

The Employment Law Seminars

2006-2007

Fall 2006 Employment Law Update

Lynnwood
[Wednesday, October 18, 2006](#)
Embassy Suites Hotel
20610-44th Avenue West
Lynnwood, WA 98036

Tacoma
[Thursday, October 19, 2006](#)
Sheraton Hotel
1320 Broadway Plaza
Tacoma, WA 98402

Bellevue
[Tuesday, October 24, 2006](#)
Bellevue Club
11200 SE 6th Street
Bellevue, WA 98004

Seattle
[Wednesday, October 25, 2006](#)
The Rainier Club
820 Fourth Avenue
Seattle, WA 98104

www.perkinscoie.com

ANCHORAGE BEIJING BELLEVUE BOISE CHICAGO DENVER LOS ANGELES
MENLO PARK OLYMPIA PHOENIX PORTLAND SAN FRANCISCO SHANGHAI SEATTLE WASHINGTON, D.C.

Perkins Coie LLP and Affiliates

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 N.W. 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

Copyright © Perkins Coie LLP 2006. All Rights Reserved

Seattle, Washington

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, including photocopying, electronic, mechanical, recording or otherwise, without the prior written permission of Perkins Coie LLP.

This briefing handout is not intended to be and should not be used as a substitute for specific legal advice, since legal opinions may be given only in response to inquiries regarding specific factual situations. Subsequent legal developments after the date of specific briefings may affect some of the legal standards and principles discussed. If legal advice is required, the services of counsel should be sought.

Our Presenters

Jeff Hollingsworth, a partner in the Seattle office, has practiced with Perkins Coie since 1981. His practice primarily involves employment litigation, with an emphasis on wrongful discharge, discrimination, and wage/hour claims. He also represents public sector clients in collective bargaining and has an active advice and counseling practice in all areas of employment relations. Jeff received his undergraduate degree from Michigan State University and his law degree from the University of Michigan.

Dev Stahlkopf, an associate in the Bellevue office, joined the firm in 2001. Dev represents and advises employers on labor and employment issues. Dev received an undergraduate degree from the University of Washington and masters degrees from Duke University and the University of Arizona. She obtained her law degree *magna cum laude* from the University of Arizona College of Law in 1999.

CONTENTS

I. DISABILITY DISCRIMINATION.....	1
A. The Washington Supreme Court Redefines "Disability" Under the Washington Law Against Discrimination to Align With the Definition Under the Americans with Disabilities Act.....	1
B. Employer Found Potentially Liable for Failure to Reasonably Accommodate Employee's Disability When Employer Did Not Engage in the Interactive Accommodation Process Required by the ADA.....	2
II. SEX DISCRIMINATION.....	4
A. An Employer's Failure to Hire a Pregnant Applicant Was Found to Constitute Unlawful Discrimination Under the Washington Law Against Discrimination.....	4
B. Employers May Require Female Employees to Wear Makeup at Work	5
C. Employers Can Be Held Liable for Sexual Harassment, Even Where the Offensive Conduct in Question Is by Non-Employees, if the Employer Either Ratifies or Acquiesces in the Harassment	6
III. AGE DISCRIMINATION	6
A. Release of Age-Related Claims Under the Age Discrimination in Employment Act Must Be Written in a Manner Calculated to Be Understood by Participants.....	6
IV. RETALIATION	7
A. The U.S. Supreme Court Gives Employees Broader Protection From Retaliation Under Title VII	7
V. HIRING/REHIRING	9
A. Disciplinary Action Against Employee Relating to Military Leave May Give Rise to Retaliation Claim Under the Uniformed Services Employment and Reemployment Rights Act.....	9
VI. WAGE AND HOUR.....	10
A. Time Lag Between Work and Payment of Wages Does Not Necessarily Lead to a Claim for Money Damages.....	10
B. Independent Contractors May Be Entitled to Attorneys' Fees Under Washington Wage Statute	10
VII. WORKERS' COMPENSATION.....	11
A. Last Injurious Exposure Rule Does Not Apply to Industrial Injury Claims.....	11
VIII. PUBLIC ACCOMMODATIONS	12
A. Businesses May Have an Obligation, Under Title III of the Americans with Disabilities Act, to Modify Their Websites to Make Them Accessible to the Blind	12
IX. ELECTRONIC DOCUMENTS.....	13
A. New Federal Rules Governing Discovery of Electronic Documents.....	13
X. UNION RIGHTS AND EMPLOYEES	13

A. Employer's Subcontracting of Jobs on Eve of Union Election Found to Be Unfair Labor Practice	13
B. Employer Required to Share Financial Data With Union After Pleading "Tough Times" in Negotiations	14
XI. PUBLIC EMPLOYERS	15
A. Employer May Restrict Employees From Discussing Religion With Clients, Displaying Religious Items That Are Visible to Clients, and Using Conference Rooms for Prayer Meetings	15
B. Employee Statements Are Not Protected by the First Amendment Where the Statements Are Made Pursuant to the Employee's Official Duties.....	16

Fall 2006 Employment Law Update

By Jeff Hollingsworth and Dev Stahlkopf

I. DISABILITY DISCRIMINATION

A. The Washington Supreme Court Redefines "Disability" Under the Washington Law Against Discrimination to Align With the Definition Under the Americans with Disabilities Act

Until the Washington Supreme Court issued its decision in *McClarty v. Totem Electric*, 157 Wn.2d 214 (2006), this summer, disability law under the Washington Law Against Discrimination (WLAD) and under its federal counterpart, the Americans with Disabilities Act (ADA), diverged in one very important respect, which had a significant impact on Washington employers. Prior to *McClarty*, "disability" under the WLAD had consistently been construed much more broadly than under the ADA. For more than 20 years, beginning in 1975, "disability" under the WLAD potentially included virtually any abnormal condition, regardless of whether that condition had a material impact on that individual's day-to-day life. This definition led to significant frustrations on the part of employers, who found themselves struggling to apply this exceedingly broad definition and to comply with two very different resulting standards under the ADA and the WLAD.

In 2000, the tides began to turn. The Washington Supreme Court began to narrow the definition of "disability" under the WLAD. In *Pulcino v. Federal Express Corp.* 141 Wn.2d 629 (2000), the Washington Supreme Court somewhat narrowed the definition of "disability" in reasonable accommodation cases, but even in reasonable accommodation cases the definition remained broader than that found in the ADA. A year later, the Washington Supreme Court hinted, but did not decide, that the *Pulcino* definition of disability might also be appropriate when an employee alleged disparate treatment because of a medical condition. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172 (2001). This led the lower Washington courts to apply inconsistent standards in different disability cases, and it left employers struggling with the uncertainty as to what the correct standard was.

Finally, in July 2006, in *McClarty v. Totem Electric*, the Washington Supreme Court provided much needed clarification. The court reviewed the history of the WLAD and the ADA and, noting the alignment of purpose between the two statutes, concluded that the definitions of "disability" under the two statutes should be aligned as well. In adopting the ADA's more restrictive definition of disability for all purposes under the WLAD, the court stated that ADA cases should provide guidance for Washington courts interpreting "disability" under the WLAD.

Under *McClarty*, an employee alleging disability discrimination under the WLAD must demonstrate that he or she has a disability by showing that he or she (1) has a physical or mental impairment that substantially limits one or more major life activities, (2) has a record of such impairment, or (3) is regarded as having such an impairment. In order to be "substantially limited," a person must be unable to perform a major life activity that the

average person in the general population can perform. "Major life activities" are those activities "that are of central importance to daily life." According to the Equal Employment Opportunity Commission (EEOC), major life activities include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2 (i). Other activities that have been found to be major life activities include:

- Standing
- Sitting
- Lifting
- Reaching
- Engaging in intimate sexual relationships
- Procreating
- Sleeping
- Interacting with others
- Reading
- Eating
- Controlling one's bowels

This is not an all-inclusive list, and the list of major life activities that are recognized by courts under the ADA is ever-evolving.

It is important to keep in mind that, even if an individual does not meet the definition of "disability" under the *McClarty* standard, he or she may nonetheless be protected under the ADA and the WLAD if he or she has a record of a disability or is regarded as disabled. A person has a record of a disability if he or she has a history of, or has been misclassified as having, an impairment that substantially limits or limited the person in a major life activity. A person is "regarded as" having a disability where he or she does not have a physical or mental impairment, or has a physical or mental impairment that does not substantially limit a major life activity, but is treated by an employer as having such a limitation, or has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment.

B. Employer Found Potentially Liable for Failure to Reasonably Accommodate Employee's Disability When Employer Did Not Engage in the Interactive Accommodation Process Required by the ADA

Employers generally have an obligation under the ADA to engage in an "interactive process" with disabled employees who request reasonable workplace accommodations. In *Dark v. Curry County*, 451 F.3d 1078 (9th Cir. 2006), *petition for cert. filed* (Oct. 3, 2006), the Ninth Circuit (the federal appeals court that covers Washington and Oregon) issued a reminder that when employers fail to engage in the interactive process, they may be found liable for disability discrimination under the ADA.

In *Dark*, the plaintiff, Robert Dark, had suffered from epilepsy since he was 16 years old. Although he was generally able to control his epilepsy with medication, Dark occasionally had seizures. His seizures were typically preceded by a physical manifestation called an "aura," "akin to a nervous jerk," which indicated the potential for a seizure that day, generally no sooner than one hour after the aura. According to Dark, when he experienced an aura he generally had a subsequent seizure about half the time.

Dark began working for Curry County Road Department in 1985 as a maintenance and construction worker. Dark's job duties included the operation of heavy equipment such as construction vehicles. Between 1985 and 2002, Dark's performance was generally satisfactory or better. On the morning of January 15, 2002, Dark experienced an aura before he went to work. Dark essentially ignored the aura. He went to work and did not inform anyone that he had had it. Dark also did not inform anyone at the county that he had recently changed his medication. Later that day, Dark had a seizure while driving a county pickup truck. The truck was moving slowly, and the passenger of the truck was able to gain control of the vehicle and bring it to a stop.

In response to this incident, Dark was requested to undergo a physical examination. The neurologist who examined Dark determined that his epilepsy was "poorly controlled," and that Dark "should not work in high places . . . [or] around moving machinery." These restrictions severely limited Dark's ability to perform the duties of his job. The county terminated Dark's employment, concluding that Dark could not safely perform the essential functions and duties of his position, and that his continued employment posed a threat to the safety of other employees. Dark appealed his termination to the county's board of commissioners, which affirmed his termination. In addition to the reasons initially cited in writing by the county, the board also concluded that Dark had engaged in misconduct by operating equipment on the day of the incident, and by not informing coworkers of his aura, Dark knowingly put the safety of coworkers in jeopardy.

Dark then filed a lawsuit in federal court, alleging among other things that the county failed to reasonably accommodate his disability, in violation of the ADA. The trial court granted the county's motion for summary judgment and dismissed Dark's case. Dark appealed.

Regarding Dark's reasonable accommodation claim, the Ninth Circuit pointed out that under the ADA the county had an affirmative obligation to engage in an interactive process in order to try to identify a reasonable accommodation that would permit Dark to retain his employment. The county had not engaged in such a process, despite the fact that Dark had proposed three potential accommodations – (1) a temporary change in duties, (2) reassignment to a different position, or (3) the use of accumulated sick leave or medical leave without pay. The court found that because the county failed to engage in an interactive process as to any of Dark's suggested accommodations, the court could uphold dismissal of Dark's reasonable accommodation claim only "if a reasonable finder of fact *must* conclude that 'there would in any event have been no reasonable accommodation available.'"

Evaluating Dark's proposed accommodations, the court concluded that, as a matter of law, the county did not have an obligation to restructure Dark's job to eliminate the operation of heavy equipment because that was one of the essential functions of the position and the ADA does not require employers to excuse performance of an essential function of an employee's job. The Ninth Circuit found, however, that Dark had presented evidence of other positions with the county that had become available after his discharge. The Ninth Circuit concluded that employers have an affirmative obligation to consider reassignment, not just to currently vacant positions but also to positions that the employer reasonably anticipates will become vacant in the fairly immediate future. Thus, the Ninth Circuit determined that Dark was entitled to trial on this issue. The court also found that a leave of absence might have been another reasonable accommodation for

Dark's condition, permitting him to transition to his new medications. Thus, Dark's reasonable accommodation claim was sent back to the trial court for a jury trial.

II. SEX DISCRIMINATION

A. An Employer's Failure to Hire a Pregnant Applicant Was Found to Constitute Unlawful Discrimination Under the Washington Law Against Discrimination

Under Washington law, it is unlawful for an employer to discriminate against a female employee because she is pregnant. In *Hegwine v. Longview Fibre Co.*, 132 Wn. App. 546 (2006), the court of appeals found that the employer unlawfully discriminated against a female job applicant on the basis of her pregnancy.

In *Hegwine*, Stacy Hegwine applied for a customer service clerk/order checker job at Longview Fibre Company. The newspaper advertisement for the job did not mention any lifting requirements, and no written job description existed. At Hegwine's job interview, however, she was told that the position required lifting up to 25 pounds. After her interview, Hegwine was offered the job contingent on successful completion of a physical exam. At the exam, in response to a medical questionnaire, she disclosed that she was pregnant. In response to Hegwine's disclosure, Fibre's corporate medical director told her that she needed medical clearance from her personal physician before she could begin work.

On March 1, 2001, Hegwine attended an orientation at Fibre's HR department. When Fibre's HR learned that Hegwine was pregnant and had not been cleared to work, Hegwine was sent home pending receipt of information from her doctor. Hegwine's doctor subsequently cleared her to lift up to 20 pounds overhead and up to 30 pounds to waist level for up to two hours per day. Fibre's HR representative, however, told Hegwine that she had been cleared to lift only 20 pounds. Hegwine called her doctor. She told him (for the first time) that the job required the ability to lift 25 pounds and asked that he clear her to lift heavier weights. When the doctor asked for more information, she contacted the corporate medical director's office and was told that the lifting requirement was 40 pounds. Hegwine's doctor cleared her to lift up to 40 pounds for up to two hours daily. Her doctor testified at trial that he might have cleared her to lift even heavier weights depending on the nature and frequency of the lifting.

No one – including Fibre – knew at that point what the actual lifting requirements were for the order checker job. Thus, Fibre asked its equal employment opportunity coordinator to analyze the essential functions of the order checker position. The coordinator 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." Based on Hegwine's clearance to only lift 40 pounds, Fibre rescinded its conditional employment offer. On March 16, the Fibre HR representative told Hegwine that the job offer was withdrawn because her "availability" prevented her from performing the job.

Hegwine sued, alleging that she was discharged because of her gender and pregnancy in violation of the Washington Law Against Discrimination. Fibre countered that Hegwine was not able to perform the essential functions of the order checker job because she was

not cleared to lift boxes weighing up to 60 pounds. Hegwine countered that, because she did not allege disability discrimination, the question of whether Fibre could have reasonably accommodated her lifting restrictions was irrelevant. The trial court sided with Fibre and applied a reasonable accommodation analysis to Hegwine's case. In a non-jury trial, the court ruled in Fibre's favor, concluding that lifting 60 pounds was an essential job function that Hegwine was unable to perform and that Fibre could not have accommodated her lifting restrictions.

The court of appeals reversed the trial court's decision, finding that Fibre was liable for pregnancy discrimination and ordering a new trial solely on the issue of damages. The court pointed out that an employer's failure to hire because of "pregnancy" is a form of gender discrimination under Washington law. Applicable 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* a failure to accommodate a disability.

In a gender discrimination case, the employer's burden is to assert a legitimate, nondiscriminatory explanation for its employment decision. The court found that although Fibre had asserted such an explanation (that Hegwine could not do the job at the time she applied for it), the court found that the evidence did not support Fibre's explanation. In other words, "it was a pretext to avoid hiring a pregnant woman." The court identified a number of facts in support of its finding of pretext. First, the initial job advertisement listed no lifting requirement, and at the job interview only 25 pounds was mentioned as a lifting requirement. When the company learned that Hegwine was pregnant through its mandatory physical, it assumed she had restrictions that her doctor would have to identify. When her doctor gave Hegwine permission to lift in excess of the 25-pound requirement, Fibre changed the requirement and told her it was 40 pounds. Hegwine had her doctor submit a second form granting permission for her to lift the 40-pound requirement, and then Fibre did a job analysis of the position and again raised the lifting requirement, this time to 60 pounds. In addition, Fibre failed to communicate the new 60-pound requirement to Hegwine or her doctor, instead telling her that her "availability" precluded her from performing the job and rescinding the job offer on that basis.

The court also held that Fibre's medical questionnaire violated a separate regulation that prohibits prehire questions regarding pregnancy, and medical history concerning pregnancy and related matters.

B. Employers May Require Female Employees to Wear Makeup at Work

In *Jespersen v. Harrah's Operating Co., Inc.*, 444 F.3d 1104 (9th Cir. 2006), a female bartender sued Harrah's for gender discrimination under Title VII, after she was terminated for violating Harrah's appearance standards policy. The plaintiff had been terminated for refusing to wear makeup, which was required under Harrah's policy. Harrah's policy also had various grooming requirements applicable to male employees and attire requirements applicable to both male and female employees.

Jespersen first claimed that Harrah's makeup requirement, in itself, constituted gender discrimination. The Ninth Circuit disagreed. Relying on previous Ninth Circuit cases, the court stated that sex-based differences in appearance standards alone, without any further showing of disparate effects, do not meet the plaintiff's burden to establish

discrimination. Rather, a plaintiff must show that the policy in question creates an "unequal burden" for the plaintiff's gender. The court rejected plaintiff's bald assertion, for which she had provided no concrete evidence, that the cost and time for a woman to comply with the makeup requirement was sufficient to show an unequal burden on women.

Jespersen also argued that Harrah's termination of her employment was impermissible under Title VII because the termination decision was based in part on a gender stereotype. Although in establishing a Title VII discrimination claim a plaintiff sometimes may introduce evidence that the employment decision was made in part because of a sex stereotype, the court rejected such sex stereotype evidence in Jespersen's case. The court found that the Harrah's policy did not constitute sex stereotyping because it placed restrictions on *all* bartenders—male or female—regarding their appearance and attire. The court concluded that the Harrah's policy did not on its face indicate any discriminatory or sexually stereotypical intent on the part of Harrah's.

C. Employers Can Be Held Liable for Sexual Harassment, Even Where the Offensive Conduct in Question Is by Non-Employees, if the Employer Either Ratifies or Acquiesces in the Harassment

In *Freitag v. Ayers*, 2006 WL 2614120 (9th Cir. Sept. 13, 2006), a female former corrections officer brought an action against the California Department of Corrections and department officials, alleging hostile work environment based on department officials' failure to stop male prisoners' sexual harassment of her. Freitag alleged that the department did nothing to address her complaints that prisoners routinely engaged in sexual misconduct, including exhibitionist masturbation, in her presence. A jury found in Freitag's favor, awarding her more than \$500,000. The department appealed, asserting among other things that Title VII does not give rise to a claim for sexual harassment based on harassment by prison inmates. The Ninth Circuit rejected the county's argument, relying on a series of prior Ninth Circuit decisions holding that employers may be liable for harassing conduct by non-employees, where the employer either ratifies or acquiesces in the harassment by not taking immediate action, and where it knew or should have known of the conduct. The court concluded that the department of corrections could be held liable for prison officials' failure to take steps to correct a hostile work environment created by the male prisoners' sexual misconduct.

III. AGE DISCRIMINATION

A. Release of Age-Related Claims Under the Age Discrimination in Employment Act Must Be Written in a Manner Calculated to Be Understood by Participants

The Older Workers Benefit Protection Act (OWBPA), added to the Age Discrimination in Employment Act (ADEA) in 1990, was drafted to help ensure that older workers are not coerced or manipulated into waiving their rights to seek relief under the ADEA. To that end, the OWBPA imposes mandatory requirements for waivers of claims under the ADEA. Specifically, it requires that any waiver of rights under the ADEA must be written in "a manner calculated to be understood" by the individual participating in the reduction plan or by an average individual eligible to participate in the plan. The release also must advise employees to consult with an attorney prior to executing the agreement. In *Syverson v. International Business Machines Corp.*, 461 F.3d 1147 (9th Cir. 2006), the

Ninth Circuit issued a decision clarifying what it means to be "written in [a] manner calculated to be understood by participants."

In January 2001, IBM began implementing a planned reduction in its workforce. As part of the reduction plan, IBM offered employees severance pay and select benefits in exchange for the execution of a severance agreement and release. Simultaneous with the issuance of the severance agreement, IBM also circulated an informational packet, which contained demographic information about the employees who were being laid off, including job titles, ages, and numbers of employees selected for layoff from each division. Based on this demographic information, a number of former employees who had signed the agreement and release and had received severance and benefits filed charges with the EEOC. The EEOC, however, dismissed the employees' charges, concluding that the waivers contained in the severance agreement and release complied with the OWBPA and were a bar to such lawsuits.

Undeterred, the former employees then filed a putative class action in federal court, claiming that the release language in the severance agreement violated the waiver requirements in the OWBPA because it was drafted in a confusing and apparently contradictory manner. The employees' confusion arose over two separate components of the release. The first was the release language itself, which waived "all claims," *including* claims arising under the ADEA. The agreement also contained a "covenant not to sue," which was drafted to permit IBM to recover attorneys' fees and costs in the event that an employee who had signed the release later sued IBM. The covenant not to sue contained a caveat, however, *excluding* from the covenant claims brought under the ADEA (which is required under the ADEA). The agreement did not explain the distinction between the general release language and the covenant not to sue, and many former employees were left with the understanding that the release did not apply at all to claims brought under the ADEA. The trial court dismissed the plaintiffs' lawsuit, finding that the release language was written "in a manner calculated to be understood by an average individual selected by IBM for employment termination."

The plaintiffs appealed the trial court's dismissal of their case, and the Ninth Circuit reversed, holding that the agreement did not satisfy the OWBPA's "manner calculated" requirement. The Ninth Circuit concluded that the agreement "use[d] a term unfamiliar to lay people, 'covenant not to sue,' and [did] not explain how the release and the covenant not to sue dovetail, either in general or as they relate to the ADEA claims." This, ruled the Ninth Circuit, was sufficient to defeat the manner calculated requirement and thus invalidated the release as to claims under the ADEA.

IV. RETALIATION

A. The U.S. Supreme Court Gives Employees Broader Protection From Retaliation Under Title VII

Title VII prohibits workplace discrimination, as well as retaliation against workers for opposing discrimination in the workplace. Title VII does not, however, define "retaliation," which has led to diverse and sometimes contradictory results among various federal courts around the country. In a unanimous decision issued in June of this year, *Burlington Northern & S. F. R. Co. v. White*, 126 S. Ct. 2405 (2006), the U.S. Supreme Court clarified what may constitute "retaliation," broadening its application far beyond where most federal courts had ventured previously.

The lawsuit leading to the decision was brought by Sheila White, a former employee of Burlington Northern & Santa Fe Railway Company (BN). In 1997, White was the only woman employed at BN's Maintenance of Way department at its Tennessee Yard. She had been hired in part because of her past experience operating a forklift and was assigned to forklift duty soon afterward. Several months after her hire, White complained to BN that her supervisor had repeatedly stated that women should not be working in the department and that he had made insulting and inappropriate remarks to her in front of other workers. After investigating, BN suspended White's supervisor and required him to attend sexual harassment training.

At the same time that White was advised of the actions that had been taken, she was also told that she was being removed from forklift duty and assigned to standard track laborer tasks. The reassignment was made because White's coworkers had reportedly complained that the more desirable forklift assignment should go to a "more senior man." White filed a charge with the EEOC, contending that she had been reassigned as retaliation for the complaint she had lodged about her supervisor. A few days later, another supervisor reported that White had been insubordinate about which truck should be used for a particular job. She was suspended without pay for 37 days pending investigation. Although White was reinstated with back pay following the investigation, she filed another charge with the EEOC claiming retaliation.

With White's case, the Supreme Court confronted the differing standards that had been applied in retaliation cases by the various appellate courts. BN argued for a restrictive standard, namely that protection against retaliation should be limited to actions affecting an employee's compensation or other terms, conditions, and privileges of employment. It urged the Supreme Court to rule that a change of assignment and a suspension for which the employee was later paid were too trivial to be actionable.

All nine justices rejected BN's position. Although Title VII does not protect a worker from "petty slights or minor annoyances that often take place at work and that all employees experience," an employer may discourage complaints about discrimination through acts that fall far short of a demotion, a reduction in pay, or a discharge. In fact, the Supreme Court recognized that an employer could retaliate with actions outside the workplace or unrelated to employment, such as unwarranted surveillance. The Court reasoned that if a reasonable employee would be harmed and thus deterred by the employer's action from advancing a complaint of discrimination, the employee can establish a violation of Title VII.

In White's case, the Supreme Court concluded that the change in her work assignment and the 37-day suspension provided adequate evidence of actionable retaliation. Although a reassignment is not automatically actionable, "[c]ommon sense suggests that one good way to discourage an employee . . . from bringing discrimination charges would be to insist that she spend more time performing the more arduous duties and less time performing those that are easier or more agreeable." As for the suspension, even though White eventually received back pay, she and her family were required to live for 37 days without income and with no certainty of a return to work. The Court found that such an action also might well deter complaints.

V. HIRING/REHIRING

A. **Disciplinary Action Against Employee Relating to Military Leave May Give Rise to Retaliation Claim Under the Uniformed Services Employment and Reemployment Rights Act**

The Uniformed Services Employment and Reemployment Rights Act (USERRA) prohibits employers from taking "any adverse employment action against any person because such person . . . has exercised a right provided for in this chapter." USERRA provides a right of reemployment for members of the armed services who (1) properly notify their employers of the need for a service-related absence, (2) take a cumulative absence of no more than five years, and (3) properly report to work or reapply for employment, depending on the length of the absence.

In *Wallace v. City of San Diego*, 460 F.3d 1181 (9th Cir. 2006), the Ninth Circuit upheld a jury's finding that the City of San Diego retaliated against the plaintiff for exercising his rights under USERRA. The plaintiff, James Wallace, was hired as a police officer for the San Diego Police Department in 1975. In 1981, Wallace was promoted to police detective, and in 1984, he was promoted to police sergeant. Beginning in 1982, Wallace also served as an officer in the Naval Reserve. Wallace was called to active duty in 1991, and served seven months in Iraq. Upon Wallace's return from Iraq, he applied for several promotions but never was considered. Wallace was again called up for three months of active duty in 1996. Upon his return, Wallace claimed that he was subjected to heightened scrutiny and excessively harsh discipline on several occasions, and received his first below standard performance evaluation. In 1999, Wallace was again called up for active duty, and he served for approximately one year. While Wallace was out of the country on active duty, his superiors instituted termination proceedings, on the basis that Wallace had failed to timely report his military duty status and his military leave was "disapproved." Wallace's termination was subsequently overturned by the assistant chief of police, who found, among other things, that Wallace's superior did not have the authority to disapprove Wallace's leave request. The assistant chief did, however, warn Wallace that any additional discipline could lead to Wallace's termination. Shortly thereafter, when Wallace realized that additional discipline was imminent, Wallace resigned from the police department and filed a lawsuit, alleging unlawful retaliation under USERRA.

Wallace prevailed at trial, and the jury awarded him \$256,800 in damages. The Ninth Circuit upheld the jury's verdict, finding that substantial evidence supported a conclusion that the police department had retaliated against Wallace for exercising his rights under USERRA. The court concluded that "evidence in the record suggests Wallace's relationship with his superiors was strained at least in part due to his military service, which permits an inference that adverse employment actions were taken . . . because of his exercise of rights protected by USERRA."

VI. WAGE AND HOUR

A. Time Lag Between Work and Payment of Wages Does Not Necessarily Lead to a Claim for Money Damages

In *Champagne v. Thurston County*, 141 P.3d 72 (Wash. Ct. App. 2006), the Court of Appeals considered whether Thurston County was required to pay damages to county corrections officers under Washington's wage and hour laws for a time lag between when employees worked and when employees were paid for certain of those hours worked.

Thurston County corrections officers are paid on the last workday of each month for regular wages earned that month. The corrections officers work under a union contract that determines both the amount of the base pay each officer is paid and the amounts of any additional pay due, including overtime pay, compensatory time, specialty pay, supervisory pay, and holiday pay. If corrections officers have earned any of that additional pay in a given month, they complete a form detailing the entitlement to the additional pay and turn it in at the end of the month in which the additional pay was earned. They then receive the additional pay in their next paycheck, which is received on the last workday of the *following* month. For example, overtime pay earned in September would be paid on the last workday of October.

The corrections officers did not dispute that they (eventually) were paid all compensation owed to them under the union contract. Rather, they argued that the lag time between when they earned the additional compensation and when they received it violated Washington's wage and hour laws. The corrections officers invoked a Washington statute that allows for double damages for recovery of unpaid wages.

The Washington Court of Appeals held that the double damages statute did not apply and did not provide a remedy in court for the county's alleged delay in paying overtime compensation and other additional wages. The court of appeals stated that "under Washington's wage-and-hour laws, employees are entitled to damages only where an employer has paid no compensation to an employee." The court concluded that the double damages statute did not apply in this case because the corrections officers admitted that they did ultimately receive their compensation, and were challenging only the timing of the compensation. The court of appeals also concluded that neither Washington's Minimum Wage Act, Chapter 49.46 RCW, nor Washington's wage withholding statute, Chapter 49.48 RCW, provides for monetary awards to an employee when the employer has actually paid its employees their due wages and the only issue is the timing of the payments. The court of appeals did note that a regulation promulgated by the Washington Department of Labor and Industries, WAC 296-128-035, does require employers to pay wages at intervals of no longer than one month. That regulation, however, only applies to compensation required under the Washington Minimum Wage Act, which was not applicable in this case.

B. Independent Contractors May Be Entitled to Attorneys' Fees Under Washington Wage Statute

In *Wise v. City of Chelan*, 133 Wn. App. 167 (2006), the Washington Court of Appeals held that an independent contractor was entitled to attorneys' fees, under a Washington wage statute, for her breach of contract claim. This holding is notable because the

attorneys' fees statute in question has previously been held by a number of Washington courts to apply only to employer-employee relationships.

The facts in *Wise* are as follows. In early 2002, Chelan contracted with Jill Wise to serve as its municipal court judge for a four-year term through December 31, 2005. The city council authorized the mayor to sign the service agreement. The contract provided that the judge was an independent contractor rather than a city employee, and as such she had to pay her own taxes and would receive no employee benefits such as sick leave, vacation, overtime, or compensatory time. The contract also provided that the city could not terminate the agreement except for official misconduct or physical or mental incapacity. The judge could end the agreement for any reason with 60 days' notice. Two years later, the city council passed an ordinance eliminating the municipal court and revised the city budget to eliminate funding, effective July 2004. The city stopped paying Wise in July 2004.

Wise sued the city for breach of contract and sought her attorneys' fees. The city argued that the contract was illegal, beyond its lawful authority, and void. The city also argued that under Washington's statutes, attorneys' fees were available only to employees, and the judge was not an employee. The trial court awarded Wise unpaid compensation in the amount of \$49,500 but denied her claim for attorneys' fees. Wise appealed the denial of attorneys' fees.

Reversing the trial court, the court of appeals concluded Wise was entitled to attorneys' fees. The court noted that as a remedial statute, the attorneys' fees provision should be liberally construed in the worker's favor and that the court "shall" award attorneys' fees to "any person" who prevails in a claim for unpaid wages or salaries. The court of appeals opined that, although the trial court had been persuaded by the city's contention that attorneys' fees may be paid only to employees, the "statute contains no such limitation; it applies to any person."

VII. WORKERS' COMPENSATION

A. Last Injurious Exposure Rule Does Not Apply to Industrial Injury Claims

Washington's Industrial Injury Act (IIA) serves as a compromise between employers and workers. Under the IIA, employers accept limited liability for claims that might not have been compensable under common law, in exchange for workers forfeiting other common law remedies. For occupational diseases (diseases or infections that arise "naturally and proximately out of employment"), Washington courts have adopted the last injurious exposure rule, which provides that the employer that subjected the employee to the most recent exposure bearing a causal relationship to the disability is liable for the entire amount of an award relating to that disability. Examples of occupational diseases triggering the last injurious exposure rule are hearing loss and asbestosis. Washington's adoption of the last injurious exposure rule for occupational disease claims stems from the inherent difficulty in (1) proving what specific exposure contributed to the development of the occupational disease and (2) allocating responsibility among employers where the employee received multiple exposures that contributed to the disease.

In *Cowlitz Stud Co. v. Clevenger*, 141 P.3d 1 (Wash. 2006), the Washington Supreme Court refused to extend the last injurious exposure rule to industrial injury claims,

overruling a prior Washington Court of Appeals case. In industrial injury claims, unlike occupational diseases, the injury arises from "a sudden and tangible happening, of a traumatic nature." The *Clevenger* court opined that the policy reasons supporting application of the last injurious exposure rule to occupational diseases do not similarly support the rule's application to industrial injury claims. The assignment of financial responsibility is relatively easy because an injury, by definition, is a discrete and isolated event occurring at a specific moment in time.

VIII. PUBLIC ACCOMMODATIONS

A. **Businesses May Have an Obligation, Under Title III of the Americans with Disabilities Act, to Modify Their Websites to Make Them Accessible to the Blind**

Title III of the Americans with Disabilities Act prevents discrimination against the disabled in places of public accommodation. "Discrimination" under the ADA includes denial of the opportunity by the disabled to participate in programs or services, and providing the disabled with separate, but unequal, goods or services. To ensure that the disabled have full and equal enjoyment of the goods and services of places of public accommodation, the ADA requires "reasonable modification" of "policies, practices, and procedures," the provision of auxiliary aids to ensure effective communication with the disabled, and the removal of architectural and communications barriers.

In *National Federation of Blind v. Target Corp.*, ___ F. Supp. 2d ___, 2006 WL 2578282 (N.D. Cal. Sept. 6, 2006), the National Federation of the Blind filed a lawsuit against Target, alleging that Target's website, Target.com, is inaccessible to the blind and thereby violates federal and state laws prohibiting discrimination against the disabled in public accommodation. More precisely, the Federation argued that by making Target.com inaccessible to the blind, Target has denied the blind the full enjoyment of the goods and services offered at *Target stores*, which are indisputably places of public accommodation.

At the outset of the lawsuit, Target moved to dismiss the Federation's suit, arguing that Target.com is not a place of public accommodation within the meaning of the ADA. Target cited to legislative history of the ADA as evidence that Congress did not intend the ADA to apply to websites. Target also pointed out that Congress amended the Rehabilitation Act to require federal government websites to be accessible to the blind, but did not similarly amend the ADA to extend to private websites.

The court did not agree with Target's suggested wholesale exclusion of websites from the scope of the public accommodation provisions under the ADA. While the court acknowledged that the Ninth Circuit has limited the definition of "place of public accommodation" to "actual, physical places," the court pointed out that the ADA applies to the services *of* a place of public accommodation, not services *in* a place of public accommodation. The court reasoned that unequal access to a "service" can give rise to a public accommodation claim where there is a "nexus" between the challenged service and the public accommodation. Thus, the court reasoned, whether a website falls within the purview of the ADA will depend on whether that website has a "nexus" to a place of public accommodation. Thus, to the extent that the services offered on Target.com are wholly unconnected to Target stores, the Federation's claim must fail. However, because the Federation alleged that the denial of access to Target.com denied the blind

the full enjoyment of the goods and services offered at Target stores, the court denied Target's motion to dismiss the Federation's lawsuit.

IX. ELECTRONIC DOCUMENTS

A. New Federal Rules Governing Discovery of Electronic Documents

In April 2006, the United States Supreme Court approved several proposed amendments to the Federal Rules of Civil Procedure to address the modern practice of discovery of electronically stored documents. The amendments will take effect on December 1, 2006. The amendments will impact employers' discovery obligations in employment litigation cases. Here are some of the highlights:

- Rule 26, which governs the initial disclosure of documents early in litigation, has been amended to expressly include "electronically stored information" as a category of information potentially to be produced in a party's initial disclosures. Under the amended Rule 26, a party may be excused from producing in discovery electronically stored information that is "not reasonably accessible because of undue burden or cost." However, the burden is on the party claiming undue burden or cost to make the required showing.
- Rule 34, the rule governing the production of documents during discovery, also has been amended to expressly include electronically stored information as a category of information that may be required to be produced during discovery. The amended Rule 34 also provides a procedure for specifying and objecting to the form in which electronic information is to be produced. The default form of production under the amended rule is that electronically stored information should be produced in the form "in which it is ordinarily maintained [or] reasonably usable." The amended rule also provides that a party is not obligated to produce the same electronically stored information in more than one form.
- Rule 37, which governs discovery sanctions, has been amended to address the loss of electronic data due to routine computer processes unrelated to the litigation. The new provision states, "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." The Advisory Committee comments explain that this amendment is intended to address the fact that ordinary computer usage necessarily involves routine alteration and deletion of information for reasons wholly unrelated to litigation.

X. UNION RIGHTS AND EMPLOYEES

A. Employer's Subcontracting of Jobs on Eve of Union Election Found to Be Unfair Labor Practice

In *Healthcare Employees Union, Local 399 v. NLRB*, ___F.3d___, 2006 WL 2589439 (9th Cir. Sept. 11, 2006), the Ninth Circuit considered the Healthcare Employees Union's appeal of the National Labor Relations Board's (NLRB's) dismissal of its unfair labor practice charge against the employer, St. Vincent Medical Center. The union had filed

the charge with the NLRB alleging that St. Vincent subcontracted out the work of the hospital's respiratory care department on the eve of a union election to prevent employees in that department from voting in the election. The charge was dismissed by an administrative law judge, and the dismissal was affirmed by the NLRB. The NLRB found that the union had failed to demonstrate that anti-union animus was a motivating factor in its decision to subcontract out the work, and that the hospital had established that it would have subcontracted out the work even in the absence of union activity.

The union appealed to the Ninth Circuit. On appeal, the Ninth Circuit reversed the NLRB's decision, finding that there was compelling evidence of anti-union animus. The Ninth Circuit identified the following facts supporting its finding of anti-union animus: (1) the hospital was actively monitoring pre-election union organizing activities at the hospital; (2) the hospital was aware of the impending union elections when the subcontracting decision was made; (3) an inference of anti-union animus was raised by the timing of the subcontracting, on the eve of the election; (4) the stated reason for the timing—management and quality control problems in the department—was not a new problem, but rather had existed for more than a decade; and (5) after the work was subcontracted, all of the employees were retained by the subcontractor, even the supervisors.

B. Employer Required to Share Financial Data With Union After Pleading "Tough Times" in Negotiations

Under the National Labor Relations Act, the duty of an employer to bargain with the union that represents employees includes the duty to supply the union with information pertinent to the negotiations. The NLRB historically has interpreted that duty to include disclosure of financial information if the employer's position is predicated on its difficult financial situation. The union can evaluate the reasonableness of the employer's position (and perhaps formulate other cost-cutting proposals) only if such information is shared. In *International Chemical Workers Union Council v. NLRB*, ___ F.3d ___, 2006 WL 1791149 (9th Cir. Apr. 28, 2006), the Ninth Circuit issued a reminder that, to avoid having to share financial information, the employer must clearly retract its position that it cannot afford to pay.

In 2002, American Polystyrene Corporation (APC) was engaged in contract negotiations with the local union representing its employees. APC wanted to limit wage increases, suspend 401(k) contributions, and eliminate company-provided meals. When the union asked why, APC said it was because "times are tough." The union says APC went even further by stating that if it agreed to the union's proposals, it would "go broke." The union tried to confirm the company's statements in a letter. APC responded, acknowledging the "tough times" comment but denying that it was asserting an inability to pay. When the union then asked for access to the company's financial records, APC refused.

The union filed an unfair labor practice charge with the NLRB claiming that APC had failed to comply with its bargaining obligations. An administrative law judge agreed with the union, but on appeal, the NLRB reversed, and the union appealed to the Ninth Circuit.

Reviewing the record as a whole, the Ninth Circuit determined that APC had communicated the message that it could not afford the union's demands. Rejecting the NLRB's view that the "go broke" statement was made "during the heat of bargaining" and therefore was not trustworthy, the court found that the company "could not have used

simpler words to declare that its financial situation was the cause of its refusal." The disavowal of that position in a subsequent letter was not effective since even then APC relied on "tough times" to support its opposition to union demands.

XI. PUBLIC EMPLOYERS

A. **Employer May Restrict Employees From Discussing Religion With Clients, Displaying Religious Items That Are Visible to Clients, and Using Conference Rooms for Prayer Meetings**

Public employees, like other citizens, have a constitutional right to speak freely as citizens on matters of public interest. That right is not without limits, however, if their public employer has good reasons for restrictions on employee speech. In *Berry v. Department of Social Services*, 447 F.3d 642 (9th Cir. 2006), the Ninth Circuit found that the plaintiff's employer did have good reasons for restricting one of its employee's speech, holding that neither the First Amendment nor Title VII required the employer to permit an employee to (1) discuss religion with clients, (2) display religious items in a way that was visible to clients, or (3) use its conference room at lunch time for prayer meetings.

Daniel Berry, a self-described evangelical Christian who believes that he has an obligation to "share his faith, when appropriate, and to pray with other Christians," was an employee of the Tehema County, California, Department of Social Services. Berry worked in a position assisting clients in transitioning out of welfare programs. Berry routinely met with his clients in his work cubicle. The department had a long-standing prohibition on speaking with clients about religious faith. Berry, uncomfortable with the prohibition, sought an exemption, which the department declined. Berry reluctantly followed the department's prohibition until the fall of 2001. At that point, he consulted with a civil rights organization that apparently encouraged him to test the policy. In early December 2001, Berry began to display a Spanish-language Bible on his desk and hung a sign on the wall of his cubicle reading "Happy Birthday Jesus." The department promptly issued a reprimand to Berry, instructing him to remove the Bible from view and remove the name "Jesus" from the sign.

The department did not prohibit Berry from sharing his religious views with coworkers. Earlier in 2001, Berry had organized a group of employees for a prayer meeting in a department conference room. The department told him and his coworkers that they could not use the department conference room, but that they could use the break room or the grounds outside their building for the meetings. The department stated that it did not want the conference room used for the prayer meetings because it did not want the conference room being used for any nonbusiness use. The department was concerned that if it permitted use of the conference room for the prayer meetings, the conference room may be considered a public forum, which would require the department to make the room available for other groups as well. The department also wanted to adhere to a state constitutional prohibition on supporting any particular religion. Despite being told not to, Berry persisted in informal, unauthorized use of the conference room for prayer meetings.

Deciding to test the department's position, Berry filed a lawsuit challenging both the prohibition on displaying religious items and the refusal to let the prayer group use the department conference room, alleging that these policies violated his rights of freedom of

religion and speech under the United States Constitution and his right to have his religious beliefs accommodated under Title VII of the Civil Rights Act of 1964. The trial court dismissed Berry's case without a trial, and Berry appealed.

The Ninth Circuit affirmed the trial court. As to Berry's claim that he should be allowed to share his religious beliefs with the clients he counseled, the court acknowledged that public employees do have free speech rights under the First Amendment, but agreed with the department that public employers also have a legitimate interest in protecting their missions and are constitutionally required to refrain from appearing to endorse a particular religion. The court concluded that when Berry worked with clients, he was an agent of the department, and if he were permitted to talk with them about his Christian beliefs and display a Bible and other religious items, the clients could be motivated to seek ways of ingratiating themselves with Berry based on religion or try to explain any lack of assistance to their own failure to share his religious viewpoint. Because of that, the court found the department's restrictions to be a reasonable balance of constitutional concerns.

The Ninth Circuit similarly affirmed the trial court's dismissal of Berry's First Amendment claim regarding the use of the conference room. The court found that the department has a right to reserve its conference room only for business-related events. Berry pointed out that various other organizations that he characterized as "social" had been permitted to use the conference room, for events such as baby showers, birthday celebrations, and "rodeo-theme picnics." The court disagreed with Berry's comparison, noting that such events are business-related in the sense that they are the types of functions typically allowed by employers in their meeting areas. Such use did not convert the conference room into a forum available for nonbusiness use, including prayer meetings.

Finally, the court evaluated Berry's claims under Title VII. Berry had claimed that the department should be required to accommodate his exercise of religious beliefs without undue hardship. The court disagreed. Had the department permitted him to share his views with clients, through talking with them or displaying religious items, it would have failed in its constitutional duty not to endorse any particular religion. Without fully defining what would constitute an undue hardship, the court found that reason sufficient to justify the department's restrictions.

B. Employee Statements Are Not Protected by the First Amendment Where the Statements Are Made Pursuant to the Employee's Official Duties

The Supreme Court recently clarified under what circumstances employee speech is protected by the First Amendment. In *Garcetti v. Ceballos*, __U.S. __, 126 S. Ct. 1951 (2006), Richard Ceballos, a deputy district attorney with the Los Angeles County District Attorney's Office, filed a lawsuit against the county and his superiors, alleging that he was subjected to adverse employment actions in retaliation for engaging in protected speech. Ceballos claimed that he was transferred and denied a promotion after he wrote and circulated a memorandum that set forth evidence of purported governmental misconduct. In a five to four decision, the Supreme Court held that, while the First Amendment invests public employees with certain rights, it does not empower them to constitutionalize employee grievances. To that end, when employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer

discipline. The Court cautioned that the location in which an employee expresses their views (inside his workplace rather than publicly) is not dispositive, nor is it dispositive that the employee is speaking concerning the subject matter of their employment. The relevant inquiry is the *context* in which the statements are made.