Perkins Coie

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What's New in Employment Law?
A Semi-Annual Update

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Our Presenters

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WHAT'S NEW IN EMPLOYMENT LAW?
A SEMI-ANNUAL UPDATE

I. LEGISLATIVE DEVELOPMENTS

A. Minimum Wage Increase

As a result of an initiative approved by voters in 1998, the Washington Department of Labor and Industries (L&I) recalculates the state's minimum wage each year in September. The initiative requires an annual cost-of-living adjustment in the minimum wage based on changes in the federal Consumer Price Index for Urban Wage Earners and Clerical Workers. The current hourly rate is $7.16. Effective January 1, 2005, the new minimum wage for employees over fifteen years of age will be $7.35 an hour. Fourteen and fifteen year old employees may be paid at 85% of the adult minimum wage.

II. REGULATORY DEVELOPMENTS

A. Federal

1. Department of Labor

(a) White Collar Exemptions to the FLSA

The United States Department of Labor ("DOL") recently announced the adoption of its long-awaited and much-debated amendments to the regulations defining "white-collar" exemptions from the minimum wage and overtime requirements of the Fair Labor Standards Act. The regulatory changes went into effect on August 23, 2004. A brief summary of these amendments follows.

- The Department of Labor has eliminated the separate "short" and "long" tests.
- The minimum salary level has increased from $250 per week (for the short test) to $455 per week ($23,660 per year).
- To be an "exempt executive," the new regulations require that an employee must have authority to hire or fire employees or that the employee's suggestions and recommendations as to hiring, firing,

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advancement, promotion, or any other change of status of other employees must be given particular weight.

- The new regulations provide more modern examples of what are and are not generally "administrative exempt" job duties.

- The white collar exemptions generally do not apply to lower level management staff within police and fire departments.

- The regulations updated the professional exemption to include more modern examples of who may be exempt professionals. The general framework for the professional exemption is maintained, but the regulations now provide that an employee need not always obtain a degree in a field of science or learning that is customarily acquired by a prolonged course of specialized intellectual instruction. Work experience may potentially substitute for some intellectual instruction.

- The creative professional and computer professional exemptions have not been materially changed.

- The Department added a "highly compensated employee" streamlined exemption. Employees who are paid at least $100,000 per year need only one exempt duty from any of the duties tests in order to be treated as exempt.

- The salary basis rules have been modified to allow suspensions for disciplinary reasons in full day rather than full week increments for violations of written workplace conduct rules.

- The final rules also give heightened protections to employers for inadvertent violations of the salary basis test. Now an employer will not lose the exemption for any employees, absent a willful violation of policy, if the following actions are taken: (1) the employer clearly communicates a policy prohibiting improper deductions and including a complaint mechanism; (2) the employer reimburses employees for any improper deductions; and (3) the employer makes a good faith commitment to comply with the salary basis test in the future.

Employers should keep in mind that, despite all of the attention given to these federal regulatory changes, Washington state law differs from federal law in certain respects. In some situations, regulations from the Washington Department of Labor and Industries provide greater benefits to employees than the federal regulations. Employers must

follow the provision, whether federal or state, that is *most* beneficial to its employees. The text of the federal regulations is available on the Department of Labor website, www.dol.org.

(b) COBRA Regulations

On May 26, 2004, the DOL issued final rules governing COBRA notice requirements. Generally, the final rules set new minimum standards for the timing and content requirements for providing notice of COBRA group health plan continuation coverage rights to participants and beneficiaries. The DOL included separate model notices to facilitate meeting the COBRA notice requirements at the commencement of plan coverage, and again following the occurrence of certain "qualifying events."

The final regulations are comprised of four separate sections, each addressing a specific required notice. The four sections are: (1) general notice, (2) employer notice, (3) qualified beneficiary notices, and (4) plan administrator notices. A brief summary follows.

- A general notice of an individual's COBRA rights must be provided to an employee and the employee's spouse upon commencement of group health coverage.

- An employer must provide notice to the plan administrator of the occurrence of certain qualifying events, such as termination of employment, reduction in hours, death of the employee, Medicare entitlement, or the employer's commencement of a proceeding in bankruptcy, within 30 days of such event. Such notice must provide sufficient information to enable the administrator to identify the plan, the covered employee, the qualifying event, and the date of the qualifying event.

- Qualified beneficiaries must provide notice of certain qualifying events such as: divorce/legal separation and loss of dependent child status, second qualifying events, disability status, and cessation of disability status.

- An "election notice" must be sent to each qualified beneficiary entitled to elect continuation coverage upon the occurrence of a qualifying event.

- Upon receiving notice of a qualifying event, a second qualifying event, or a determination of disability from a participant or beneficiary, a

plan administrator who determines that an individual is not entitled to continuation coverage to provide an explanation to the individual explaining why the individual is not entitled to elect COBRA continuation coverage. This notice must be provided within the same timeframe as the election notice.

- A plan administrator must provide notice to all qualified beneficiaries whose continuation coverage is terminated prior to the end of their maximum COBRA coverage period. This notice may be coupled with the HIPAA certificate of creditable coverage and must be provided as soon as administratively practicable.

The final regulations provide model notices of both the general notice and the election notice for single employer group health plans. Use of these model notices appropriately modified and supplemented will be deemed to constitute compliance with the requirements of the applicable notice regulation. However, use of the model notices is not mandatory. All notices must be "written in a manner calculated to be understood by the average plan participant" and allow for electronic delivery subject to regulatory requirements.

The final regulations became effective on July 26, 2004, and are applicable to notice obligations on or after the first day of the first plan year beginning on or after November 26, 2004 (i.e., January 1, 2005). To ensure compliance, employers should review the regulations and revise their COBRA procedures and notices as appropriate.

(c) ERISA

The DOL recently released Field Assistance Bulletin 2004-1 to help employers, plan officials, and others to comply with the Employment Retirement Income Security Act (ERISA). The bulletin provides guidance about the circumstances in which ERISA will apply to health savings accounts ("HSAs"). HSAs are a new type of savings vehicle designed to help individuals pay for current and save for future health expenses on a tax-free basis. The bulletin is available online at www.dol.gov/ebsa/regs/fab_2004-1.html.

2. National Labor Relations Board

(a) Employees Subject to Disciplinary Investigations Are No Longer Entitled to Have a Coworker Present at Interviews.

In *IBM Corp*., 341 NLRB No. 148 (2004), the National Labor Relations Board ("NLRB") held that a nonunion employee is no longer entitled to have a co-worker present when he or she is being interviewed as part of a disciplinary investigation. This decision overrules the Board's decision to the contrary only four years ago, in which the Board held that even nonunion employees are allowed to have a coworker present during interviews that they reasonably believe could lead to discipline. The right to have a coworker present, known as "Weingarten rights," is an established practice in a union setting. The *IMB Corp*. decision represents the third time the NLRB has flip-flopped on the question of whether nonunion employees are entitled to the same rights. Although the current Board has presently concluded that nonunion employees are not entitled to have a coworker present during disciplinary investigation interviews, be prepared for the Board to reverse itself again.

(b) Graduate Students at Private Universities Are No Longer Entitled to Organize and Engage in Collective Bargaining.

In *Brown University*, 1–RC—21368 (July 2004), the NLRB decided that graduate students who work as teaching or research assistants at private universities are not "employees" under the National Labor Relations Act ("NLRA"); thus, they are not entitled to organize and engage in collective bargaining. The Board reasoned that graduate students who work for their professors "have a predominately academic, rather than economic, relationship with their school," making them students, not employees. The ruling applies only to graduate students at private universities because public universities are governed by state law. Note that, under a 1999 NLRB ruling, interns, residents, and house staff at Boston Medical Center *are* "employees" under the NLRA.

3. Equal Employment Opportunity Commission

On March 4, 2004, a taskforce led by the Equal Employment Opportunity Commission ("EEOC") published a new, proposed definition of "applicant." The proposed definition is intended to clarify employers' record-keeping obligations under federal anti-discrimination laws and, more specifically, under the Uniform Guidelines on Employee Selection Procedures

("UGESP"). Significantly, the definition will apply solely to recruiting and hiring via the Internet and related technologies, and ultimately the proposed definition will leave it to employers to clearly define the term "applicant" for themselves.

The public comment period for the definition ended on May 28, 2004, but the EEOC has not yet issued a final definition. The proposed definition states that, to be an applicant in the context of the Internet and related electronic data processing technologies, the following must have occurred: (1) the employer acted to fill a particular position; (2) the individual followed the employer's standard procedures for submitting applications; and (3) the individual indicated an interest in the particular position.

B. State

1. Department of Labor & Industries

In light of the recent changes to the federal white collar exemptions, the Washington State Department of Labor and Industries ("L&I") has issued helpful charts and statements explaining important differences between state and federal minimum wage and overtime requirements. L&I reminds employers that they must comply with whichever provision, whether state or federal, is most beneficial to the employee. More information is available on L&I's website at www.lni.wa.gov/WorkplaceRights/files/overtime/FedOTCompareChart.pdf and http://www.lni.wa.gov/WorkplaceRights/files/overtime/FedOTFactSheet.pdf.

III. NOTABLE COURT DECISIONS

A. Racial Discrimination and Racially Hostile Work Environment

1. Fact-Specific Inquiries Are Common to Claims of Racial Discrimination.

An employee alleging racial/ethnic discrimination is entitled to a trial on the merits when the employee presents evidence that he was treated differently because of his race/ethnicity and the employer fails to provide any legitimate reasons for that treatment. In *Fonseca v. Sysco Food Services of Arizona, Inc.*, 374 F.3d 840 (9th Cir. 2004), an employee of a food wholesale distribution business filed a pro se action against his employer, alleging discrimination based on his Hispanic race and Guatemalan ethnicity in violation of Title VII and § 1981. The employee presented evidence that: (1)

he had been treated more harshly with respect to his use of bereavement leave; (2) he was improperly denied overtime and required to file grievances to get the pay he should have received while white employees automatically received the pay to which they were entitled; (3) he was disciplined for an accident that wasn't his fault; and (4) his supervisor mocked him for his accent. The employer offered very little rebuttal evidence other than insisting that the accident for which the employee was disciplined was his fault. The trial court dismissed the employee's claims.

The Ninth Circuit Court of Appeals, which is the appellate court that hears Washington federal court appeals, reversed the dismissal. The Ninth Circuit found that the employee had presented sufficient evidence to entitle him to a trial. The court's ruling relied on very little other than the employee's statements to conclude that a judge or a jury should sort out all of the facts at trial. Accordingly, this case emphasizes the importance of ensuring that all employment actions are fair and reviewing adverse actions for any appearance of unfairness based on race or other protected status.

2. An Employee Need Only Present Minimal Evidence of Discrimination to Be Entitled to a Trial.

An employee alleging racial discrimination need only provide "a short and plain statement of the claim showing that the pleader is entitled to relief" to avoid dismissal of his or her claim. In *Maduka v. Sunrise Hosp*., 375 F.3d 909 (9th Cir. 2004), an African-America physician brought a civil rights action against a hospital when his staff privileges were suspended, alleging that the suspension was racially discriminatory. His privileges were suspended after two incidents in which the physician improperly placed endotracheal tubes during surgery; one incident resulted in the death of the patient. The physician was not told who reported these incidents to the hospital, nor was he allowed to confront these witnesses or present his side of the story. He argued that the suspension was discriminatory because: (1) during the two surgical incidents in question, non-African American staff members had violated hospital rules but were not disciplined; and (2) he had been summarily dismissed without being afforded procedural protections that were routinely provided to non-African Americans. The trial court dismissed the physician's claim. The Ninth Circuit reversed the dismissal. Without evaluating the merits of the physician's claim, the Ninth Circuit determined that the facts presented in his complaint were sufficient to let him proceed with his claim. Thus, a complaint need not spell out all of the facts necessary that the employee would need to prevail. This case also demonstrates that, even if a complaining employee provides very little evidence of

discrimination in his or her complaint, it will still be difficult to have the case dismissed at that stage of the proceedings.

3. Racial Discrimination Must Be Evaluated Through the Eyes of the Victim.

Allegations of a racially hostile work environment must be assessed from the viewpoint of a person from the same racial or ethnic group as the claimant. This principle originated from claims of sexually hostile work environments; more than a decade ago, the Ninth Circuit determined that such claims must be evaluated through the eyes of a "reasonable woman." In *McGinest v. GTE Service Corp.*, 360 F.3d 1103 (9th Cir. 2004), a divided Ninth Circuit panel extended this principle, reasoning that "[r]acially motivated comments or actions may appear innocent or only mildly offensive to one who is not a member of the targeted group, but in reality be intolerably abusive or threatening when understood from the perspective of the plaintiff who is a member of the targeted group." The plaintiff in this case was an African-American employee who had worked as a supervisor for GTE for twenty-three years. He alleged that during that period: (1) he did not receive overtime pay for pre-shift work when non-African American supervisors did; (2) certain coworkers refused to work for him, commenting that "I'll retire before I work for a Black man" or "I refuse to work for that dumb son of a bitch"; (3) the maintenance shop refused to replace the dangerously-worn tires on his truck but replaced the tires on non-African American supervisors' trucks; and (4) his supervisors made racially offensive comments, such as commenting that the plaintiff must be a drug dealer because he wore a gold chain and repeatedly using the "n" word, including when referring to the plaintiff. The trial court dismissed the employee's claims.

In reversing the trial court's dismissal, the Ninth Circuit concluded that the employee had presented sufficient evidence of a racially hostile work environment, when viewed through the eyes of an African American, to entitle him to a trial on the merits. This case imposes a challenging task on employers; they must evaluate the workplace through the eyes of each member of a diverse workforce. In this case, however, some of the alleged racial comments were far from subtle. Thus, even when an employee's reactions to more ambiguous statements may be unclear, use of the "n" word, whether stated in a joke or scrawled on the bathroom wall, should never be tolerated.

B. Retaliation Claims

1. Suspicious Timing of Termination May Allow an Employee to Proceed With a Retaliation Claim.

When an employer discharges an employee soon after the employee files a harassment complaint, and the employer's justification for doing so is questionable, the employee will be able to proceed with his or her retaliation claim at trial. In *Hernandez v. Spacelabs Medical, Inc.*, 343 F.3d 1107 (9th Cir. 2003), an employee was fired soon after filing a sexual harassment complaint against his supervisor on behalf of a coworker. The coworker had told the employee that their supervisor was sexually harassing her, but that she was afraid to report it because she thought that she would be fired. Soon after the employee filed the complaint on her behalf, the Human Resources Department initiated an investigation of the supervisor's conduct. During the investigation, another supervisor approached the employee and told him that he "was now in trouble."

Less than a month after filing the complaint, the employee was discharged, allegedly for failing to complete important repairs on company equipment. The employee denied that he had failed to complete such repairs. The employee believed that he was discharged in retaliation for filing the sexual harassment complaint against his supervisor because the supervisor either knew or suspected that he was the one who had filed the complaint, and the employee's supervisor made the initial decision and wrote the termination letter. The trial court dismissed the retaliation claim.

The Ninth Circuit reversed, finding that the employee had presented enough evidence for a reasonable jury to infer that the employee was fired in retaliation for filing the sexual harassment complaint against his supervisor. The timing of his termination, as well as the supervisor's role in the decision to terminate him, could raise an inference of retaliation.

2. Employee May Attempt to Show Causal Link Between Time-Barred Claims and Recent Claims.

Even if an employee's claims for sexual harassment are time-barred, the employee is not precluded from attempting to show a causal link between the earlier harassment and more recent alleged acts of discrimination or retaliation. In *Porter v. California Dept. of Corrections*, 2004 WL 2029923 (9th Cir. Sept. 10, 2004), a female correctional officer brought an action against the state corrections department ("CDC"). She alleged that she was the victim of continuing sexual harassment, discrimination and retaliation as a result of her rejection of sexual advances in 1995 and 1996 by correctional

officers, one of whom was her supervisor. The trial court granted the CDC's motion for summary judgment, holding that (1) the temporal gap between the complaints of sexual harassment and the alleged acts of retaliation precluded the employee from showing a causal link; and (2) the alleged incidents of sexual harassment could not be considered with the allegations of retaliation for the purpose of stating a viable cause of action. The Ninth Circuit reversed the dismissal and remanded the case, holding that the employee was *not* precluded from attempting to show a causal link between the earlier harassment and more recent alleged acts of discrimination or retaliation. Thus, even though her earlier claims of harassment were time-barred, she could still bring them by showing a connection between the past and more recent events.

C. Religious Discrimination

1. It Is Not Religious Discrimination to Require an Employee to Comply with Company Anti-Harassment Policy.

An employer is not required to allow employees to harass coworkers because he says his religious beliefs require him to do so, nor does an employer need to abandon its "diversity" campaign to accommodate an objecting employee's religious beliefs. In *Peterson v. Hewlett-Packard Co*., 358 F.3d 599 (9th Cir. 2004), an employee was discharged for failing to comply with the employer's anti-discrimination and anti-harassment policy. He then sued the employer for religious discrimination and failure to accommodate. The employer's policy prohibited harassment on many grounds, including race, national origin, sex, religion, and sexual orientation. Additionally, the employer posted "diversity" posters to promote tolerance in the workplace. Each poster featured a photograph of an employee with a word such as "Black," "Hispanic," "Blonde," "Old," or "Gay" next to the caption "Diversity is Our Strength." The employee had objected to the inclusion of the "Gay" poster and began posting in his cubicle biblical verses and slogans condemning homosexuality, which were clearly visible to anyone walking by. The employer concluded that the postings violated its anti-discrimination policy and removed them. In response, the employee demanded that the employer remove the "Gay" poster. The employee and employer then had a series of meetings to resolve the issue, during which the employer clarified that the employee need not condone homosexuality or in any way change his beliefs; he simply needed to respect *all* of his coworkers. The employee requested that the employer accommodate his religion by removing homosexuality from its diversity campaign or allowing him to post his anti-gay posters. The employer denied both accommodations. The employee again posted the anti-gay posters in his cubicle and was subsequently fired.

The Ninth Circuit affirmed the dismissal of the employee's religious discrimination claim; requiring the employee to remove his anti-gay posters and otherwise comply with the employer's anti-harassment policy did not amount to religious discrimination. Additionally, the court concluded that the employee's proposed accommodations would have imposed an undue burden on the employer. The court stated that "[a]n employer need not accommodate an employee's religious beliefs if doing so would result in discrimination against his coworkers or deprive them of contractual or other statutory rights."

2. Discharge of Employee who Violated Anti-Harassment Policy Did Not Amount to Religious Discrimination.

Similarly, in *Bodett v. CoxCom, Inc.*, 366 F.3d 736 (9th Cir. 2004), an evangelical Christian filed suit against her employer for religious discrimination. The employee, who supervised a group of 13 employees during her employment, was terminated for violating her company's anti-harassment policy by attempting to "convert" an openly gay subordinate to heterosexuality. On many occasions, the supervisor told her subordinate that God condemned her lifestyle and that homosexuality was an abominable sin. She also bought the subordinate a ticket to an evangelical Christian event and pressured her to go, despite the subordinate's insistence that she already had plans that evening. The subordinate stated that she did not report these incidents because she was afraid that she would lose her job. However, she did discuss these incidents with her coworkers. A higher level supervisor of both women heard rumors regarding these incidents, and eventually asked the subordinate whether they were true. When the subordinate stated that her supervisor's frequent condemnation of her sexuality made her uncomfortable, the employer fired the first-level supervisor for violating the company's anti-harassment policy.

The Ninth Circuit affirmed dismissal of the religious discrimination claim. The court concluded that the supervisor's behavior, while well-intentioned, in fact violated the employer's anti-harassment policy. The supervisor failed to present any evidence that the company was motivated to fire her because of her religion; rather, the company presented ample evidence that the supervisor's conduct violated its anti-harassment policy.

D. Religious Employment: The Ministerial Exception and Its Limitations

1. Ministerial Exception Bars Church Employee's Title VII Disability Discrimination Claim.

The "ministerial exception," rooted in the free exercise clause of the First Amendment, protects churches from Title VII liability when application of Title VII would encroach on churches' constitutionally-protected right to choose its ministers. In *Werft v. Desert Southwest Annual Conference of United Methodist Church*, 377 F.3d 1099 (9th Cir. 2004), a minister sued a church for employment discrimination in violation of Title VII, alleging that the church failed to accommodate his disabilities. The Ninth Circuit affirmed dismissal of the minister's Title VII claims because they involved the employment relationship between church and minister and were thus barred by the ministerial exception to Title VII liability.

2. The Ministerial Exception Does Not Bar Former Church Employee's Sexual Harassment Hostile Work Environment Claim.

The Ninth Circuit recently recognized a limit to the ministerial exception: churches are not immune from sexually and retaliatory hostile work environment claims. In *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2004), an ordained minister brought claims under Title VII against her church and her supervisor alleging that she was sexually harassed, and then retaliated against when she reported the harassment. The trial court applied the ministerial exception and dismissed her claims. The Ninth Circuit reversed and remanded the case for trial. In doing so, the court engaged in a delicate balancing of the church's and the minister's rights. The court concluded that, while the ministerial exception protects a church's right to make its own employment decisions, the minister presented narrower sexual harassment and retaliation claims that did not implicate protected employment decisions. Thus, she could pursue those claims because they did not interfere with the church's right to select its ministers or make employment *decisions*; they only related to the *treatment* she received while employed.

E. Disability Discrimination

1. There Must Be a Nexus Between Accommodation and Medical Necessity Under Washington Law.

An employee alleging that his employer failed to accommodate his disability must be able to establish that the requested accommodation was medically necessary. In *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 94 P.3d 930

(2004), an employee was fired after seven years of employment. When he reapplied for a job, the employer refused to rehire him. The employee, who suffered from depression and posttraumatic stress disorder (PTSD), sued the employer for lack of disability accommodation during his employment, and disparate treatment during the firing and rehiring process. The trial court dismissed both claims on summary judgment. The court of appeals reversed summary judgment on the disparate treatment claim and affirmed summary judgment on the accommodation claim. The Washington Supreme Court affirmed the court of appeals, dismissing the accommodation claim but reinstating the disparate treatment claim.

This case confirms that, if challenged, an employee must come forward at summary judgment or trial with competent evidence establishing a nexus between his or her disability and the medical need for accommodation. Additionally, it confirms that disability discrimination claims under Washington law are not easily dismissed because all relevant inquiries are questions of fact and thus must be decided at trial.

F. Sexual Harassment

1. Employers Can Be—But Aren't Always—Automatically Liable in Constructive Discharge Sexual Harassment Cases.

The U.S. Supreme Court recently issued a much-anticipated decision regarding whether employers are *automatically* liable under Title VII when an employee is constructively discharged or forced to resign due to sexual harassment by her supervisors. The decision resolved a split among federal appellate courts. The specific question before the Court was whether constructive discharge qualifies as a "tangible employment action." If constructive discharge is a tangible employment action, the employer is automatically liable to the employee, assuming she can prove that she was harassed. However, if constructive discharge is not a tangible employment action, then the employer can avoid liability by proving that: (1) it exercised reasonable care to prevent and promptly correct the harassment; and (2) the harassed employee unreasonably failed to use the employer's complaint procedures or otherwise avoid harm.

In *Pennsylvania State Police v. Suders*, 124 S. Ct. 2342 (2004), a female former employee sued state police, alleging that sexual harassment by her supervisors resulted in her constructive discharge in violation of Title VII. She alleged that she was subjected to essentially non-stop obscene comments and gestures by her three supervisors. She talked to her department's Equal Employment Opportunity officer about what was going on, but received little response. Then her supervisors told her that she had failed an exam and

arrested her for stealing the papers. She later found the exam, ungraded, stuffed in a drawer. She quit her job, then sued, alleging that she had been constructively discharged.

The Court clarified that the type of conduct that gives rise to a constructive discharge claim has to be more severe than typical workplace harassment. It must be so severe that the employee has no choice but to quit rather than rely on the employer to resolve the harassment. In short, the Court concluded that employers can be—but aren't always—automatically liable in constructive discharge sexual harassment cases. The Court stated that employers will be automatically liable if the employee reasonably resigns in response to an official company action that adversely changes her employment status or situation. The Court gave the following examples of what could constitute such an action: a humiliating demotion, an extreme cut in pay, or a transfer to a position in which the employee would face unbearable working conditions. In response to the employee's specific claims, the Court found that there were unresolved questions of fact, which meant that she could proceed with her claims.

This case reminds employers that the best way to avoid harassment claims is to prevent the misconduct in the first place. The first step is establishment of strong anti-harassment policies and training programs to make sure employees and supervisors know that the employer will not tolerate harassment, and that employees know what to do if they are the victim of harassment. Because an employer cannot always control and monitor employee behavior, the next best protection lies in the response to employee complaints of harassment. An employer *must* promptly investigate and *stop* the harassment.

G. Age Discrimination

1. The ADEA Does Not Prevent an Employer From Favoring an Older Employee over a Younger Employee.

In *General Dynamics Land Systems, Inc. v. Cline*, 124 S. Ct. 1236 (2004), the United States Supreme Court considered whether the Age Discrimination in Employment Act ("ADEA"), which forbids discriminatory preference for the young over the old, also prohibits favoring the old over the young. The dispute arose when a collective-bargaining agreement between an employer and a union eliminated the employer's obligation to provide health benefits to subsequently retired employees; however, current employees who were at least 50 years of age remained eligible to receive such benefits. Plaintiffs were then at least 40 years of age and thus protected by the ADEA, but under 50 and therefore not eligible to receive the benefits upon retirement.

Plaintiffs argued that this agreement violated the ADEA because it discriminated against them with respect to compensation, terms, conditions, or privileges of employment "because of . . . age." The EEOC agreed with plaintiffs and invited the parties to settle. When the parties failed to do so, plaintiffs filed suit, combining claims under the ADEA and state law.

The district court granted the employer's motion to dismiss, characterizing the action as a "reverse age discrimination" suit and noting that no court had granted relief on such grounds before. The Sixth Circuit reversed and remanded. The Supreme Court granted certiorari and held that: (1) discrimination against the relatively young is outside the ADEA's protection; and (2) the employer therefore did not violate the ADEA's prohibition against discrimination "because of . . . age" by eliminating the health insurance benefits program for employees under 50 but retaining the program for employees over 50. The Court concluded that "the text, structure, purpose, and history of the ADEA, along with its relationship to other federal statutes, [shows] that the statute does not mean to stop an employer from favoring an older employee over a younger one." *Id.* at 1248-49.

H. Mandatory Arbitration

1. Federal Courts Will Disturb an Arbitration Decision Only Where the Arbitrator "Manifestly Disregards" Federal Law.

Federal courts may disturb an arbitration decision under the Federal Arbitration Act ("FAA") only when the arbitrator "manifestly disregards" federal law. In *Luong v. Circuit City Stores, Inc.*, 368 F.3d 1109 (9th Cir. 2004), an employee petitioned to vacate an arbitration award in favor of the employer on the employee's ADA claim. The employee stated that the arbitrator had ignored or refused to comply with federal law, and that was enough to establish the court's jurisdiction. The Ninth Circuit agreed that it had jurisdiction to review the arbitrator's decision, but explained that a "manifest disregard of the law" meant that the arbitrator must have recognized the applicable law and then intentionally ignored it. The employee did not meet this standard because, in the arbitrator's decision, he expressly stated the applicable law and recognized its importance. The Ninth Circuit did not comment on whether the arbitrator applied the law correctly because it was clear that he had not recognized and then ignored applicable federal law. Thus, the arbitrator did not "manifestly disregard" the applicable law, and the Ninth Circuit would not disturb the decision.

2. Washington Courts Will Likely Enforce Agreements to Arbitrate.

Even though the U.S. Supreme Court ruled several years ago that the FAA supports the enforcement of agreements to arbitrate employment disputes, cases decided since then—including several from the Ninth Circuit—have raised additional questions regarding the enforcement of mandatory arbitration agreements. A recent Washington court suggests that such agreements will be enforceable in Washington absent unconscionability or other public policy concerns. In *Walters v. A.A.A. Waterproofing, Inc.*, 120 Wn. App. 354, 85 P.3d 389 (2004), an employee sued his private employer for overtime pay. The employer moved to stay proceeding pending arbitration, as mandated by the arbitration clause in their employment agreement. The employee resisted enforcement of the clause on several grounds, including arguing that: the agreement did not involve commerce as defined in the FAA, lacked mutuality, was ambiguous, and violated public policy. Both the trial court and the appellate court rejected these arguments and concluded that the parties must arbitrate their dispute pursuant to their arbitration agreement.

I. Wage and Hour Disputes

1. Employees Working Almost Exclusively on Indian Tribal "Intramural Matters" Are Exempt From the FLSA.

Employees of Indian tribes working on tribal "intramural matters" are not subject to certain federal labor laws. The Ninth Circuit recently addressed this issue in *Snyder v. Navajo Nation*, 371 F.3d 658 (9th Cir. Sept. 2, 2004). In *Snyder*, law enforcement officers of the Navajo Nation Division of Public Safety filed actions against both the Navajo Nation and the United States, claiming that they were denied overtime payments as required by the Fair Labor Standards Act ("FLSA"). In dismissing the claims, the Ninth Circuit held that the employees were not subject to federal labor laws because law enforcement was an "intramural matter" for the tribe. The court further reasoned that any work performed off the reservation occurred because of a crime that occurred on the reservation or for some other reason that directly affected the interests of the tribal community. This case has direct implications for tribal employers, and also reminds other employers that generally applicable employment laws may have exceptions when operating on or near a reservation.

2. Agreements for Fixed-Pay "Off-Duty" Work Must Be Reasonable.

Employers must ensure that agreements to pay employees a fixed amount for off-duty work are "reasonable" in light of "all the pertinent facts." In *Leever*

v. Carson City, 360 F.3d 1014 (9th Cir. 2004), the Ninth Circuit recognized that the FLSA permits employers and employees to agree to specific payments for work performed during off-duty hours. However, the Ninth Circuit overturned the trial court by holding that the agreement must at least take into account an approximation of the hours of work *actually performed* by the off-duty employee. In this case, a flat payment of $60 every two weeks to a canine sheriff's deputy who groomed, fed, bathed, trained and exercised her police dog was found to be unreasonable because it did not reflect the actual number of hours spent performing such work. Employers with employees who perform work during their off-duty hours should proceed with care. If the nature of the off-duty work makes it difficult to accurately anticipate the amount of time spent on such work, the FLSA permits employers to agree to a "reasonable" set payment for the overtime work.

3. Preshift and Postshift Activities May Be Compensable if Performed for the Employer's Benefit.

An employer must compensate employees for activities before and after shifts if they are an "integral and indispensable" part of the performance of the primary work activities. In *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901 (9th Cir. 2004), employees sued their employer to recover unpaid overtime wages for activities performed before and after their shifts. Prior to the start of each shift, employees were required to don uniforms, then protective suits over the uniforms, and then pass through an air shower before entering the "cleanroom" work areas. Donning and removing the uniforms and protective suits took up to thirty minutes. However, the employer argued that dressing and undressing were "de minimus" activities that were not compensable. The Ninth Circuit concluded that such activities were compensable because: (1) employees were required to wear uniforms underneath the protective suits; (2) the company mandated that employees change into and out of the uniforms exclusively on company premises; and (3) the company required the wearing of plant uniforms for its own benefit. Thus, employers should proceed with caution before requiring employees to perform activities before and after their shifts; such time may be compensable.

4. Public Employers Offering Compensatory Time Have Some Discretion in Determining When Employees Use It.

Under the FLSA, a public-sector employer has some discretion in defining the "reasonable period" within which an employee may exercise his or her right to compensatory time. In *Mortensen v. County of Sacramento*, 368 F.3d 1082 (9th Cir. 2004), the court held that a county employer did not

violate the FLSA by limiting an employee's use of accrued compensatory time off. Specifically, the employee requested compensatory time off during a period in which the employer would have been required to pay another employee overtime wages to cover the time. Despite a U.S. Department of Labor ("DOL") opinion letter stating that it would not be "unduly disruptive" to pay one employee overtime so as to permit another employee to use compensatory time off, the court found that there was no need to look at the DOL's opinion letter for guidance because the FLSA was clear on its face. Under the Act, public-sector employers have discretion in defining the "reasonable period" within which an employee may exercise his right to comp time. If an employee could demand comp time and require the public employer to expend funds to cover the comp time shift through overtime to another employee, the entire purpose of public-sector comp time would be defeated.

5. State Appellate Courts Split Over Resident Worker On-Call Exemption.

State overtime law exempts employees who sleep or reside at their place of employment or otherwise spend a substantial portion of their work time on call but not performing active duties. However, Washington appellate courts have reached conflicting conclusions about whether such workers are entirely exempt from overtime rules, or whether they are covered by overtime laws excluding their on-call time. In the most recent appellate case, *Berrocal v. Fernandez*, 120 Wn. App. 555, 85 P.3d 969 (2004), the Court of Appeals, Division III (eastern Washington) held that employees who sleep and live full time at the workplace, sheepherders in this case, are exempted from requirements of Washington's Minimum Wage Act ("MWA") only for those hours during which they are not engaged in active duties. In reaching that conclusion, the court disagreed directly with a decision of Division I of the Court of Appeals in Seattle, which found that employees who live and work on a cruise ship are not covered by the MWA. If this most recent decision holds, whether someone lives and sleeps on his employer's premises would be largely superfluous: on-call time during which workers aren't performing active duties is not compensable anyway. The case confused the distinction between exempt status and on-call hours of nonexempt workers that aren't compensable. While the courts have yet to settle this issue, it is clear that the MWA's exemptions are being narrowly construed and that the burden is on employers to establish the exemption. Employers should take a conservative approach in deciding which jobs to treat as exempt; which duties are actually assigned to an employee and what percentage of his time is spent on nonexempt work must be vigilantly monitored and controlled.

J. "Living Wage" Ordinance

1. Living Wage Ordinance Is Constitutional.

It is constitutional to require employers that receive some form of financial benefit from the city to pay a 'living wage' to its employees, even if that wage is well above federal and state minimums. In *Rui One Corp. v. City of Berkeley*, 371 F.3d 1137 (9th Cir. 2004), the Ninth Circuit held that an employer with a fifty-year lease agreement with the city could be required to pay a wage that approximates the actual cost of living in the community (here between $9.75 and $11.37 per hour) pursuant to a local ordinance. The rationale behind the ordinance was that "the privilege of using public property to operate a business enterprise should not be granted to parties that will exacerbate the problems associated with inadequate compensation of workers." The employer asserted a number of constitutional claims to invalidate the ordinance, principally those based on the Contract Clause, but also including Equal Protection and Due Process claims. The court rejected all claims, stating that the employer still set prices and could use its best judgment to maximize profits. Furthermore, the court noted that the lease agreement expressly stated that it was the parties' "entire agreement," thus foreclosing the possibility of any additional implied terms, such as the pay scale for employees. Those contracting with public entities should be aware that there can be strings attached. Living wage ordinances are just one example of the types of requirements that some jurisdictions have imposed on employers with which they do business.

K. Public Employers

1. Notice of Termination That Includes "Stigmatizing Information" Triggers a Right to a Due Process "Name-Clearing" Hearing.

A discharged public-sector employee has a constitutionally-based liberty interest in clearing his or her name when stigmatizing information regarding the reasons for the termination is publicly disclosed. Information in personnel files is publicly disclosed, noted the court in *Cox v. Roskelley*, 359 F.3d 1105 (9th Cir. 2004), because Washington's disclosure laws make a public-sector employee's personnel file a public record. In *Cox*, a Spokane County employee was terminated for "failure to meet his responsibilities" and "poor managerial judgment." A copy of the termination letter was placed in his personnel file. The Ninth Circuit held that failure to provide a name-clearing hearing is a violation of the Fourteenth Amendment's Due Process Clause. Additionally, the court rejected the county's claim that it was entitled to a "qualified immunity" because the employee's right to such a hearing was clearly established. This decision will likely be appealed, but until the appeal

is resolved, public-sector employees in Washington should be aware of the constitutional due process rights involved in such termination cases. For employers already familiar with the similar due process rights required by the U.S. Supreme Court in *Loudermill v. Cleveland Board of Education*, instituting such procedures during the appellate review may not be particularly burdensome.

2. A Public Employee Who Voluntarily Resigns May Not Rescind His or Her Resignation.

A public employee does not have a right to withdraw a voluntary resignation after his employer has accepted it. In *Travis v. Tacoma Public School Dist.*, 120 Wn. App. 542, 85 P.3d 959 (2004), a Tacoma school teacher resigned in June when he became aware that his contract would not be renewed for the following year. The school board accepted his resignation, which the teacher stated to be official as of August 31, the end date of his contract. After the board accepted his resignation but before August 31, the teacher tried to withdraw his resignation. When the board would not agree to do so, the teacher filed a lawsuit claiming that he had the right to rescind up until August 31. The Washington Court of Appeals disagreed and held that an employee does not have the right to withdraw a voluntary resignation once accepted. Furthermore, the court noted that an employee's resignation is presumed voluntary, even if the employee resigns in response to a threat of discharge, and an employee who voluntary resigns waives his claim for wrongful termination.

3. Some Degree of Discretion May Be Permissible in Public-Sector Civil Service Promotions.

Public employers with civil service promotional rules may be able to defend up to a "Rule of Six" in determining promotions. The Washington Supreme Court, in *Seattle Police Officers Guild v. City of Seattle*, 151 Wn.2d 823, 92 P.3d 243 (2004), recently upheld a Seattle civil service rule allowing the police chief to make discretionary promotion selections from a list of five certified finalists on a civil service exam. The police chief could consider factors other than exam scores for the top five finalists and promote any one of the five. The court reasoned that the Legislature considers a system allowing a list with up to six names to be one that "substantially accomplishes" the purpose of merit-based promotion and complies with Washington civil service laws. While the decision directly affects only the state statute authorizing police civil service, the court's logic and reliance on the Rule of Six endorsed by an unrelated civil service law for state employees arguably suggests that other public employers with civil service rules may allow promotional discretion from a list of up to six candidates.

L. Tax Consequences

1. Washington Employers Liable for Plaintiffs' Increased Federal Income Tax Consequences in Addition to Other Damages.

The Washington Supreme Court recently held that employers will be responsible for the increased federal income tax consequences imposed on an employee who obtains a damages award for employment discrimination. In *Blaney v. International Association of Machinists and Aerospace Workers, Dist. No. 160*, 151 Wn.2d 203, 87 P.3d 757 (2004), plaintiff filed a gender discrimination suit against her union under the WLAD. After plaintiff won at trial, the high court eventually concluded that an employer is responsible for the additional federal income taxes resulting from a jury award in a discrimination suit.

2. Plaintiffs Are Not Taxed on the Portion of a Settlement or Court Judgment That Is Awarded for Attorneys' Fees.

The Ninth Circuit also addressed the taxability of settlements in *Banaitis v. C.I.R.*, 340 F.3d 1074 (9th Cir. 2003). There, the court upheld an Oregon statute designating that portion of the settlement or judgment allocated for attorney's fees as taxable income only for the attorney. In response to the Ninth Circuit's ruling in *Banaitis*, the Legislature passed and the governor signed substitute SB 6270, which relieves employees from paying taxes on the portion of a settlement or court judgment awarded for attorney's fees. The law provides that because the employee's attorney has a property interest in that portion of the settlement or judgment allocated to his fees, that part of the award is not taxable income of the employee.

M. Wrongful Discharge/Constructive Discharge

1. Employee on Medical Leave May Prove Constructive Discharge Without Resigning.

An employee does not need to "quit" or "resign" from his job in some formal way to be considered constructively discharged. In *Korslund v. DynCorp Tri-Cities Services, Inc.*, 121 Wn. App. 295, 88 P.3d 966 (2004), three employees filed an action for damages against their employer for wrongful discharge and retaliation in violation of public policy. The trial court dismissed the constructive discharge claims of two of the employees because they were on medical leave from their employment and thus could not be considered "discharged." The court of appeals disagreed, stating that the question is whether the employee has permanently left the job, not whether he or she resigned or quit. Thus, the court concluded that the employee who

had gone on unpaid medical leave had permanently left the job and could pursue his wrongful termination claim. However, the employee on medical leave who was receiving long term disability and employee medical benefits had not established that she permanently left the job, and could not pursue her claim for wrongful termination.

N. Whistleblowing

1. Extra Caution Required in Disciplining Whistleblowers.

When disciplining "whistleblowers," employers must ensure that the discipline fits the violation and is otherwise consistent with company discipline guidelines. In *CalMat Co. v. U.S. Dept. of Labor*, 364 F.3d 1117 (9th Cir. 2004), the Ninth Circuit denied the employer's petition for review of the DOL's finding that it violated the Surface Transportation Assistance Act's (STAA) whistleblower protections by suspending an employee without pay. The employer purportedly suspended the employee for making an ethnic slur, using obscene language, and encouraging a work slowdown. Prior to his suspension, the employee closely monitored the employer's overtime hours and reported violations. When the employee challenged his suspension without pay, an arbitration panel determined that the suspension was for "just cause" because he had encouraged a work slowdown. The employee then filed a separate complaint before an Administrative Law Judge ("ALJ"). The ALJ found that the suspension was excessive in light of company policy and was therefore pretext for retaliation in violation of the whistleblower provisions of the STAA. The Administrative Review Board upheld the ALJ's decision. Finally, the Ninth Circuit ultimately determined that the ALJ did not have to defer to the original arbitration panel's findings because the panel did not consider the STAA's whistleblower protections. While the Ninth Circuit's scope of review was narrow, this case highlights the need to use extra care when disciplining a whistleblower by making absolutely sure that the discipline is consistent with company discipline guidelines.

2. Whistleblowers Do Not Have a Cause of Action Against the Entity That Contracts with Their Employer.

By definition, a claim for wrongful discharge depends on the termination of employment. Accordingly, an employee has no wrongful discharge action against an entity with which it did not have an employment relationship. In *Awana v. Port of Seattle*, 121 Wn. App. 429, 89 P.3d 291 (2004), the court held that an entity that hires a contractor, and expressly leaves employee relations to that contractor, is immune from wrongful discharge claims brought by the contractor's employees. Asbestos abatement workers had reported inadequate safety procedures to the Washington Department of

Labor and Industries and were subsequently terminated. The employees then sued their employer and the Port of Seattle, which had contracted with employer to renovate an airport, for wrongful termination. The court held that the employees had no cause of action against the Port of Seattle, despite the employees' allegations that it used its influence to get the workers fired; the employees had no employment relationship with the entity. In conclusion, the court noted that the wrongful discharge doctrine is narrow and must be extended with caution. The Port's victory in this case held the line on expansion of liability for wrongful discharge.

O. Undocumented Workers

1. Employers May Be Prohibited From Inquiring About the Immigration Status of Employees Alleging Workplace Discrimination in a Lawsuit.

Employers alleged to have committed national origin discrimination may be prohibited from inquiring about the immigration status of their employees in depositions or interrogatories. In *Rivera v. Nibco, Inc.*, 364 F.3d 1057 (9th Cir. 2004), the Ninth Circuit affirmed a magistrate judge's protection order by concluding that the employer couldn't use the discovery process (i.e. the pretrial exchange of facts) to inquire regarding the immigration status of the employees because it would place an "undue burden" on the employees and could have a "chilling effect" on the pursuit of their workplace rights. The Ninth Circuit affirmed the order despite a recent U.S. Supreme Court decision holding that an employee's immigration status may affect the employer's liability as to damages. This case primarily involved a procedural issue that would not likely come up in most employment discrimination litigation. Should an employee's immigration status come up in a particular case, employers have the right to inquire about it and, if opposed, require opposing counsel to seek a protective order as was done in this case. Other judges may well decide the same issues quite differently.

2. Employers May Discharge Employees for Failing to Provide Proper Documentation of Work Status After Repeated Requests.

While the timing of a discharge shortly after the onset of a disability or the filing of a workers' compensation claim might normally be deemed sufficient evidence to proceed to trial, an employer's strict obligation to ensure that their employees are authorized to work in the United States takes precedence. In *Anica v. Wal-Mart Stores*, 120 Wn. App. 481, 84 P.3d 1231(2004), the Washington Court of Appeals upheld the lower court's rejection of all of plaintiff's discrimination and retaliation claims. While employed, the employee had failed to produce evidence that she was authorized to legally

work in the U.S., despite the employer's repeated requests. Meanwhile, the employee went on medical leave to recover from a workplace injury. Upon her return, she was fired for failing to produce evidence of valid work authorization. Plaintiff then alleged disability discrimination, retaliation for filing a workers' compensation claim, and/or discrimination based on citizenship, all of which were dismissed. Employers must ensure that they hire employees who are authorized to legally work in the U.S., and this case highlights that undocumented workers have no special protection from the results of that compliance. However, as noted in the case above, an employee may be prohibited from inquiring as to an employee's immigration status *after* the employee has initiated litigation.