further agreed that American Seafoods owed Thorman no fiduciary duty to disclose its internal pricing or accounting methods, despite a line of cases describing seamen as needing special protection by the court against potentially overreaching ship owners. The court reasoned that those special protections were not unlimited in scope, and applied generally to agreements under which a seaman releases the vessel owner of liability, as well as physical risks associated with the dangers of the job. The Ninth Circuit therefore affirmed the lower court's dismissal.

B. Employment Contract Was Not Formed Where Oral Offer of Employment Was Made Over the Phone, and Rescinded One Day Later.

Division Two of the Washington Court of Appeals Division recently affirmed dismissal of a breach of contract claim filed by a disappointed applicant whose oral job offer was revoked following a negative reference from his current employer. In *Andrus v. State, Department of Transportation*, _ Wn. App. _, 117 P.3d 1152 (2005), the court determined that the employer's oral job offer did not create a contract and that even if it did, an employer cannot be held liable for terminating an at-will employment offer.

Scott Andrus applied for an at-will position as a building inspector with the city of Olympia. He received a call from Tom Hill, an engineering supervisor with the city who was partially responsible for hiring building inspectors, offering him the job. Andrus accepted and requested that additional information about the job be faxed to him. Andrus expected to receive his written offer of employment the following day via fax. Instead, Andrus received a message from Hill that the offer had been rescinded following additional reference checks. Andrus filed suit

claiming wrongful termination. The trial court granted the city's motion for summary judgment. Andrus appealed.

On appeal, the court upheld the judgment in favor of the city. The court reasoned that the oral offer did not create a valid contract because it did not create the reasonably certain terms necessary to meet the definition of a legal offer. The verbal offer lacked information about a starting date, salary, or benefits. Moreover, even had a contract been formed, Andrus did not dispute that the position was at-will employment. There was no evidence that the parties had contractually modified the at-will relationship, and the city was therefore permitted to terminate Andrus at any time. Andrus also asserted that Hill lacked the authority to fire him. The court, however, found this argument to be disingenuous. Andrus could not on the one hand rely on Hill's authority to grant employment, and on the other say that Hill had no authority to fire Andrus. The court ultimately found Andrus' appeal frivolous, and not only upheld the judgment in favor of the city but also awarded the city attorneys' fees for the appeal.

VI. ARBITRATION AND ALTERNATIVE DISPUTE RESOLUTION

A. Arbitration Clauses That Are Not Contained in, or Explicitly Referenced in, an Agreement Between the Employer and Employee Are Unenforceable.

Stockbrokers are members of the National Association of Securities Dealers (NASD). Membership is mandatory. The NASD requires all securities dealers to complete a form when they begin or transfer jobs. The form contains an arbitration clause that is incorporated into all NASD members' employment agreements. In *Todd v. Venwest Yachts, Inc.*, 127 Wn. App. 393, 111 P.3d 282 (2005), Division One of the Washington Court of Appeals recently held that where a voluntary Yacht Brokers Association required members to agree to an arbitration clause, but the clause was not referenced in a Yacht Broker's employment agreement, it was unenforceable by the employer against a broker employee.

Gerald Todd was a commissioned salesperson of yachts, working under an oral contract until he resigned. Following his resignation he sued his former employer to recover commissions he claimed he was owed. Todd was a member of the Northwest Yacht Brokers Association (NYBA). Membership was voluntary, and not required to be a broker. As a part of membership, brokers agreed to mandatory arbitration of disputes between members. Todd's former employer was also a NYBA member, and moved to dismiss Todd's suit on the grounds that Todd had failed to arbitrate their dispute. The trial court denied Venwest's motion

because the arbitration agreement was neither a part of, nor referenced in, Todd's employment agreement.

The court of appeals agreed with the trial court. Although Venwest analogized to those cases where NASD brokers were required to arbitrate their disputes, the court found several glaring distinctions. First, membership in the NYBA was voluntary for yacht brokers, unlike a securities dealer's required membership in the NASD. Second, securities dealers were required to sign a document containing the NASD's mandatory arbitration provision whenever they began or transferred jobs. Here, Todd's employment agreement neither contained, nor made reference to, the NYBA's mandatory arbitration provision. Rather, Venwest sought to enforce arbitration against Todd based solely on their mutual membership in the NYBA and Todd's initial assent to the arbitration provision when he became a member. The court of appeals held that an arbitration agreement that is neither contained in, nor referenced by, an employee's employment agreement is unenforceable.

B. An Employer Who Forces an Employee to Submit to Mandatory Arbitration of State Court Claims May Face Both Substantive and Procedural Unconscionability Challenges to Its Ability to Enforce Arbitration.

In *Circuit City Stores, Inc. v. Mantor*, 417 F.3d 1060 (9th Cir. 2005), the Ninth Circuit recently reaffirmed its prior ruling in that same matter that an employer arbitration program was both substantively and procedurally unconscionable where the employee was coerced into joining. Mantor started working for Circuit City in August of 1992. When he was hired, Circuit City did not have an employee arbitration program. In 1995, however, Circuit City implemented an arbitration program and instructed its managers that it was important for every employee to participate. Circuit City was acting in the face of rising numbers of lawsuits filed by its employees. Mantor refused to participate in the program and in 1998 he was told that if he continued to refuse he would have no future with Circuit City. Mantor signed up for the program. He subsequently filed a lawsuit against Circuit City for various employment related claims. Circuit City sought mandatory arbitration and a stay of Mantor's state court proceedings against it. The trial court granted Circuit City's request, and Mantor successfully appealed.

In the first appeal, the Ninth Circuit found the arbitration agreement between Mantor and Circuit City unenforceable on the grounds that it was both substantively and procedurally unconscionable, and remanded the case to the lower court. The lower court did not dispose of the case for several months. In the interim, the Ninth Circuit decided another case titled *EEOC v. Luce*, wherein it held that the Civil Rights Act of 1991 did not preclude employers from requiring

employees to arbitrate future Title VII claims as a condition of employment. Circuit City filed a motion for reconsideration of its appeal on the grounds that the Ninth Circuit's subsequent decision in *Luce* should alter the outcome in its case. The Ninth Circuit rejected Circuit City's claim and affirmed its prior decision that Circuit City's arbitration agreement was unenforceable.

VII. FAMILY AND MEDICAL LEAVE

A. **Employees Are Entitled to Leave Under the Family and Medical Leave Act Only if They Are Actually Present and Participating in the Care of the Sick Family Member.**

The Family and Medical Leave Act (FMLA) provides job security to employees who may need to take time off to care for a family member with a health condition. In *Tellis v. Alaska Airlines, Inc.*, 414 F.3d 1045 (9th Cir. 2005), the Ninth Circuit held that an employee's cross-country trip to retrieve the family car during his wife's late-stage pregnancy difficulties was not to "care for" his wife under the FMLA, even though he called her on the phone during his three-and-a-half-day trip. Therefore, the court upheld his termination for unexcused absences. In so holding, the court reasoned that providing care to a family member under the FMLA requires some actual care, which did not occur in this case—instead of participating in his wife's ongoing treatment by staying with her, the employee left her for almost four days. The court reasoned that although having a working vehicle may have provided his wife psychological assurance, it was an indirect benefit from an unprotected activity. Furthermore, the court concluded that phone calls during the employee's trips did not constitute participation in ongoing treatment as required.

VIII. UNEMPLOYMENT COMPENSATION

A. **Unless an Employer Announces a Layoff in Writing and Then Retains the Discretion to Approve or Reject Applications for Voluntary Layoffs, the Employer and its Employees Cannot Rely on Unemployment Benefits.**

In *Employees of Intalco Aluminum Corp. v. Employment Security Department*, 128 Wn. App. 121, 114 P.3d 675 (2005), an employer decided it had to lay off employees and negotiated a layoff with the union representing its workers. As part of the negotiated layoff, 24 employees with less than two years of seniority were laid off, other employees received their base rate of pay, and hourly employees were offered one of three voluntary severance packages through a written memorandum. Some 280 employees elected one of the voluntary severance offers. After accepting voluntary severance, 48 of those employees applied for unemployment benefits, which the Employment Security Department

(ESD) denied on the grounds that the employees had voluntarily terminated their employment.

Division One of the Court of Appeals reasoned that by statute, an employee is disqualified from receiving unemployment benefits if he or she voluntarily leaves work without good cause. However, an exception to the rule is that after an announced layoff, an employee may volunteer to be among those laid off and may still be eligible for benefits. But for that exception to apply, the layoff must be announced in writing, the option for employees to choose to be among those laid off must be also be in writing, and the employer must take the final action in the separation process by accepting the employee's offer to be laid off. The court of appeals concluded that the employer had not announced a *layoff* in writing because the voluntary severance packages actually achieved a reduction in force through means *other* than a layoff. The court further noted that potential future layoffs would not fulfill the requirement of announcing a layoff in writing. The court also concluded that the employer had not taken the final action necessary—processing the paperwork for the voluntary severance was merely clerical and did not show that the company had reserved the ability to reject the worker's participation in the layoff. Because as soon as an employee signed one of the voluntary severance offers the contract was finalized, the employer did not retain the necessary control.

The employees could still recover benefits if they could show good cause to quit, which they argued they had because the employer's actions made the employees fear for their jobs. But Washington courts have held that the prospect of a layoff at some indefinite future time is not good cause to quit. Because the employer had not laid anyone off since the initial 24 low seniority employees, whether the voluntary layoffs prevented more layoffs the court deemed mere conjecture. The court of appeals therefore reversed the lower court's holding and reinstated ESD's denial of benefits.

IX. SOCIAL SECURITY AND DISABILITY

A. An Individual Must Show More Than Symptoms to Prove a Disability Under the Social Security Act.

The Social Security Act defines “disability” as the “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.” In *Ukolov v. Barnhart*, 420 F.3d 1002 (9th Cir. 2005), Marc Ukolov filed applications for disability insurance benefits and supplemental security income, asserting inability to work due to multiple health problems. The decision of the

administrative law judge (ALJ) followed the five-step process established by the Social Security Administration for determining disabilities. During that evaluation, if a claimant is found not to be disabled at any point, there is no need to consider subsequent steps. Step two in the process requires that the claimant have one or more “severe impairments that significantly limit [his] physical or mental ability to conduct basic work activities.” Ukolov claimed various physical and psychological impairments, and asserted that those impairments caused severe limitations in his hands and frequent falls.

The ALJ considered opinions of various medical professionals, including a neurologist, and concluded that Ukolov failed to establish a medical impairment. The ALJ’s decision became final and Ukolov appealed to federal district court, which affirmed the denial of benefits. Ukolov then appealed to the Ninth Circuit, claiming that the ALJ erred by failing to find him disabled based on a tendency to fall. The Ninth Circuit considered the appropriate standards and reasoned that Ukolov could only establish an impairment if the record included “signs,” the results of medically acceptable clinical diagnostic techniques or tests, as well as symptoms, such as Ukolov’s representations regarding his impairments. The court concluded that because “none of the medical opinions included a finding of impairment, a diagnosis, or objective test results, Ukolov failed to meet his burden of establishing disability,” and the court affirmed the ALJ’s denial of benefits.

X. SEX DISCRIMINATION

A. Employers Can Make Tough Business Decisions That Negatively Affect Employees as Long as the Stated Reasons Are Legitimate, Make Sense, and Are Not Discriminatory.

In *Mondero v. Salt River Project*, 400 F.3d 1207 (9th Cir. 2005), the Ninth Circuit upheld dismissal of a gender discrimination claim where the employee failed to either offer direct evidence of gender bias or present specific and substantial indirect evidence that the employer’s justification for not permitting her to receive on-the-job training was pretextual. Sylvia Mondero was hired in 1987 to work for the Salt River Project as a temporary electrician, although she eventually became a regular employee. In 1998 her employer determined that it no longer needed two electricians in Mondero’s department and assigned her and her more senior coworker to perform nonelectrical duties while continuing to pay them journeyman electrician wages. In May 1999, Mondero was told she was being laid off from her department but that she could work on a temporary loan assignment with another department.

In November 1998, six months before Mondero’s layoff, five male electricians were told they were going to be laid off because of department restructuring. The

company reached an agreement with the union representing the electricians to have the men temporarily assigned to the department where Mondero was eventually transferred. The men were given on-the-job training as part of a “trial” program. Throughout their training the men were paid higher operations journeyman wages. When Mondero arrived she requested similar on-the-job training, but was denied, and paid lower wages as a service-level worker. Her temporary assignment ended with her layoff, whereupon she filed a sex discrimination suit against her employer.

Mondero’s employer did not contest that she had established a prima facie case of gender discrimination. Further, they argued that any presumption of unlawful discrimination had been rebutted. The employer’s explanation for not offering Mondero on-the-job training program was twofold: (1) it did not wish to continue paying operations journeyman wages for service-level work; and (2) although the program was still in progress, the company was not convinced it was the best way to obtain trained journeymen. Mondero presented evidence of derogatory comments made by two working foremen in order to demonstrate pretext on the part of the company. Both the trial court and the Ninth Circuit, however, concluded that Mondero had failed to present any evidence that the alleged sexist comments related in any way to her employer’s decision not to repeat the “trial” program for her. In fact, Mondero failed to prove that those making the decision were influenced by, or even aware of, the alleged comments. In this case, a stated desire to avoid paying higher wages for lower-classified work and the frank reconsideration of whether the program was working well for the employer constituted legitimate, nondiscriminatory reasons for the employer’s actions.

B. Employers May Be Liable Under Title VII Even if They Have a Legitimate Reason for Their Employment Decisions, as Long as an Illegitimate Reason Was a Motivating Factor.

In *Dominguez-Curry v. Nevada Transportation Department*, __ F.3d __, 2005 WL 2218908 (9th Cir. Sept. 14, 2005), the Ninth Circuit recently held that even if an employer had chosen the superior candidate for a position, that did not preclude liability under Title VII where the plaintiff could show that discrimination was a motivating factor in the hiring decision. Sylvia Dominguez-Curry worked under the supervision of Roe Stacey in the Nevada Department of Transportation’s contract compliance division. Stacey routinely made demeaning comments to women in the division. In November of 1999, Stacey qualified for a Contract Compliance Manager position. Around that time an opening was announced for a Program Officer III in the division. Dominquez applied for the position, and she and another applicant, Phillip Andrews, were ranked fifth among the seven top applicants. Andrews had a college degree, had attended law school for two years, and had worked in a similar position in Wyoming. Dominguez had worked in the

department for many years but did not have a college degree. Each candidate was interviewed by Stacey and Mark Elicegui, Chief Construction Engineer. Following the interviews Stacey and Elicegui compared notes and had independently arrived at Andrews as their first choice, and another female applicant as their second choice. Dominguez filed suit against her employer for failure to promote on the basis of gender, intentional infliction of emotional distress, and sex discrimination. The trial court granted summary judgment in favor of the employer.

On appeal, the Ninth Circuit found that Stacey's comments were sufficiently severe and pervasive that a reasonable jury could find in favor of Dominguez on her hostile work environment claim. The court looked to the circumstances surrounding all of the comments Stacey made to Dominguez and other female employees. The court also reversed the lower court's decision on Dominguez's claim of pretext in the decision to hire Andrews. In particular, the court held that specific and substantial evidence of the pretext was not required where Dominguez had proffered direct (as opposed to circumstantial) evidence of pretext. That direct evidence included Stacey's comments about wanting to hire a man for the position. This comment was especially important where Stacey was directly involved in the hiring decision. Moreover, the court held that even if Andrews was the most qualified candidate, that fact alone was insufficient to preclude a finding of discrimination. Dominguez could prevail on her claim if she could show that an illegitimate reason for not hiring her was a motivating factor in the ultimate hiring decision.

C. A Pattern of Abuse in the Workplace Directed at One Gender, Whether Motivated by a Discriminatory Intent or Not, Can Violate Title VII if the Effect of the Abuse Is to Disadvantage One Gender Versus the Other.

The Equal Employment Opportunity Commission (EEOC) brought an action on behalf of three female employees of the National Education Association—Alaska (NEAA) alleging a hostile work environment. In *EEOC v. National Education Association, Alaska*, 422 F.3d 840 (9th Cir. 2005), the Ninth Circuit reversed a trial court decision granting summary judgment in favor of NEAA and held that an employer's specific intent to discriminate against or target women was not necessary for employees to succeed in a hostile work environment claim.

Three female employees of the NEAA filed claims with the EEOC regarding the conduct of Thomas Harvey, the Executive Director of the NEAA. They offered evidence of numerous episodes where Harvey made loud, abusive, hostile, and profane comments against them and other female employees. They also alleged that Harvey's verbal conduct was accompanied by a hostile physical component. None of the comments or actions taken by Harvey were, on their face, sex- or

gender-related. The trial court found the absence of intent to be an essential factor lacking in the claim, and granted the NEAA's motion for summary judgment.

On appeal, however, the Ninth Circuit found "no legal requirement that hostile acts be overtly sex- or gender-specific in content" to support a hostile work environment claim. Rather, the "ultimate question . . . is whether 'members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'" It was not necessary for Harvey to have the specific intent to target or harass women. Instead, all that was necessary was a pattern of abuse against women in the workplace that disadvantaged women versus men. Moreover, the fact that the workplace had more female than male employees was also irrelevant. The Ninth Circuit's ruling highlights that the inquiry for hostile work environment claims is not the intent of the alleged harasser; rather, it is the impact of the harassment that is important.

XI. RACE DISCRIMINATION

A. Emotional Distress Awards Are Unpredictable—There Is a Risk of Large Noneconomic Damages Awards Even Where Little Evidence of Emotional Distress Exists.

In *Bunch v. King County Department of Youth Services*, _ Wn.2d _, 116 P.3d 381 (2005), Ralph Bunch, an African-American juvenile detention officer, sued his employer, King County Department of Youth Services, for racial employment discrimination under the Washington Law Against Discrimination. He asserted that he was disciplined for a variety of minor offenses during his employment for which other detention officers were not disciplined. Bunch was fired in April 2001 for allegedly showing inmates an R-rated video, which Bunch denied. He claims that he was subjected to retaliation and race discrimination during the six years leading up to his firing. Bunch now works elsewhere as a security guard, making less than he did at the county. He attested to depression and anger as a result of the discrimination, as well as difficulty explaining his termination to his family and financial hardship that the change in jobs had caused.

A jury awarded Bunch \$343,500 in lost past and future wages, \$260,000 in noneconomic, or emotional distress, damages, and more than \$170,000 in attorneys' fees and costs. On appeal, the Washington Court of Appeals reduced the noneconomic damages from \$260,000 to \$25,000 after concluding that the evidence was insufficient to support the greater award, the award was supported by passion and prejudice, and the award shocked the court's conscience. The employee appealed to the Washington Supreme Court, which reinstated the jury's original \$260,000 emotional distress damages. The court found that there was sufficient evidence to support the award even though Bunch had never consulted a

health care professional—it reasoned that his own testimony was sufficient evidence of anguish and emotional distress and that the facts alleged, taken together, provided a basis from which a jury could infer emotional distress. After reasoning that the size of the emotional distress damages alone was insufficient to show they were based on passion or prejudice of the jury, the court held that the court of appeals was not justified in reducing the emotional distress damages from \$260,000 to \$25,000 and reinstated the jury’s original award.

B. Forcing an Employee of Non-American Heritage to Go by a Western Name May Be Discrimination.

A CEO’s repeated uses of a Western name, “Manny,” rather than an employee’s Arabic name, “Mamdouh,” was deemed racial discrimination by the Ninth Circuit in *El-Hakem v. BJY Inc.*, 415 F.3d 1068 (9th Cir. 2005). Despite the employee’s objections, the CEO claimed use of a Western name would increase the employee’s chances of success and would be more acceptable to the employer’s clientele, and continued to refer to the employee as “Manny” for approximately one year. When the employee’s term of employment ended, the employee sued the employer and CEO. A jury found the CEO intentionally discriminated against the employee on the basis of race by creating a hostile work environment under 42 U.S.C. § 1981.

The employer and CEO appealed, arguing that because “Manny” was not a racial epithet, they could not be held liable for racial discrimination. The Ninth Circuit reasoned that race discrimination does not need to be based on genetically determined characteristics such as skin color. Referencing a U.S. Supreme Court opinion, the court held that Section 1981 was intended to protect from discrimination “identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics.” The court held that names were often a proxy for race and ethnicity. Furthermore, the Ninth Circuit held that the CEO’s repeated use of the name “Manny” was sufficient to create a hostile work environment. A hostile work environment requires conduct that is severe or pervasive—the frequent use of the term was sufficient to create a hostile work environment even though the court did not deem use of the term severe. The Ninth Circuit affirmed the jury’s verdict and also affirmed the lower court’s decision to amend the jury’s original verdict to hold the employer vicariously liable for the CEO’s discrimination.

XII. NATIONAL ORIGIN DISCRIMINATION

A. **Discrimination Difficult to Prove Where the Same Actor Responsible for the Adverse Employment Action Also Was Responsible for a Positive One.**

The “same actor” doctrine strengthens the defense of an employer faced with an employee discrimination claim. In *Coghlan v. American Seafoods Co.*, 413 F.3d 1090 (9th Cir. 2005), James Coghlan, an American commercial fisherman, sued his employer alleging national origin discrimination under Title VII of the Civil Rights Act of 1964 and the Washington Law Against Discrimination. Coghlan based his claim on a series of events through which a Norwegian fisherman received the position of master of a large vessel over Coghlan. However, prior to being denied that position, Coghlan’s employer had both retained him during layoffs and promoted him. The trial court dismissed Coghlan’s claim, and Coghlan appealed.

On appeal, the Ninth Circuit reasoned that to make out his claim, Coghlan was required to show that (1) he was in a protected class (i.e., American), (2) he was qualified for the position that he held or the one to which he aspired, (3) he was terminated, demoted, or denied a promotion to that position, and (4) the job went to someone outside of his protected class (i.e., a non-American—here, a Norwegian). After making that showing, the burden shifted to Coghlan’s employer to present evidence that it had legitimate, nondiscriminatory reasons for taking the contested action. If his employer was able to do so, Coghlan could only proceed to trial if he could prove that his employer’s reason were merely pretextual.

When the Ninth Circuit applied that standard, it concluded that Coghlan had presented enough evidence to make out his initial claim. However, the court reasoned that Coghlan’s employer presented enough evidence of nondiscriminatory reasons for its actions—that Coghlan was not qualified for the desired position. Thus, Coghlan had to then show that his employer’s reasons were simply a pretext for intentional discrimination. If Coghlan had direct evidence of discrimination, such as discriminatory statements by his employer, the court reasoned he would have to show relatively little evidence to proceed to a jury. Because Coghlan had only circumstantial evidence of discrimination, however, his claim required “specific and substantial” evidence of intentional discrimination to proceed to trial.

Moreover, the court found that intentional discrimination was especially difficult to prove in Coghlan’s case because he was attempting to show discrimination by the same supervisor who had provided him with a desirable job change. That fact

gave rise to the “same-actor inference,” a theory that suggests a lack of a discriminatory intent when the “same actor” has taken both positive and adverse job actions affecting the plaintiff within a relatively short amount of time. The Ninth Circuit concluded that Coghlan had not presented enough evidence of bias by his supervisor or other decision makers to defeat the same actor inference, and it affirmed the lower court’s dismissal.

XIII. AGE AND RELIGIOUS DISCRIMINATION

A. Employers Can Strengthen Their Defense of Employee Discrimination Claims if They Have Documentation of Employee Performance Problems.

An employer’s defense to an employee discrimination lawsuit would have been made easier if it had maintained better documentation of the employee’s performance problems, according to *Griffith v. Schnitzer Steel Industries, Inc.*, 128 Wn. App. 438, 115 P.3d 1065 (2005). In that case, Schnitzer Steel Industries, Inc. initially promoted Dennis Griffith to general manager of its Tacoma scrap metal facility. At that time, Griffith was 52 years old and Schnitzer knew that he was of the Mormon faith. In the years following the promotion, the facility initially improved and then began losing substantial amounts of money. Sometime after the downturn, Griffith was demoted to assistant general manager and Jay Robinovitz, a 42-year-old Jewish man, was made general manager. Robinovitz testified that he lost faith in Griffith after discovering disturbing and even dangerous management practices, and that he was concerned with Griffith’s managing style, which made him unaware of several improper business practices and incidents. But apparently Robinovitz did not document his concerns. In June 2000, Robinovitz terminated Griffith.

Griffith sued Schnitzer Steel and Robinovitz under the Washington Law Against Discrimination, alleging age and religious discrimination as the basis for his discharge. Griffith’s only basis for the age discrimination claim was that the replacement manager was younger. Griffith also asserted religious discrimination because Schnitzer Steel had several Jewish individuals in its management, and he pointed to polygamy jokes told by the general manager of another scrap metal facility. However, he also testified that telling jokes regarding national origin was considered taboo by Schnitzer Steel, and that Schnitzer Steel’s in-house counsel apologized for the jokes. Although the trial court dismissed the religious discrimination claim against Robinovitz, the jury found in favor of Griffith on the remaining religious and age discrimination claims and awarded him \$2,026,500. On appeal, the Washington Court of Appeals reasoned that in order to make out an initial case of discrimination, an employee must show that he: (1) belongs to a protected class (based on his religion or age here); (2) was discharged; (3) was

doing satisfactory work when he was discharged; and (4) was replaced by someone not in his protected class (for age, an employee need not show that he was replaced by someone outside of the protected class of persons 40-70, just that it was someone significantly younger). Once the employee makes that showing, a presumption of discrimination exists and the employer must show evidence of a legitimate, nondiscriminatory reason for the termination. If the employer can do so, then the employee must show that the employer's reason was merely pretextual.

The court of appeals reasoned that an employer's lack of documentation of an employee's poor performance may be circumstantial evidence that the justifications for discharge were fabricated post hoc, but it concluded that Schnitzer Steel was entitled to judgment for two reasons: (1) Griffith had failed to demonstrate that the justifications proffered for his termination were unworthy of belief; and (2) the record was insufficient for a rational trier of fact to find that Griffith's age or religion was a substantial factor in his termination. The court found it significant that Schnitzer Steel was aware of his age and religion when it promoted him to Manager and gave him a \$20,000 increase in salary. When an employee is both promoted and fired by the same decision maker within a relatively short period of time, the "same actor" inference arises—an inference that the employee was not fired due to any attribute the decision makers were aware of at the time of the promotion. The court did not consider the five years between promotion and firing here significant. Nor, did the court consider the inference inappropriate where Robinovitz was not involved in Griffith's promotion because Griffith partially attributed his firing to decision makers who were involved in his promotion. The evidence of discrimination provided by Griffith was insufficient to overcome the inference, and the court of appeals overturned the jury award.

XIV. DISABILITY DISCRIMINATION

A. An Employee With Heart Disease Who Was Restricted From Performing Strenuous Activity Could Not Sustain a Prima Facie Case of Disability Discrimination or Wrongful Discharge Against Former Employer.

In *Becker v. Cashman*, 128 Wn. App. 79, 114 P.3d 1210 (2005), Division Three of the Washington Court of Appeals recently held that an employee who suffered from heart disease could not sustain his claims of disability discrimination or wrongful discharge even where he was expressly limited from performing strenuous activity. James Becker was employed as an estimator for a glass company. In 1998 he was hospitalized and diagnosed with a heart condition that caused poor circulation and heart congestion. Becker's doctor wrote a letter to his employer detailing his condition and stating that Becker had difficulty going up

and down stairs. Becker voluntarily quit his job in 2000 to take a new job in Montana. However, he later left that job citing the small size of the business and the effect the altitude was having on his condition. He was subsequently rehired by Cashman, but then discharged some time later. Becker filed suit claiming disability discrimination and wrongful discharge. The trial court dismissed his claims for failure to sustain a prima facie case on either count.

The court of appeals agreed with the trial court. Cashman and Becker disputed the reasons why Becker was discharged. Becker claimed that Cashman discharged him because of his health. Becker also claimed that Cashman discriminated against him by refusing to move his desk to the first floor, or to give him a parking space in front of the building. Becker said that because of the strain of getting to his office he needed to take downtime to lower his heart rate in accordance with his doctor's orders. Cashman claimed that he discharged Becker because he slept constantly at work, and because clients had repeatedly complained about Becker's attitude and manner.

The court ultimately determined that Becker could not meet his burden on either of his claims. As a part of his disability discrimination claim Becker asserted that his condition substantially limited his ability to perform his job. The court noted, however, that Becker's "insistence that [his] shut down periods lasted only a few minutes undermines his insistence that the condition substantially limited his abilities." The court further noted that while Becker had made a prima facie showing of wrongful discharge, he could not show that the explanation offered by his employer for his discharge was pretextual. In fact, that Becker's employer was aware of his condition at the time of his rehire substantially cut against his wrongful discharge claim. The court noted that "when someone is both hired and fired by the same decision makers within a relatively short period of time, there is a strong inference that he or she was not discharged because of any attribute the decision makers were aware of at the time of hiring." For these reasons the court of appeals affirmed the lower court's dismissal of Becker's claims.

XV. PRIVACY RIGHTS

A. Employers Should Rigorously Protect the Confidentiality of Employees' Medical and Disability Information.

Unauthorized disclosure of an employee's medical information may give rise to a claim against the employer under the common law right to privacy. In *White v. Township of Winthrop*, __ Wn. App. __, 116 P.3d 1034 (2005), a town marshal sued the town's mayor and the town after the mayor disclosed to the local newspaper that the marshal resigned due to his epilepsy and a recent seizure and the paper published a front-page story containing the information. The marshal

alleged statutory violations and violation of his right to privacy. The trial court dismissed both claims, and the marshal appealed.

On appeal, Division Three of the Washington Court of Appeals affirmed the lower court's dismissal of the statutory claim. The statutory claim alleged that the unauthorized dissemination of the health information violated the Washington Law Against Discrimination's (WLAD) prohibition against preemployment inquiries about disabilities and discrimination in written job descriptions and postings. The court held that even a liberal construction of the statute would not support the claim. The court also disagreed with the marshal's attempt to invoke a Human Rights Commission regulation requiring that health care information be kept confidential and separate from personnel files and be disclosed only on a need-to-know basis. The court held that the regulation applied to how an employer may seek the opinion of a health care professional to determine whether a disability affects job performance and to get suggestions on accommodations. Further, the regulation did not come into play because it applied to WLAD and the marshal had failed to make out a claim of discrimination under the statute. But the court of appeals held that the marshal's common law claim of a violation of privacy could go to trial. The law recognizes that everyone has aspects of their life that they do not want exposed to the public eye and are entitled to keep private. An actionable claim for invasion of privacy arises when the "intimate details of [one's] life are spread before the public gaze in a manner highly offensive to the ordinary reasonable man." The court held that in this case a jury should decide whether the public had a legitimate concern in the exact nature of the marshal's health condition.

XVI. UNION EMPLOYEES

A. Employers, Who by Their Own Actions Create Disputes Over Jurisdiction of Work Between Unions, Must Use Means Other Than Intervention by the National Labor Relations Board to Resolve the Disputes.

Section 10(k) of the National Labor Relations Act, 29 U.S.C. § 160(k) (§ 10(k)), allows the National Labor Relations Board (the Board) to resolve disputes between unions over jurisdiction of certain work, and to make awards of the work to one of the competing unions. However, in *Recon Refractory & Construction Inc. v. NLRB*, _ F.3d _, 2005 WL 2210201 (9th Cir. Sept. 13, 2005), the Ninth Circuit reminded employers that § 10(k) cannot be used to resolve disputes over work where the employer creates the dispute.

In that case, a refractory installation company, Recon, signed on to the Union of Bricklayers & Allied Craftworkers, Local 4's (the Bricklayers) collective bargaining agreement ("CBA"). The Bricklayers performed all refractory work

for Recon for the next decade. And the CBA contained a clause preserving the Bricklayers' right to perform "all work which has been historically or traditionally assigned" to the Bricklayers. But after the Bricklayers eliminated its class of unskilled members and refused Recon's request to freeze wage increases or reduce wages, Recon reassigned work protected by the CBA to employees of another union. When the Bricklayers discovered the reassignment, they filed a grievance and later a complaint in district court for breach of its CBA. When the newly assigned union found out about the Bricklayers' lawsuit, they threatened to take economic action to preserve its claim of work from Recon. Recon therefore filed unfair labor practice charges with the Board. But after a hearing pursuant to § 10(k), which allows the Board to resolve work jurisdictional disputes between unions, the Board concluded that the dispute was not appropriate for resolution under § 10(k) because the dispute was created by Recon.

On appeal, the Ninth Circuit explained that § 10(k) was enacted to protect employers trapped between two competing unions—it was not created to allow the Board to resolve disputes that are actually between an employer and a union. Thus, where a dispute over work is due to an employer's reallocation of work, the dispute is not deemed jurisdictional and the Board will not intervene. In those instances, the court reasoned, the employer is not left entirely without remedy, but it must use other means, such as arbitration, to resolve the dispute. Therefore, the Ninth Circuit reaffirmed that "§ 10(k) cannot be used as a tool to aid employers in avoiding their contractual obligations to employees when the terms of those contracts become inconvenient," and it affirmed the Board.

B. Union Members Allowed to Speak Out Against Nonunion Contractors by Flying Banners Near Companies Doing Business With Them.

In *Overstreet v. United Brotherhood of Carpenters & Joiners of America, Local Union No. 1506*, 409 F.3d 1199 (9th Cir. 2005), the National Labor Relations Board (NLRB) sought to enjoin union members' display of flags near businesses using nonunion employees. The union hung flags at those businesses as part of an ongoing labor dispute with three contractors in California and Arizona—the companies employed nonunion workers, and the union claimed that they failed to meet local labor standards. The union decided to try to influence the companies that did business with the contractors—hotels, restaurants, and other retailers. To do so, the union hung large banners on public property near the businesses that said "labor dispute," and "shame on" the retailer for not using union employees, and distributed handbills explaining their position to passing pedestrians. In response, some of the retailers filed suit with the NLRB, which deemed the banners an unfair labor practice because it amounted to unlawful picketing of a secondary employer not directly involved in the organizing dispute and it misled customers into thinking the retailers were involved in a labor dispute with the

union. The union, however, argued that it was just exercising its right to free speech—its displays were on public sidewalks and did not block access to the retail establishments. The union further argued that its actions were not coercive or intimidating and did not violate federal labor law. The district court denied NLRB’s attempt to enjoin the union, and it appealed.

The Ninth Circuit too rejected NLRB’s request for a preliminary injunction against the union. In so deciding, the Ninth Circuit clarified the governing standard that a district court should use to evaluate whether to grant injunctions to stop unfair labor practices under the National Labor Relations Act (NLRA). In analyzing the substance of the claim, the Ninth Circuit applied authority from the Supreme Court where union organizers had targeted secondary employers and distinguished the use of banners and handbills from ambulatory picketing that tends to intimidate and threaten by creating a barrier. The banners, the court reasoned, were more like signs or billboards that do not threaten, intimidate, or coerce, but rather just persuade. The court also reasoned that the activity was not signal picketing designed to communicate with other union members, which is not protected speech and is barred by the NLRA—this activity was intended to communicate with the public. Furthermore, the Ninth Circuit rejected the notion that the banners’ statement of “labor dispute” fraudulently conveyed that the retailers themselves were involved in a labor dispute. The court reasoned that the phrase is not limited to primary disputes and can apply to secondary disputes, which appeared to exist here because the union believed that the retailer’s willingness to work with nonunion contractors likely interfered with the union’s attempts to negotiate working conditions with the contractors. Furthermore, the court concluded that even if the representations were actually false, the First Amendment does not allow a prior restraint on speech simply because the speech is fraudulent. The court held that especially in light of the First Amendment concerns presented, the NLRB had not established a fair chance of proving a violation of the NLRA and affirmed denial of an order blocking the union’s activity.

XVII. PUBLIC EMPLOYERS

A. Due Process May Require a Pretermination Hearing Before a Public Employee Can Be Unconditionally Terminated From His or Her Job.

At a minimum due process requires both notice and an opportunity to be heard before the state can deprive someone of a life, liberty, or property interest. Property interest has been broadly defined to include legitimate expectations in the continued receipt of certain public benefits, including employment by public agencies under some circumstances. Therefore, when a public employer seeks to terminate an employee who is subject to either an express or implied employment

contract a pretermination hearing may be required to satisfy the due process clause of the U.S. and Washington State constitutions.

In *Giedra v. Mount Adams School District No. 209*, 126 Wn. App. 840, 110 P.3d 232 (2005), Division Three of the Washington Court of Appeals held that a pretermination hearing was required where two public school teachers were summarily discharged following the inadvertent lapse of their state teaching licenses. In each case the teacher discovered that his or her license had inadvertently lapsed, was put on leave to renew his or her license, obtained temporary credentials, and was ultimately discharged without a hearing for lack of a current teaching license. Each teacher requested, but did not receive, a pretermination hearing. The teachers then filed suit alleging a violation of their due process rights.

The court of appeals agreed with the teachers. Analyzing long-standing federal and state case law in this area, the court first determined that the teachers had a legitimate property interest in their employment as teachers. As such, the court weighed the interests of the teachers in their continued employment against the government's interest in efficiently removing unqualified teachers from the classroom. The court also considered whether a pretermination hearing would have a measurable impact on preventing the erroneous discharge of teachers who had plausible mitigating factors for their lack of a license. Each inquiry was answered in the teachers' favor. The court found their private interest outweighed the school's interest because Washington courts had previously noted the severe impact a deprivation of livelihood could have on an individual. Moreover, the court found that a pretermination hearing had "obvious value" in avoiding the sort of erroneous terminations that may have occurred in this instance. Finally, the court reasoned that a pretermination hearing would not have intolerably burdened or unreasonably delayed the district's interests. The court's opinion highlights that public employers should evaluate the need for pretermination hearings before taking adverse employment actions, especially where the employee in question is subject to either an express or implied employment contract.

B. State Government Employees Must Receive Equal Pay for Equal Work.

Historically, Washington State employees working in higher education have been paid different salaries than their counterparts in other state government departments. In some cases the salaries are higher, and in some cases they are lower. More than a decade ago, civil service law moved toward the elimination of the differences between the two groups by creating the Washington Personnel Resources Board, which assumed responsibility for employees in both groups.

In 1999, the union representing state workers who were not in higher education, along with individuals serving as representatives of a class of general government and higher-education employees, sued the state, seeking pay lost because of the salary discrepancy. Their suit, *Washington Public Employees Association v. State*, 127 Wn. App. 254, 110 P.3d 1154 (2005), was based on: (1) the state civil service law; (2) the equal protection requirements of the U.S. Constitution; and (3) the state's privileges and immunities clause. Division Two of the Washington Court of Appeals analyzed their equal protection claim under the "rational basis" test. Under that test, government action will be upheld if: (1) all class members are treated alike; (2) there is a reasonable basis to distinguish between those who are in the class and those who are outside it; and (3) the classification (in this case, of general government workers and higher-education system workers) has a rational relationship to a legitimate government purpose. The court agreed with the employees that classifying people doing the same job differently depending on whether they were assigned to higher education or worked in other departments of government irrationally distinguished between similarly situated employees.

As the court analyzed the situation, the two classifications to be compared were not higher-education employees and general state employees. Instead, the relevant comparison was between lower-paid employees in both systems doing the same work. The court concluded that the failure to equalize salary levels bore no rational relationship to the purpose of Washington's civil service laws. The court ruled that the state had denied equal protection to the employees by failing to provide equal pay for essentially equal work. Although this case applies directly to public employers, it also highlights the need for private employers to remain alert to ensure that "protected classes" (typically women in an equal pay case) do not receive unequal pay for unequal work because this could subject an employer to liability under other sex discrimination and equal pay laws.

XVIII. EMPLOYER LIABILITY

A. Scope of Insurance Coverage for Employers Is Narrowed Under Washington Law.

Under the reasoning of *Woo v. Fireman's Fund Insurance Co.*, 128 Wn. App. 95, 114 P.3d 681 (2005), an employee may have the power to determine whether the employer's insurance company will have to defend an employee's claim by how the employee pleads the case. By alleging intentional rather than accidental conduct of the employer, the employee may force the employer to defend the claim. This case involved a lawsuit brought by a former employee against her former employer and dentist based on an incident when the employee was under anesthesia for a dental procedure and the dentist-employer played a practical joke on her by putting false teeth shaped like boar tusks into her mouth and taking

pictures. That incident followed a pattern of teasing and abuse by the employer regarding the employee's interest in pot-bellied pigs. She sued her employer for a number of claims arising from the incident. At the time of the lawsuit, the employer held insurance policies for dental professional liability, employment practices liability, and general liability. However, the insurer claimed that it did not have a duty to defend the employer. The employer then settled with the employee and sued the insurance company.

The trial court held that the insurance company did have a duty to defend the employer. At trial, a jury found in favor of the employer and awarded damages against the insurance company. On appeal, Division One of the Washington Court of Appeals reasoned that the duty to defend a lawsuit hinges not on the insured's potential liability, but rather on whether the *complaint* against the insured contains any factual allegations rendering the insurer liable under the insurance policy. The insurer must go beyond the allegations in the complaint if those allegations are in conflict with facts known or readily ascertainable by the insurer, or if the allegations are ambiguous or inadequate. All of the employee's allegations stemmed from the employer's alleged scheme to humiliate the employee by placing boar tusks in her mouth while she was under anesthesia, taking pictures, and later referring to the tusks and pictures as a trophy.

Starting with the professional liability policy, the court of appeals disagreed with the trial court's conclusion that placement of the tusks in her mouth constituted dental services or failure to render dental services, reasoning that no reasonable person could believe that a dentist would diagnose or treat a dental problem by placing boar tusks in the mouth while a patient was under anesthesia in order to take pictures to ridicule the patient. The court reasoned that to analyze questions of professional liability in insurance coverage cases, it must look to the act of the alleged misconduct itself, not the title of the party performing the act or where it occurred. The court further held that the employment practices portion of the policy also did not apply because there was no cognizable claim for wrongful discharge based on boorish behavior unless the behavior violated an employment contract, discrimination statute, the constitution, or public policy. Finally, the court concluded that the general liability coverage did not apply because (1) the behavior alleged could not be considered an *accident* within the policy—it was intentional conduct, and (2) the alleged conduct had nothing to do with providing professional dental services. The court of appeals therefore reversed the lower court and dismissed the suit against the insurance company.