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2006–2007

Spring 2007 Employment Law Update

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

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

Our Presenters

Nancy Williams has been practicing in the area of labor and employment law for more than 25 years. She counsels employers and represents them in litigation on equal employment opportunity, discipline and discharge, and a wide variety of other employment issues. Nancy is an active member in the American Bar Association and Washington Bar Association, especially in the labor and litigation areas. She is also a frequent speaker at events highlighting what employers should be aware of when dealing with employment law. Nancy is chair of the Seattle Labor & Employment practice at Perkins Coie and currently chairs the King County Bar Association's Labor and Employment Law Section.

Katie Loring is a member of the firm's Labor & Employment practice. Her practice focuses on employment counseling and litigation for a broad range of clients in areas including race, sex, and age discrimination, disability law, and the Family and Medical Leave Act. Katie obtained her legal degree from Boston College Law School where she was the Symposium Editor of *The Boston College Law Review*. She obtained her undergraduate degree from the University of Rochester.

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Employment Law Update

By Nancy Williams and Katie Loring

I. LEGISLATIVE DEVELOPMENTS

A. FEDERAL LEGISLATION

Congress has initiated several bills that could impact many employers' obligations and policies. Although each bill still is pending, the following summaries are provided to let you know what is on the horizon.

1. Fair Pay.

On April 11, 2007, legislation (S. 1087) was introduced that would prohibit employers from discriminating against employees in the payment of wages on the basis of sex, race, or national origin. The bill would amend the Fair Labor Standards Act of 1983 ("FLSA") and require employers to give equal pay for jobs of comparable skill, effort, responsibility, and working conditions. The bill would also prohibit employers from reducing other employees' wages to obtain pay equity and would require employers to disclose job categories and pay scales when needed for enforcement. Employers could still pay different wages based on seniority systems, merit systems, or any system that measured wages by the quantity or quality of production.

2. Genetic Nondiscrimination.

Although genes are facially neutral, many genetic conditions and disorders are associated with specific racial and ethnic groups or gender. Some genetic traits are more prevalent in certain groups, so use of genetic information could have a disparate impact on members of a particular group. States have adopted genetic antidiscrimination laws that vary widely. Congress recently proposed genetic nondiscrimination legislation (H.R. 493, S. 358), which would amend Title VII of the 1964 Civil Rights Act and other laws to prohibit employers from discharging, refusing to hire, or otherwise discriminating against employees on the basis of genetic information. Genetic information would be defined as an individual's own genetic tests, the genetic tests of his or her family members, and the occurrence of a disease or disorder in the individual's family members. It would not include information regarding an individual's sex or age.

The bill would also amend other laws including the Public Health Service Act and the Employee Retirement Income Security Act to preclude discrimination by group health plans and insurance issuers against individuals based on genetic information. Such protections would include a prohibition on adjusting premiums based on genetic information, not allowing insurers to require genetic testing, and prohibiting the collection of genetic information for underwriting.

3. Paid Sick Leave.

There is currently no federal law requiring employers to provide paid—or unpaid—sick leave. On March 15, 2007, legislation was introduced (H.R. 1542) that would require employers of 15 or more employees to provide seven paid sick days per year to workers working 30 hours or more per week. The bill would also provide part-time workers prorated leave and would allow employers to request certification by employees who request three or more consecutive days.

4. Minimum Wage and Tax Relief.

Congress is currently considering legislation that would provide tax breaks to ease the burden on small businesses of a $2.10 per hour incremental increase in the federal minimum wage from $5.15 to $7.25 by 2009 (H.R. 1591).

B. WASHINGTON LEGISLATION

The most recent session of the Washington Legislature just ended on Sunday, April 22, 2007. Although the Legislature will not consider a bill "dead," if it a bill did not pass both bodies of the Legislature by that time, it will not become law without further consideration next session.

Two bills pertinent to employers made the long journey through the Legislature this session and are summarized below. A new definition of disability under the Washington Law Against Discrimination ("WLAD") was adopted, as was an insurance program to provide paid family and medical leave. Both bills are currently awaiting action by the Governor.

A number of other interesting bills did not get that far. We summarize one such bill here due to the impact that it could have if it reappears in the future.

1. The Definition of Disability.

The definition of disability under the WLAD continues to evolve. As you know, last summer the Washington Supreme Court in *McClarty v. Totem Electric*, 157 Wn.2d 214, 137 P.3d 844 (2006), adopted the federal definition of disability found in the Americans with Disabilities Act ("ADA"). The decision became final in March 2007 when the court denied a long-pending motion for reconsideration. In a direct response to the court's decision, the Legislature just passed legislation to expand the definition of disability beyond that which existed prior to the *McClarty* decision. The new definition has the potential to impact employers' accommodation obligations and employees' discrimination claims.

The legislation defines disability as a sensory, mental, or physical "impairment" that is "medically cognizable or diagnosable, exists as a record or history, or is perceived to exist, whether or not it exists in fact." "Impairment" includes:

> (i) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory, including speech organs,

> cardiovascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, skin, and endocrine; or
>
> (ii) Any mental, developmental, traumatic, or psychological disorder, including but not limited to cognitive limitation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

S.S.B. 5340.

The legislation recognizes a disability in a broad range of circumstances, including temporary impairments, regardless of the potential for mitigation, even if the impairment only limits the employee's ability to do a specific job.

> A disability exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or work at a particular job or whether or not it limits any other activity within the scope of this chapter.

S.S.B. 5340.

2. Paid Family and Medical Leave.

Most workers are currently entitled to unpaid family and medical leave under the federal Family and Medical Leave Act ("FMLA"), the Washington Family Leave Act, and the Washington Family Care Act. But after significant negotiating between the House and Senate, the Washington Legislature recently adopted legislation to provide limited *paid* family and medical leave (E.2.S.S.B. 5659). The legislation requires the Washington Department of Labor and Industries ("L&I") to establish and administer a family and medical leave insurance program. Through that program, eligible employees are entitled to paid family and medical leave benefits up to five weeks per year.

3. Legal Redress for Workplace Bullying.

The Legislature proposed H.B. 2142, amending Title 49 of the RCW, to provide redress for employees harmed psychologically, physically, or economically by deliberate abusive work environments regardless of protected status. The bill stated that "[l]egal protection from abusive work environments should not be limited to behavior grounded in protected class status such as is provided under employment discrimination statutes." The bill declared it "an unlawful employment practice" "[t]o subject an employee to an abusive work environment" or "[t]o retaliate in any manner against an employee because he or she has opposed [or participated in opposition to] any unlawful employment practice" under the new law. The bill defined "abusive conduct" as "conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests." It defined "abusive work environment" as "a workplace where an employee is subjected to abusive conduct that is so severe that it causes physical or psychological harm to the employee." The bill also provided an

affirmative defense for employers much like that provided by federal law in the hostile work environment context.

This bill did not pass this session, but could be resurrected in the future. It would create a new cause of action for workplace harassment not based on protected status.

II. WASHINGTON REGULATORY DEVELOPMENTS

A. Minimum Wage

Pursuant to Initiative 688, L&I calculated a new Washington minimum wage in September 2006, which became effective January 1, 2007. The minimum wage increased from $7.63 to $7.93.

B. Emergency Heat Stress Rules

The L&I Division of Occupational Safety and Health ("DOSH") plans to file a draft emergency heat stress rule on June 5, 2007. The specific language will be available on the DOSH website. DOSH will begin formal rulemaking in October.

III. CASE LAW DEVELOPMENTS

A. DISABILITY DISCRIMINATION

1. Employee's Misconduct May Be Part of His or Her Disability and Not a Separate Basis for Termination.

Generally, an employee with a disability may be held to the same standards of conduct and performance as employees without disabilities. But there may be a different result if the employee's misconduct is *caused by* the disability. In *Gambini v. Total Renal Care, Inc.*, 480 F.3d 950 (9th Cir. 2007), the Ninth Circuit addressed this issue in reviewing claims of disability discrimination by a bipolar employee fired after an angry outburst in the workplace. Stephanie Gambini was a clerk for DaVita, Inc with a history of health problems. Gambini began to experience anxiety and depression, culminating in an emotional breakdown at work. Gambini told her supervisor and later her supervisor's replacement that she was seeking treatment for bipolar disorder, and eventually requested several accommodations. As time went on, her symptoms were more severe—she was increasingly irritable, easily distracted, and had a hard time concentrating on her work. Gambini consulted with a psychiatric nurse practitioner who confirmed that she suffered from bipolar disorder. Around the same time, her supervisors became concerned about her poor performance and attitude on the job. They met with Gambini and presented her with a written performance improvement plan ("PIP"). Gambini arrived at the meeting agitated and began to cry as soon as she was presented with the PIP. As she read the PIP, she became increasingly upset, threw the PIP across the desk, and with a flourish of obscenities and a threat, she stated that it was unfair and unwarranted, and stomped out slamming the door. That was followed by kicking and throwing things in her cubicle. Although DaVita provisionally approved a leave of absence under FMLA, it also began an investigation of her outburst. Employees expressed concerns about Gambini's behavior and requested that she not be allowed to return to the workplace. Approximately a week after the outburst, while

Gambini was still on FMLA leave, DaVita informed her that it was terminating her employment. Gambini asked for reconsideration because the behavior was due to her bipolar disorder. When DaVita refused, Gambini filed a lawsuit, alleging that her termination was based on her disability in violation of Washington law. DaVita prevailed at trial, and Gambini appealed.

On appeal, Gambini argued that the jury should have been instructed that "[c]onduct resulting from a disability is part of the disability and not a separate basis for termination." On review, the Ninth Circuit agreed based on a previous Washington Supreme Court opinion relying on a Ninth Circuit interpretation of a similar issue under the ADA. The Ninth Circuit held that Washington law was consistent with the ADA, and the trial court erred in not instructing the jury as Gambini proposed. The court concluded that if a jury can reasonably find that a mental disability was a substantial factor in the employer's termination decision, it is entitled to conclude that there was a violation of the WLAD. The failure to give the necessary instruction therefore entitled Gambini to a new trial. The defendant has requested reconsideration.

Going forward, employers will have to consider whether employee misconduct is part of or caused by the employee's disability. If so, disciplinary actions or dismissal for such misconduct could violate state or federal disability law.

2. "Regarded as" Disability Discrimination Claim Denied.

A disability is defined by the ADA as a physical or mental impairment that substantially limits one or more of the major life activities, a record of such an impairment, or being regarded as having such an impairment. In *Walton v. U.S. Marshals Service*, 476 F.3d 723 (9th Cir. 2007), Naomi Walton sued the U.S. Marshals Service ("USMS") under the Rehabilitation Act of 1973 for unlawful discharge because she was regarded as being disabled based on a hearing impairment. Walton was discharged by a company that contracts with the USMS to provide court security officers at federal courthouses because she did not meet the USMS's audiological standards and was medically disqualified. Applying U.S. Supreme Court precedent, the Ninth Circuit reasoned that to state a regarded as disabled claim, a plaintiff must establish that his or her employer believed that he or she had an impairment, and provide evidence that the employer subjectively believed that the plaintiff was substantially limited in a major life activity, not just unable to meet a particular requirement of the job. Walton asserted that she was regarded as substantially limited in the major life activities of hearing, working, and localizing sound. Despite recognizing that hearing and working are major life activities, the court held that Walton did not present sufficient evidence to raise an issue of fact that her employer subjectively believed that she was substantially limited in those activities. Just because an employer requires a certain physical standard for its employees does not mean that the employer regards those who fail to meet the standard as being substantially limited in the relevant major life activity. Failure to meet the employer's standard is not alone sufficient to raise an issue of fact that the employer regards an employee as disabled. Likewise, an allegation that an employer regards an impairment as precluding the employee from holding a specific position is insufficient to support a claim that the employer regards the employee as having a substantially limiting impairment. To be substantially limited in the major life activity of working, one must be significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes—not just a specific job. The court also rejected

Walton's claim that she was discharged due to her "record of impairment." A record of impairment may be protected if the individual has a past history of or is misclassified as having a condition that substantially limits a major life activity. The medical test records reflecting Walton's hearing limitation did not constitute such a record. Therefore, the Ninth Circuit held that Walton had failed to raise an issue of fact that the USMS regarded her as disabled and affirmed the lower court's summary dismissal of her claim.

Many jobs have physical requirements such as the ability to lift a certain amount of weight or a certain level of visual acuity, but the inability to meet the physical requirements of individual jobs does not mean that an applicant has a disability that is protected by the ADA. Employers should be cautious about making comments that might suggest that they regard such individuals as disabled.

3. Employer Cannot Bar Deaf Workers From Certain Jobs.

In *Bates v. UPS, Inc.*, 465 F.3d 1069 (9th Cir. 2006), employees and applicants for package-car driver positions who were unable to pass the Department of Transportation's ("DOT") hearing standard brought a class action against their employer for claims including discrimination based on disability under the ADA. The plaintiffs alleged that UPS unfairly applied DOT standards to all driving jobs. When jobs became available for package car drivers at UPS, employees working in qualifying positions could bid on them in the order of their seniority. The bidder had to submit an application, be at least 21 years old, possess a valid driver's license, have a clean driving record, pass the UPS road test, and pass a physical examination, which included the DOT hearing standards. The plaintiffs challenged the company's policy of categorically excluding individuals from employment as package car drivers because of their inability to pass the DOT physical examination. The DOT only requires drivers of vehicles weighing 10,001 pounds or more to pass its physical examination, but UPS required all package car drivers to pass the exam, regardless of the vehicle driven. Therefore, the class alleged that it was unlawful for UPS to exclude deaf individuals from consideration for positions driving vehicles that weigh less than 10,001 pounds.

The trial court certified a class of nearly 500 deaf and hearing-impaired current and former employees and additional potential applicants, and held that UPS violated the ADA. The Ninth Circuit affirmed, concluding that the plaintiffs did not need to show that they could perform the job safely, but only that they could meet all the requirements for the job other than the challenged criterion. The plaintiffs also had to show that the qualification screened out or tended to screen out disabled individuals. If plaintiffs could do so, UPS would then have to establish that the qualification was job-related and consistent with business necessity. To prove business necessity, UPS had to show that either substantially all deaf drivers present a higher risk of accidents than drivers who were not deaf or that there are no practical criteria for determining which deaf drivers present a heightened risk. The Ninth Circuit agreed with the trial court that UPS failed to satisfy the business necessity defense and therefore violated the ADA. UPS has sought review by the entire Ninth Circuit. We will have to stay tuned to see whether this ruling is altered.

In the Ninth Circuit, employers will have to show that any safety-related qualification standards that screen out or tend to screen out individuals with disabilities are based on business necessity. As shown here, that standard is not easy to satisfy.

4. State Employers and Individual Defendants Are Immune From Liability Under the ADA.

The Ninth Circuit recently reaffirmed the principle that public sector employees cannot sue their employers for damages under the ADA because of constitutional immunity, and also held that individual defendants, whether private or public sector, cannot be liable under the ADA. In *Walsh v. Nevada Department of Human Resources*, 471 F.3d 1033 (9th Cir. 2006), a Nevada Department of Human Resources employee who was denied requested accommodations to have a different supervisor and work in a quiet area to accommodate her obsessive compulsive disorder, and whose employment eventually ended while on medical leave, sued her former employer for violations of the ADA. When the Department moved to dismiss based on constitutional immunity, Walsh attempted to add two supervisors as individual defendants. The Department argued that individuals also were not subject to liability under the ADA. The trial court agreed and dismissed Walsh's case.

On appeal, the Ninth Circuit applied U.S. Supreme Court authority holding that state governments are immune from ADA suits for money damages based on the Eleventh Amendment's guarantee of sovereign immunity, which precludes the exercise of federal judicial power in actions against states. Although sovereign immunity does not bar suits for injunctive or declaratory relief, Walsh did not have standing to bring a claim for injunctive relief. Because Walsh was no longer an employee of the Department and did not request to return to work, the requested injunctive relief would not redress her alleged injury. Additionally, the Ninth Circuit considered the issue of individual liability under the ADA for the first time. It concluded that based on case law interpreting an analogous statute, Title VII of the Civil Rights Act of 1964, the statute limits liability to only *employers* of 15 or more workers and excludes individuals from personal liability.

Despite the protection this ruling affords individual defendants, employers should be aware that employees may bring claims against individuals under state law or tort theories.

B. CLASS ACTIONS

1. Certification of the Largest Discrimination Class Action.

The nation's largest employer is now facing the largest discrimination class action ever. In *Dukes v. Wal-Mart, Inc*., 474 F.3d 1214 (9th Cir. 2007), the Ninth Circuit gave a green light to a lawsuit that contends that Wal-Mart pays women less than men in comparable positions and promotes women less frequently and after longer waits than male employees. The claimant class is estimated to include 1.5 million present and past Wal-Mart employees.

Betty Dukes and six other women who worked at Wal-Mart filed their sex discrimination claims in federal court in California. They sought not only to bring claims on their own behalf but also for all women, hourly and salaried, who had been employed at any Wal-Mart store at any time since December 26, 1998, and who had been subject to Wal-Mart's challenged pay and promotional policies and procedures. Wal-Mart opposed the women's motion for class certification on various grounds. The trial court was not persuaded. Even though the proposed class was very large, the trial court nonetheless certified the case to go forward as a class action, and Wal-Mart appealed.

On review, the Ninth Circuit looked first at whether the proposed class met the requirements of the federal rule for class actions. Were class members so numerous that separate trials were impracticable? Were there common questions raised, and were the claims of Dukes and other named representatives typical of the claims of the class members? Would the named representatives be able to adequately represent the interests of the entire class? Finally, were there other circumstances that supported permitting the claims to proceed on a class basis? The Ninth Circuit answered all these questions affirmatively. It found that Dukes and the others had shown that Wal-Mart had companywide corporate practices and policies that included a strong corporate culture, excessive subjectivity in personnel decisions, and gender stereotyping. The plaintiffs had also presented both statistical evidence of gender disparities allegedly due to discrimination and anecdotal evidence of gender bias. Their expert testified that Wal-Mart's equal employment opportunity policies and practices were deficient, making women vulnerable to discrimination.

Wal-Mart challenged the plaintiffs on several additional points. It tried to persuade the court that the plaintiffs' expert should have been disregarded because he could not quantify with certainty the level of alleged discrimination. It also claimed that its own expert's store-by-store analyses were more accurate than the regional analyses presented by the plaintiffs. The Ninth Circuit rejected these arguments, finding that the plaintiffs' evidence was sufficient to show the common questions of fact for class certification, regardless of whether the evidence was ultimately found persuasive on the merits of the case. The court also concluded that, even though there was not a named representative for each management category, the representatives were nonetheless "typical" of the class because of their claim that all of the women faced the same discrimination. Wal-Mart also opposed certification of the class on the grounds that the plaintiffs' monetary claims predominated. In such instances, a class action may be denied because of the difficulties of sorting out monetary damages for each individual class member. Here, too, the court disregarded Wal-Mart's objections. What the plaintiffs were seeking was an end to Wal-Mart's allegedly discriminatory practices; the amount of any potential damages was simply a factor of Wal-Mart's size and did not make money the primary focus of the case.

The Ninth Circuit affirmed certification of a class of unprecedented size and scope against Wal-Mart because of its strong central control of employment policies across its stores and the statistics that allegedly resulted from those policies. This case is a reminder to all employers of the importance of fair practices applied without bias.

2. Court of Appeals Denied a Class Action Suit by Restaurant Chain Managers for Overtime.

Former manager for Emerald City Pizza, David Weston, sued his former employer on behalf of those similarly situated based on allegations that managers were improperly classified as exempt employees and denied overtime compensation. The trial court certified a class of plaintiffs upon concluding that there were common questions of law or fact between the class members that predominated over issues affecting individual members, and that a class action was superior to other available methods of relief for the fair and efficient adjudication. But, the Court of Appeals disagreed. *Weston v. Emerald City Pizza, LLC*, 151 P.3d 1090 (Wash. Ct. App. 2007). The Court of Appeals explained that courts must liberally interpret the class action rules to avoid multiple lawsuits and save the

plaintiffs' costs, but class certification is far from automatic. The plaintiffs must show that the class is so numerous that joinder of all the members is impracticable; there are common questions of law or fact; the claims of the representative parties are typical of the class; and the representative will fairly and adequately protect the interests of the class. In this case the plaintiff also had to show that common questions of law or fact predominated over questions affecting individual members and that class action was superior to other methods of adjudication. Common facts exist where a defendant has engaged in a common course of conduct in relation to all potential class members. A representative's claim is typical if the same legal theory applies to all class members' claims.

In Washington, an employee is exempt from overtime if he or she is an executive, which requires that the employee earn a salary of $250 or more per week, have the primary duty of management, and customarily and regularly direct the work of two or more other employees. Weston alleged that managers were improperly classified as exempt because managers mostly performed production work and had limited discretion. Emerald City asserted that the applicability of the executive exemption turned on the individual employee's allocation of time between management and production and the degree of discretion the employee actually exercised. Because of the individual assessment required and the difference between Weston and the potential class members, Emerald City argued that class certification was improper. The Court of Appeals agreed. It concluded that Weston failed to provide evidence that Emerald City required all managers to perform primarily production rather than management duties and, therefore, failed to establish that Emerald City engaged in a common course of conduct in relation to all potential class members.

C. EMPLOYEES' PRIVACY

1. Employer May Waive Employee's Right to Privacy in Workplace.

The Ninth Circuit recently held that despite having a legitimate expectation to privacy in one's unshared, locked office, where an employer maintains control over the workplace and any work computer, the employer maintains the right to consent to a police search of the office or computer. In *United States v. Ziegler*, 474 F.3d 1184 (9th Cir. 2007), the owner of Frontline Processing's Internet provider informed the FBI that one of Frontline's employees was accessing child pornography from his work computer. Frontline provided its employees computers at work with Internet access, and had a firewall in place to control and monitor employees' Internet activities. Although it is not clear whether the FBI agent directed Frontline to make copies of the employee's hard drive, Frontline employees obtained a key from the chief financial officer to the employee's office, entered his office late at night, opened his computer's outer casing, and made two copies of the drive. The FBI agent did not pursue a search warrant because everyone at Frontline was cooperating. Following a federal grand jury indictment, the employee filed pretrial motions to suppress evidence obtained from the search of his workplace computer—he alleged that the FBI agent had violated the Fourth Amendment by asking the Frontline employees to search his private office and computer without a search warrant. The trial court denied the motion to suppress the evidence. On appeal, the employee claimed that the entry into his private office to search his workplace computer violated the Fourth Amendment, and, as such, the evidence contained on the computer had to be suppressed.

The Fourth Amendment protects a criminal defendant when that person can show he or she had a legitimate expectation of privacy in the place searched or the item seized. The Ninth Circuit held that the employee had a reasonable expectation of privacy in his office, which was kept locked and was not shared. The court then evaluated whether the search of his office and computer was *reasonable*. Generally, searches are unreasonable where there is no search warrant; however, there are certain limited exceptions to that rule. Among them is the exception for valid consent to the search, including consent obtained from a third party with common authority over the premises. The Ninth Circuit applied a U.S. Supreme Court opinion to hold that where a private employee retains an expectation that his private office will not be the subject of an unreasonable government search, such interest may be subject to the possibility of an employer's consent to a search of the premises it owns. The court reasoned that an employer can give consent to search a hard drive because the computer is the type of employer property that remains within the control of the employer even if the employee has placed personal items on it. The court held that the employee could not reasonably have expected that the computer was his personal property free from control by his employer. The employee's download of items to his work computer did not destroy the employer's common authority over it. Frontline could have consented to a search and, the court held, *had* consented to a search of the office and computer. Therefore, the search was reasonable and the Ninth Circuit affirmed.

2. NLRB Has Not Yet Ruled on Employees' Rights to Use Their Employers' E-mail Systems.

As you might remember from the February/March Breakfast Briefing on Privacy in the Electronic Workplace, on March 27, 2007, the National Labor Relations Board ("NLRB") heard oral argument regarding whether employees have the right to use their employers' e-mail systems to communicate with other employees about union or other protected matters. *The Guard Publ'g Co., d/b/a The Register-Guard*, Cases 36-CA-8743-1. In a rare case, the NLRB set forth specific questions to be addressed in the oral argument and invited interested persons to file briefs addressing those points or other matters. The NLRB asked the following questions:

1. Do employees have a right to use their employer's e-mail system (or other computer-based communication systems) to communicate with other employees about union or other concerted, protected matters? If so, what restrictions, if any, may an employer place on those communications? If not, does an employer nevertheless violate the Act if it permits non job-related e-mails but not those related to union or other concerted, protected matters?

2. Should the Board apply traditional rules regarding solicitation and/or distribution to employees' use of their employer's e-mail system? If so, how should those rules be applied? If not, what standard should be applied?

3. If employees have a right to use their employer's e-mail system, may an employer nevertheless prohibit e-mail access to its employees by nonemployees? If employees have a right to use their employer's e-mail system, to what extent may an employer monitor that use to prevent unauthorized use?

4. In answering the foregoing questions, of what relevance is the location of the employee's workplace? For example, should the Board take account of whether the

employee works at home or at some location other than a facility maintained by the employer?

5. Is employees' use of their employer's e-mail system a mandatory subject of bargaining? Assuming that employees have a Section 7 right to use their employer's e-mail system, to what extent is that right waivable by their bargaining representative?

6. How common are employer policies regulating the use of employer e-mail systems? What are the most common provisions of such policies? Have any such policies been agreed to in collective bargaining? If so, what are their most significant provisions and what, if any, problems have arisen under them?

7. Are there any technological issues concerning e-mail or other computer-based communication systems that the Board should consider in answering the foregoing questions?

The NLRB's rulings on these issues have the potential for a huge impact on technology issues. Stay tuned to see what the NLRB concludes.

D. FIRST AMENDMENT

1. Internal Comments in One's Professional Capacity Do Not Trigger First Amendment Protection.

A Department of Social and Health Services ("DSHS") employee who was discharged in a reduction in force and then reassigned to a different position sued DSHS alleging retaliation and violation of her First Amendment right to free speech in *Tyner v. State*, 154 P.3d 920 (Wash. Ct. App. 2007). Paula Tyner was a supervisor at a state residential habilitation facility for adults with developmental disabilities. In the course of addressing complaints made by subordinates in her group, Tyner told a human resources representative that her supervisor should not be chosen to conduct the investigation because she would not do a thorough job. The head of human resources disagreed and assigned the supervisor to conduct the investigation. In the course of the investigation, one of the subordinates alleged that Tyner had created a hostile work environment. Based on those allegations, Tyner was placed on an alternative assignment with no loss in pay or benefits, and was allowed shorter working hours and mileage reimbursement to account for working farther away. During the investigation into Tyner, the Legislature implemented a budget cut that resulted in several positions being cut, including Tyner's. DSHS offered Tyner an "option for continued employment" in a different position, which she accepted. But Tyner sued DSHS and several named parties alleging retaliation for her comment that her supervisor should not conduct the investigation by being investigated and reassigned. She therefore also asserted a violation of her First Amendment right to free speech. The trial court granted summary judgment in favor of DSHS and Tyner appealed.

Unlike a private employer, a public employer may be liable if it violates an employee's right to free speech. There is a specific four-step test that must be satisfied to find such a violation. The threshold requirement is that the speech relates to "a matter of public concern." Even if the speech deals with public concern, the public employee must prove that his or her interest in commenting on that issue outweighs the employer's interests in "promoting the efficiency of the public services it performs." The Court of Appeals

concluded that the statement Tyner made was not about a matter of public concern—it was an internal communication in the workplace while Tyner was performing her official duties. The court also held that even if it assumed the speech related to a matter of public concern, DSHS's decision to allow the supervisor to conduct the investigation as part of its interests in efficiently and effectively managing personnel issues outweighed any marginal First Amendment interest Tyner had. Further, DSHS had to remove Tyner during the investigation into her conduct so as not to disrupt its procedures or erode faith in the investigation. The court held that the First Amendment claim was properly dismissed.

The court also affirmed dismissal of Tyner's retaliation claim because her relocation without loss of pay or benefits did not constitute an adverse employment action as required to find retaliation. The court reasoned that an adverse employment action requires a change in employment conditions that is *more than just an inconvenience or alteration of responsibilities*. Her relocation, including the efforts to shorten her day and give her mileage reimbursement to account for the longer commute, did not suffice.

E. IMMIGRATION

1. Federal Immigration Law Did Not Bar an Employee's Wrongful Discharge Claim.

Employers are prohibited by the Immigration Reform and Control Act of 1986 (the "IRCA") from knowingly employing unauthorized aliens. But, in *Incalza v. Fendi North America, Inc.*, 479 F.3d 1005 (9th Cir. 2007), the Ninth Circuit recently held that the IRCA is not a complete defense to claims for wrongful discharge anytime an employer discharges a foreign worker with visa issues. Incalza, an Italian citizen, worked as a sales associate for Fendi in Rome. Incalza then transferred to its New York store, and Fendi helped him obtain the appropriate visa to work in the United States. Meanwhile, the head of the company assured Incalza that his job would be secure so long as he continued to perform well. After more than 10 years at the New York store, Incalza was promoted to store manager of the Beverly Hills store, but after French investors acquired a majority interest in Fendi, Incalza's Italian-based visa was no longer valid. The company was informed by counsel that it could most likely obtain other visas for Italian employees, which could be determined in 15 days. Fendi did seek such a visa for a U.S.-based Italian manager, but not for Incalza. Instead, Incalza's supervisor informed him that his employment with Fendi was ending because nothing could be done to correct the visa situation. Incalza asked to be placed on unpaid leave pending his upcoming marriage to a U.S. citizen, which would again make him legally employable in the United States, but his supervisor refused. Fendi had not filled his position by the time Incalza was married, but the company still refused his rehire request, instead hiring a non-Italian. Incalza therefore filed suit alleging wrongful discharge without cause based on an implied contract and discrimination based on his Italian national origin. A jury found in favor of Incalza on his wrongful discharge claim, but against him on his discrimination claim. Fendi appealed, alleging that the IRCA required the company to discharge Incalza and barred recovery for wrongful discharge under California law.

California law protects one's employment rights regardless of immigration status. But the IRCA forbids employers from knowingly employing illegal aliens. Fendi argued that the IRCA therefore required it to fire Incalza when his visa was no longer valid. But the Ninth Circuit found that there was no actual violation of the IRCA because Fendi could have

taken other action besides discharging him and still complied with the IRCA. The Ninth Circuit rejected Fendi's argument that it had no choice but to discharge Incalza. Putting an employee on unpaid leave for a reasonable period of time to correct immigration issues is consistent with the text and purpose of the IRCA because the person would not be "employed" during the period of unpaid leave. The court also rejected Fendi's argument that Incalza's jury award was improper because the IRCA does not permit the payment of wages to illegal aliens. The Ninth Circuit reasoned that Incalza's temporary unauthorized status was primarily the result of Fendi's inaction and that he suffered wage loss even after he was again lawfully employed elsewhere.

This case is a good example of the competing issues employers must consider. Employers must comply with immigration laws, but cannot ignore the rights of employees.

F. WRONGFUL DISCHARGE

1. Indian Tribe and Tribe Employee Are Immune From Liability for Race Discrimination and Harassment.

Christopher Wright was employed by a tribal government corporation of the Confederated Tribes of the Colville Reservation ("CTCR") as a pipe-layer and equipment operator. Wright sued the tribal government corporation and his former supervisor alleging race discrimination, racial harassment, hostile work environment, negligent supervision, and negligent infliction of emotional distress. The trial court dismissed the lawsuit. The Court of Appeals reversed, holding that the doctrine of tribal sovereign immunity did not protect the tribe's corporations. But on review, the Washington Supreme Court reversed, applying federal law to hold that Indian tribes *and* their tribal government corporations are entitled to sovereign immunity absent express waiver of immunity by the tribe or congressional abrogation of the immunity. The court reasoned that CTCR had not waived its immunity, nor had Congress abrogated tribal sovereign immunity to suit for employment discrimination. Further, the court held that the sovereign immunity extended to individuals named solely in their official capacity as tribal officials acting in their representative capacity and within the scope of their authority. *Wright v. Colville Tribal Enter. Corp.*, 159 Wn.2d 108, 147 P.3d 1275 (2006).

2. Firing of School District Employee Improper if Conduct Remediable.

The Freeman School District in Eastern Washington fired a school bus driver after she dropped off a 10-year-old student in an unfamiliar area two miles from his home after he gave her conflicting explanations as to where he usually got off the bus. The district found that the driver had failed to ensure student safety or to follow the district's policy by taking the student back to the transportation facility. The bus driver challenged the decision, and the trial court granted summary judgment for the school district, preventing a trial. In *Woodall v. Freeman School District*, 146 P.3d 1242 (Wash. Ct. App. 2006), the Court of Appeals reversed, holding that the termination of school district employees for performance deficiencies is not proper where the deficiency can be remedied. The court reasoned that there was evidence that the school district's written policies actually supported the driver's actions. Therefore, the Court of Appeals sent the case back to the trial court to determine

whether the driver's conduct was deficient and, even if it was, whether it was reasonably correctable through training, instruction, or more experience.

3. HR Manager's Termination From the Criminal Justice Training Commission Supported by Cause.

Kevin Skelly worked as a Human Resources manager for the Criminal Justice Training Commission ("the Commission"). Following a satisfactory evaluation, Skelly was issued a letter of reprimand for making inappropriate comments regarding an employee's L&I claim and was cautioned that similar behavior could result in disciplinary action. Skelly's supervisor received additional complaints about him and conducted an investigation. The investigation convinced the supervisor that Skelly had neglected his duty and abused his authority, creating a negative, hostile, and adversarial work environment for his co-workers and subordinates, and also willfully violated agency rules and regulations, among other issues. Based on Skelly's performance and the investigation results, he was discharged. The agency found the termination justified. Skelly appealed to the agency board, which affirmed. The superior court disagreed, concluding that there were no extreme circumstances to require termination and the Commission should have given Skelly another opportunity to correct his problems. On appeal to the Court of Appeals, Skelly argued that the agency improperly ignored a statute on performance evaluations requiring that employees whose work is unsatisfactory be notified in writing of the deficiencies and, unless extreme, given an opportunity to demonstrate improvement. The Court of Appeals held that the statute requiring the agency to notify employees of deficient performance and allow an opportunity for improvement did *not apply to managers* like Skelly, only to nonmanagement employees. A regulation in effect during Skelly's termination and appeal allowed appointing authorities to demote, suspend, reduce in salary, or dismiss permanent management service employees (as Skelly was) for cause. Based on that regulation, the court held that the Commission had sufficient cause to dismiss Skelly.

4. No Protection for Employees Who Criticized Their Manager.

Generally an at-will employee may be terminated at any time without cause. Washington law recognizes an exception where the termination would contravene public policy, such as where an employee is terminated based on the exercise of a legal right to engage in "concerted activity" without retaliation by his or her employer. Concerted activities are actions taken by employees together to improve their working conditions. But in *Briggs v. Nova Services*, 135 Wn. App. 955, 147 P.3d 616 (2006), the court held that complaining about a manager's style, leadership skills, administration, etc., did not qualify as concerted activity. In *Briggs*, a group of employees complained about their manager to the nonprofit company's board. Following the board's investigation into their complaints, their manager fired two of the employees for insubordination. The other employees then wrote to the board threatening to leave if the manager was not fired and the employees reinstated. The board took no action, and when the employees failed to appear for work, they were deemed to have resigned. The employees sued, alleging claims including wrongful termination and retaliation. The trial court dismissed their claims before trial. On appeal, the employees alleged that they were fired for banding together to engage in concerted activities and that their termination therefore violated public policy. The Court of Appeals disagreed, reasoning that concerted activities are those undertaken to improve working conditions that could be addressed through collective bargaining—e.g., wages, hours, and

safety issues. Personal preferences or differences such as management style and communication concerns were not entitled to protection. Further, the court noted that the managers among the plaintiffs were exempt from the public policy protection for concerted activity.

Employers should keep in mind that employees may bring public policy claims based on concerted activities even in nonunion workplaces. Even if your workplace is nonunion, you cannot retaliate against employees for their joint activity to address working conditions.

G. WAGE AND HOUR

1. Insurance Adjustors Held to Be Exempt Employees Under FLSA.

In *In re Farmers Insurance Exchange*, 466 F.3d 853 (9th Cir. 2006), the Ninth Circuit reversed a trial court's award of nearly $52.5 million in a class action alleging that Farmers Insurance Exchange had incorrectly treated all of its insurance adjustors as exempt employees not entitled to overtime compensation. The Ninth Circuit rejected the trial court's case-by-case approach to determining whether adjustors were exempt in favor of application of the U.S. Department of Labor's ("DOL") applicable regulation. The DOL regulations delineate exemptions for professional, executive, and administrative jobs for employees paid on a salary basis who have responsibilities requiring the exercise of discretion and independent judgment. One regulation issued in 2004 specifically provided: "Insurance claims adjustors generally meet the duties requirements for the administrative exemption, whether they work for an insurance company or other type of company, if their duties include activities such as interviewing insureds, witnesses and physicians; inspecting property damage; reviewing factual information to prepare damage estimates; evaluating and making recommendations regarding coverage of claims; determining liability and total value of a claim; negotiating settlements; and making recommendations regarding litigation." *Id.* at 859. The Ninth Circuit held that the regulation was directly applicable and the court was bound by it. Unlike the trial court's approach, the regulation contained no threshold dollar amount for claims in order to have adjustors qualify as exempt. Regardless of the amount of claim, the adjustor has to go through the same steps, and must implement discretion and independent judgment. Because the trial court's findings essentially tracked the regulation, the Ninth Circuit held that the findings required the conclusion that the Farmers adjustors were exempt under the FLSA and reversed the trial court's judgment and damages award.

This opinion highlights the importance of getting proper guidance in analyzing whether a particular job is exempt or nonexempt under the FLSA. Employers often mistakenly assume that any employee paid by salary is exempt from the FLSA. But such a determination also requires analysis of the specific duties of the job.

2. New Interpretation of Prevailing Wage.

The Washington Prevailing Wage Act ("WPWA") provides that hourly wages paid to workers on public works projects must be at least the prevailing rate paid for an hour's work in the same trade or occupation in the largest city within the county where the work is performed. The prevailing wage is often higher than the market wage where the work is performed because many projects are constructed outside the largest city in a county. L&I

adopted regulations to define the applicability of the WPWA to delivery of materials to public projects. In pertinent part, the regulations state that workers are not subject to the provisions of the WPWA when "the employees' duties do not include spreading, leveling, rolling, or otherwise participating in the incorporation of the delivered materials into a public works project." WAC 296-127-018(3)(a).

In *Silverstreak, Inc. v. State Department of Labor & Industries*, 154 P.3d 891 (Wash. 2007), a company supplying the fill materials for construction of a runway at Sea-Tac Airport challenged L&I's notice that it was violating the WPWA by not paying end-dump truck drivers the prevailing wage. In preparing its bid for the project, the supply company relied on a 1992 policy memorandum issued by L&I on the delivery of materials under WAC 296-127-018, which stated that delivery of materials where the truck does not roll while the material is placed or rolls only enough to allow the materials to exit the truck does not include incorporation of the materials into the job site under the regulation and therefore does not require the prevailing wage. Then, one year after completion of the project L&I issued a notice of violation of the statute, which would require the supply company to pay approximately $500,000 in additional wages based on the prevailing wage. The supply company challenged the citation at the administrative level with mixed results, and the case was appealed all the way up to the Washington Supreme Court. The Washington Supreme Court deferred to L&I's interpretation of its regulation, reasoning in part that the WPWA is remedial legislation that should be construed liberally in favor of the worker. The court held that L&I's expansive reading of the regulation's phrase "otherwise participate in any incorporation of the materials into the project" controlled and required the conclusion that the end-dump truck drivers at issue participated in the incorporation of the fill materials into the project. The court held that L&I was equitably estopped from imposing its interpretation on the supply company because the interpretation was inconsistent with its previous position, which the company relied on in good faith. Indeed, L&I had sent its 1992 policy memorandum to bidders on the runway project, a group that included the supply company, which expressly held out its position on whether the method of delivery would entitle end-dump truck drivers to prevailing wages. L&I never repudiated the policy set forth in the memorandum until the claims at issue arose. Therefore, the court held that it was reasonable for the supply company to rely on L&I's policy statement, which caused them to bid hundreds of thousands of dollars less than they would have if they believed they had to pay prevailing wages, and they accepted payment in the amount for their bid before L&I issued its notice of violation. But employers should note that the more expansive interpretation will apply going forward.

3. Employers of Interstate Truckers Liable Under the Minimum Wage Act for All Hours Worked in or Outside Washington.

In *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 153 P.3d 846 (2007), plaintiff sought overtime for all of his hours worked as an interstate truck driver, whether worked within Washington or outside the state, under Washington's Minimum Wage Act ("WMWA"). Bostain's employer, Food Express, asserted that he was only entitled to overtime for hours worked in excess of 40 hours per week *in the state of Washington*. The trial court sided with Bostain, but the Court of Appeals agreed with Food Express. The Washington Supreme Court held that under the WMWA, Washington employees are entitled to overtime wages based on their *total hours worked anywhere*, not just their total hours worked in Washington as L&I has directed through its regulations. L&I's regulations stated that overtime meant

"the amount of compensation paid for hours worked *within the state of Washington* in excess of 40 hours per week." WAC 296-128-011(1) (emphasis added). The Washington Supreme Court reasoned that the plain language of the WMWA required overtime compensation to be calculated based on the total hours worked rather than the total number of hours worked by those employees in the state of Washington. Therefore, the court held that to the extent L&I's regulations directed otherwise, they are invalid because an administrative agency cannot promulgate regulations that conflict with a statutory mandate.

This opinion has the potential to dramatically impact employers who have been relying on L&I's interpretation of the WMWA in paying their interstate drivers. Food Express has sought reconsideration, which has been joined by other interested entities. Issues raised in reconsideration include asking the court to apply its ruling prospectively only. Stay tuned to see what happens.

4. Route Drivers Are Not Exempt Outside Salesmen.

Both Washington and federal law provide an exemption to the requirement to pay overtime for "outside salesmen." A group of former route drivers for Farmer Brothers Company convinced the Washington Court of Appeals to affirm the trial court's ruling in their class action lawsuit that they were not exempt and therefore were entitled to overtime pay, in *Miller v. Farmer Bros. Co.*, 136 Wn. App. 650, 150 P.3d 598 (2007). An employer bears the burden to prove exemption from overtime. Regulations under the WMWA define outside salesman as an employee "[w]ho is employed for the purpose of . . . and regularly engaged away from his employer's place . . . of business" in "making sales." According to the regulations, the employee must also regulate his or her own work hours and the employer must not have control over the total hours worked. The time spent on nonexempt work must not exceed 20% of the employee's hours in the workweek. Farmer Brothers argued that because their customers have no contractual obligation to buy their coffee, the drivers must sell the coffee as they deliver. But the court found that the drivers fell into a category described under federal law as "driver salesmen" who deliver products and do some selling, but the sales aspect is a secondary, not primary, aspect of the job. Therefore, the court held that the route drivers were not exempt from overtime requirements whether the deliveries were in Washington or other states.

5. Washington Court of Appeals Upholds City's Payment Practice.

Employees sued the City of Kent claiming that the City's bi-monthly payment procedures violated an L&I regulation The City paid employees on the 5th and 20th of each month. Wages earned from the 1st through 15th were paid on the 20th, and wages earned from the 16th through the end of the month were paid on the 5th of the following month. The City also sometimes required additional processing time for overtime and other irregular pay, such that overtime and irregular pay sometimes was not paid on the upcoming payday but on the following regular payday. The relevant regulation requires employers to pay at regular intervals and to facilitate bookkeeping, allows an employer to "implement a regular payroll system in which wages from up to seven days before pay day may be withheld from the pay period covered and included in the next pay period." WAC 296-128-035. The employees claimed that any withholding greater than seven days violated the regulation, and the trial court agreed and entered summary judgment in their favor. But on appeal, the Court of Appeals found the regulation ambiguous and therefore relied on the associated

agency guidance and the regulation's history. The guidance and history indicated that the seven-day withholding limitation was limited to employers that paid on a monthly basis, the maximum interval allowed between pay periods; there is no limit on the processing period for employers who pay more frequently than once per month. The court found that those interpretations were consistent with the conclusion offered by an L&I representative asked to examine the City's specific payment practices at issue in 2005. Therefore, the court concluded that the regulation did not apply to the City's practices at all because the City paid its employees twice per month. *Clark v. City of Kent*, 136 Wn. App. 668, 150 P.3d 161 (2007).

6. Other Wage Issues.

In *City of Tacoma v. Price*, 152 P.3d 357 (Wash. Ct. App. 2007), a city employee sued the city asserting that he had not been paid the correct amount of longevity pay or credited the correct amount of accrued vacation time. The city sought a declaration that its interpretation of the relevant ordinances was correct, and the trial court agreed. The employee appealed, and the Court of Appeals affirmed. After concluding that the applicable ordinance was ambiguous, the court applied several rules of statutory construction to conclude that the city's interpretation of the ordinances was the reasonable one—longevity pay and vacation accrual should be credited on the first day of the calendar year when the employee would complete the applicable required years of service.

In *Harden v. City of Spokane*, 135 Wn. App. 742, 145 P.3d 1244 (2006), a retired City Civil Service Commission employee sued the city over a salary and job classification dispute from while he was still employed. The former employee alleged that he was entitled to a salary increase and that the City Manager erred in reclassifying him without permission from the Commission. The trial court dismissed because the employee failed to address his claims under his collective bargaining agreement and could the City Manager had no duty to address his reclassification with the Commission. The Court of Appeals affirmed.

H. PROFESSIONAL LICENSURE

1. Suspension of Professional License Requires High Showing.

Based on events leading to Alice Ongom's discharge from a retirement home, the Washington Department of Health issued a statement of charges to be determined by an administrative hearing officer. Ongom, for whom English is a second language, represented herself at the hearing. After hearing conflicting evidence as to whether Ongom took violent actions against an Alzheimer's patient, the hearing officer held that the state had proven misconduct by a preponderance of the evidence—which required merely that the scales tipped in its favor ever so slightly. Based on a state regulation, the hearing officer held that was sufficient to suspend Ongom's license for 24 months. Ongom appealed. The Washington Supreme Court reasoned that the key issue was the appropriate burden of proof required to suspend or revoke a professional license, and whether the low threshold of a preponderance of the evidence satisfied Ongom's due process rights. The court had previously recognized a "lawful entitlement to practice one's chosen profession" and required a higher evidentiary standard in a case where a doctor's license was at issue. The court found the same reasoning applicable to Ongom's case despite the fact that Ongom only had a nursing assistant's license to lose. The court held that the appropriate standard

of proof in profession disciplinary hearings is "clear and convincing" evidence, vacating the relevant regulation that permitted the lower standard. *Ongom v. Dep't of Health*, 159 Wn.2d 132, 148 P.3d 1029 (2006).

I. UNION ACTIVITY

1. Bargaining Order Denied Over Union Objection.

Federal law provides rules for a level playing field during the period before workers vote on whether to be represented by a union, and there are penalties for breaking the rules. One of the most severe penalties, known as a *Gissel* order, requires an employer that has engaged in serious antiunion conduct to bargain with a union even though the union lost the representation election. The order is named after the 1969 U.S. Supreme Court case of *NLRB v. Gissel Packing Co.*, which recognized for the first time such a remedy based on an employer's extreme antiunion activity. In the recent case of *United Steel Workers of America v. National Labor Relations Board*, --- F.3d ----, 2007 WL 959897 (9th Cir. Apr. 2, 2007), the Ninth Circuit deferred to a ruling of the NLRB denying a *Gissel* order.

The employer at issue was Tower Industries, Inc., a manufacturer of custom machine parts. It had 91 employees who were eligible for union representation, and the United Steelworkers persuaded 57 of them to sign cards authorizing the union to represent them. But before the date set for the representation election and the same day as the union organizing meeting, the employer disciplined and fired two employees for their union support. Tower later disciplined a third employee and threatened a fourth for union support, as well as removed union literature from company posting areas while leaving other postings. When the election was held, only 37 of 79 votes cast were in favor of union representation. The union filed a complaint with the NLRB that Tower had violated the rules for conduct before a union representation election. The administrative law judge agreed, and recommended an order that the employer cease and desist from its antiunion activity, reinstate and give back pay to the two employees it had discharged, expunge disciplinary records motivated by union activity, and post a notice about employees' union rights. The ALJ also recommended a *Gissel* order to require Tower to bargain with the union. On review, the NLRB adopted the ALJ's recommendations except the *Gissel* order, instead requiring a new election. The union appealed to the Ninth Circuit. The Ninth Circuit limited its review to the narrow question of whether the NLRB abused its discretion, and would overturn the NLRB only if its ruling was "a patent attempt to achieve ends other than those that can be fairly said to effectuate the policies" of federal labor law. The court noted that its review was so narrow because Congress committed the interpretation of national labor laws and policy primarily to the NLRB. The narrow standard of review is contrasted with the lack of deference given when the NLRB issues a *Gissel* order because of the extreme nature of the order; elections are the preferred method for ascertaining employee sentiment. The court concluded that the NLRB had not abused its discretion.

This case is a good reminder to employers to be cautious if unions are attempting to organize their employees. Federal law sets ground rules for what an employer can do or say before a representation election. The time leading to the election is a good time to get legal advice to ensure that you comply with the applicable laws.

2. Unions Have Specific Obligations to Their Members.

The International Longshore and Warehouse Union Local 13 in Los Angeles has an Allied Division and a Longshoremen's Division. Plaintiff Richard Diaz was among nine workers laid off from jobs with the Allied Division of the union. After the layoff, the employees asked the union to transfer them to the Longshoremen's Division and allow them to seek jobs through that division. The union refused. Diaz and the other workers sued the union alleging that it violated its duty of fair representation by failing to transfer them, failing to inquire about available positions in the Longshoremen's Division, excluding them from its hiring hall list, and failing to investigate grievances regarding its operation of the hiring hall. After the trial court dismissed plaintiffs' case, the workers appealed. A union is legally required to serve the interests of its members in a particular bargaining unit in good faith without discrimination, but owes no duty to persons who are not members of the bargaining unit at issue. Additionally, courts generally will not scrutinize a union's internal affairs. Based on those principles, the Ninth Circuit concluded that the union had no duty to transfer the workers to the Longshoremen's Division—the requested transfer was an internal issue. The court held that the union also had no duty to inquire about work-affiliated employers. However, the Ninth Circuit did reverse the lower court's dismissal of the hiring hall and failure to investigate grievance claims—the court reasoned that when a union operates a hiring hall, it owes a duty of fair representation to all applicants using it. To comply with its duty of fair representation, a union must also conduct at least some minimal investigation of grievances brought to its attention. The hiring hall and failure to investigate claims were allowed to proceed to trial *Diaz v. Int'l Longshore & Warehouse Union, Local 13*, 474 F.3d 1202 (9th Cir. 2007).

3. Union Members Allowed to Pursue Their Tort Claims in Court.

A group of Circus Circus Casino employees sued their employer for tort claims arising from an incident where Circus Circus security guards interrupted a meeting where employees were distributing leaflets regarding the progress of contract negotiations through their union. One individual got on a chair and spoke about union members defending their employment rights, and others began chanting "union, yes" and "we want a contract." When security guards interrupted the meeting and asked participants to leave, the workers locked arms in a circle around the employee on the chair. The guards pushed through, pulled him off the chair, and handcuffed him. The employees sued for tort claims including assault and battery, false imprisonment, intentional infliction of emotional distress, and negligent hiring, training, and supervision. Circus Circus transferred the case to federal court, where it argued that the employees' sole remedy was through the grievance and arbitration procedural prescribed by their collective bargaining agreement ("CBA"). The trial court agreed and dismissed the suit. The employees appealed. On review, the Ninth Circuit reasoned that the federal Labor-Management Relations Act preempts claims by union workers against their employer and requires arbitration rather than court action where the claims presented would require the court to interpret the terms of the parties' CBA. Circus Circus argued that the court had to interpret the CBA to determine whether the workers' activity at the meeting interfered with the Casino's business in violation of the agreement. But the Ninth Circuit disagreed, concluding that there was no need to interpret the CBA to determine whether the guards used undue restraint, physical force, and threats to stop the meeting. Even if the workers violated the agreement, the casino's right to control its workforce did not include the right to use threats or force. Defenses based on the CBA were

not enough to preempt the workers' tort claims. The Ninth Circuit sent the case back to state court. *Ward v. Circus Circus Casinos, Inc.*, 473 F.3d 994 (9th Cir. 2007).

4. An Expired CBA May Sometimes Be Enforceable.

In *Operating Engineers Local Union No. 3 v. Newmont Mining Corp.*, 476 F.3d 690 (9th Cir. 2007), the Ninth Circuit required an employer to arbitrate a dispute arising from its discharge of a union employee for allegedly falsifying a tool request form. The employer had refused to arbitrate, asserting that it was not required to arbitrate because the CBA mandating arbitration had expired. The trial court sided with the union, finding that the key facts and occurrences took place before the agreement expired. The employer appealed. But the Ninth Circuit affirmed the lower court's decision, concluding that the dispute over the employee's discharge *arose under* the CBA before it expired. The central issue was whether the dispute involved facts and occurrences that arose before the contract's expiration. The court reasoned that unlike the lower court's focus, the determinative issue is not the importance of the facts that took place before the agreement's expiration, but whether the parties agreed to arbitrate the facts in dispute. The court held that because the issue was whether the employee falsified the tool request, and the bargaining agreement was still in effect when the alleged offense took place, the dispute arose under the agreement and the union was entitled to arbitrate the dispute.

In *Maple Valley Professional Fire Fighters Local 3062 v. King County Fire Protection District No. 43*, 135 Wn. App. 749, 145 P.3d 1247 (2006), the Washington Court of Appeals held that the King County Fire Protection District was not required to arbitrate a union grievance because despite the fact that they were currently in labor negotiations over new terms for the CBA, the most recent agreement had already expired. The union asserted that it had a right to arbitrate its grievance of the district's discontinuance of one of its health plans under the expired CBA because the agreement to arbitrate was a condition of employment that could not be changed during pendency of interest arbitration proceedings. The union asserted that federal authority against the enforcement of arbitration provisions following the expiration of agreements was inapplicable because of the Public Employees' Collective Bargaining Act's overriding policy against strikes by uniformed personnel and in favor of arbitration of disputes. But the court relied on decisions by the Public Employment Relations Commission and decisions under the National Labor Relations Act to conclude that agreements to arbitrate disputes cannot be enforced after expiration of the underlying agreement even though such arrangements are a mandatory subject of bargaining. The court noted that had the Legislature wanted to extend grievance arbitration beyond expiration of a CBA, it could have done so and had done so in provisions applicable to nonuniformed personnel. One exception to the expiration rule, however, which is depicted in the previous case, is that a party might have a right to a grievance arbitration after the expiration of the CBA where the grievance involves facts and occurrences that arose before the expiration.

J. UNEMPLOYMENT COMPENSATION

1. Legislation Changing the Criteria for Unemployment Compensation Was Unconstitutional.

According to the Washington Constitution, portions of a bill not fairly expressed by its title should be stricken as unconstitutional. In *Batey v. State Employment Security Department*, 154 P.3d 266 (Wash. Ct. App. 2007), the Court of Appeals addressed a constitutional challenge to a bill changing the criteria for determining when an employee has good cause to voluntarily quit under the unemployment compensation laws. If a worker quits without good cause, he or she is disqualified from receiving unemployment benefits. The governing statute previously set forth four specific situations that constituted good cause to quit, and the Employment Security Department ("ESD") had discretion to find good cause for other reasons. In 2003, the Legislature decided to tighten the voluntary quit criteria. The bill removed the ESD's discretion, but added six more specific situations that would constitute good cause. The claimant was found not to satisfy one of the 10 situations for good cause set forth in the amended statute and was denied benefits. She petitioned the Superior Court alleging that the bill was unconstitutional because it did not comport with the constitutional requirement to lay out the subject of the bill in the title—the bill referred to creating 40 rate classes for determining employer contribution rates, not voluntary quit criteria. The trial court certified the case for direct review by the Court of Appeals. On review, ESD did not defend the bill against the title challenge; rather, ESD claimed that it had already remedied the problem by reenacting the bill's provisions retroactively in 2006 in a subsequent bill. Even though the Legislature could have cured the defect in the bill title in that manner, the claimant asserted and the court found that the Legislature's second try was also defective in its title. The court reasoned that the title of the bill must be sufficient to give notice to parties whose rights will be affected. The mere reference to a statute or section in the title is insufficient. Therefore, the Court of Appeals struck down the original bill and the attempted curative bill and remanded for a determination of whether the employee had good cause to quit based on the statute as it existed in 2002—the version currently still in effect.

2. No Unemployment Benefits for an Employee Discharged for Complaining About Co-Workers in a Harassing Manner.

In *Pappas v. Employment Security Department*, 135 Wn. App. 852, 146 P.3d 1208 (2006), an employee appealed an ESD decision denying her unemployment benefits because she was discharged for cause—misconduct. The employer's personnel manual defined unacceptable harassment to include various conduct that had the "purpose or effect of creating an intimidating, hostile or offensive working environment." Pappas violated the policy on several occasions, most recently by publicly disparaging a co-worker for giving her a bad check to pay for Avon products and repeatedly publicly accusing another co-worker of stealing $200 from her coat. Pappas's employer had previously told her to bring issues to management to avoid altercations. She was warned that her accusatory comments violated the company's harassment policy with her accusatory comments to others in the office about her co-worker giving her a bad check and by repeatedly accusing her co-workers in front of others in the workplace. The court therefore affirmed the denial of benefits based on misconduct.

3. An Employee Must Comply With the Statutory Requirements to Be Entitled to Unemployment Compensation.

In *Nordlund v. Employment Security Department*, 135 Wn. App. 515, 144 P.3d 1208 (2006), the Court of Appeals affirmed the ESD's denial of unemployment benefits because the employee failed to comply with the illness safe-harbor provision of the Employment Security Act. The employee argued that she was entitled to benefits despite abandoning her job because the illness and death of her mother created an exception to the disqualification of unemployment benefits under the statute. Where an employee leaves work voluntarily without good cause, he or she is not entitled to unemployment benefits. But there is an exception where an employee quits due to illness or disability or the death, illness, or disability of the employee's immediate family member so long as the employee "took all reasonable precautions . . . to protect his or her employment status by having promptly notified the employer of the reason for the absence and by having promptly requested reemployment when again able to assume employment." RCW 50.20.050(1)(b)(ii). Because there was evidence that the employee failed to comply with her employer Expedia's requests for information, failed to make reasonable efforts to keep Expedia informed of her mother's death and the need to take time off, failed to get Expedia's permission for an extended absence or to exhaust reasonable alternatives before leaving without notice, failed to tell Expedia she was leaving the state, and failed to inform Expedia that she changed her address while away—the employee did not take all reasonable precautions to protect her job and did not satisfy the statutory exception to quitting without cause.

4. Knowing Failure to Disclose a Conflict Was Misconduct Sufficient to Prevent Unemployment Benefits.

The Court of Appeals affirmed the ESD's denial of unemployment benefits based on an employee's misconduct where the employee knowingly failed to disclose a conflict of interest to his employer. The court agreed that such knowing failure to disclose the conflict satisfied the standard for misconduct that the employee acted in "willful disregard" of the employer's interest, thereby harming the employer. The employee's claim that he intended no injury was unpersuasive; the court reasoned that the law does not require an *intent to harm* the employer's business to find sufficient misconduct—the employee need only voluntarily disregard the employer's interest. In addition to showing a willful disregard of the employer's interest, the employer must prove actual harm caused by the employee's disregard. The court found that the fact that the employee's concealment of his conflict prevented his employer from complying with its own ethics code harmed the employer. The employer was also harmed by the appearance of unfairness cause by the employee's conflict of interest. The court concluded that although the harm caused the employer may not have been measurable, it was real. *Anderson v. Employment Sec. Dep't*, 135 Wn. App. 887, 146 P.3d 475 (2006).

K. WORKERS' COMPENSATION

1. Workers' Compensation Time Loss Calculation Includes the Employer's Contribution for Health Benefits.

In *Department of Labor & Industries v. Granger*, 159 Wn.2d 752, 153 P.3d 839 (2007), the Washington Supreme Court addressed whether an employer's payments to the employee's health care trust fund under a union's collective bargaining agreement should be included in the workers' compensation wage loss calculation *even though at the time of the employee's injury he was not yet eligible for benefits*. The relevant statute requires all wages an employee is receiving from employment to be included in the compensation figure, and wages is defined to include the value of board, housing, fuel, and other consideration "received from the employer." RCW 51.08.178(1). The Washington Supreme Court has addressed what should be considered a wage contributed by the employer over a long line of cases, and has already held that the value of employer-provided health care coverage should be included in the calculation of workers' compensation payments. But L&I argued this case was different because the employee was not entitled to receive the value of the benefit at the time of his injury, and he therefore had not "received" the health care benefits from his employer. The court sided with the employee, analogizing to its previous opinion holding that employees had "received" retirement benefits when employers paid into a retirement trust fund even though they were not retired and receiving those benefits. The court held that the employee here "lost the ability" to accumulate benefits in the trust and should be compensated for the loss.

2. Workers' Compensation Is the Sole Remedy for Employees Assaulted by Patients.

In *Brame v. Western State Hospital*, 136 Wn. App. 740, 150 P.3d 637 (2007), the Washington Court of Appeals held that employers were immune from tort liability for employees' injuries pursuant to the Washington Industrial Insurance Act ("WIIA"). The WIIA provides employees with certain, no-fault compensation for injuries sustained on the job. The WIIA also protects employers from civil lawsuits by their workers, with the limited exception where an employer *intentionally injures* an employee. Courts had narrowly interpreted the exception to protect employers even when injuries resulted from gross negligence or failure to observe safety laws or procedures. In 1995, the Washington Supreme Court found intentional injury where employees had complained to management about fumes making them sick, but management denied requests for improved ventilation, and the workers later became ill. The court found that the employer knew the symptoms were the result of the exposure and therefore deliberately intended the injuries because it willfully disregarded its knowledge that injury was certain to occur. But, in *Brame*, the court reasoned that although it was foreseeable that patients would engage in violent behavior that could cause injuries, the behavior was unpredictable and particular injuries could not be predicted with certainty. The employees could not show that the hospital willfully disregarded knowledge that injuries would occur. Instead, it provided training for employees on how to respond to assaults by patients and implemented a nonviolence initiative. The court held that there was no deliberate intention to inflict injuries through patient assaults, and the employees' claims were therefore barred by the WIIA.

If you become aware that there is a hazardous situation in your workplace that makes it likely that your employees will suffer injury or illness, take proactive steps to correct or prevent it.

L. WORKPLACE SAFETY

1. L&I Ergonomics Citations Potentially On the Horizon.

In 2003, Washington voters approved Initiative 841, which repealed all ergonomics regulations adopted by L&I. The regulations were designed to address workplace safety hazards that cause workers to develop musculoskeletal problems. The regulations, including requirements for ergonomics awareness education, were criticized as unnecessarily burdensome. The initiative repealed the ergonomics regulations and prohibited L&I from adopting more until required to by the federal government. But, in a decision issued last fall, the Washington Supreme Court unanimously held that in repealing L&I's ergonomics regulations, the voters did not intend to preclude L&I from citing employers for ergonomics-related safety standards under the general duty clause of the Washington Industrial Safety and Health Act ("WISHA"). *SuperValu, Inc. v. Department of Labor & Industries*, 158 Wn.2d 422, 144 P.3d 1160 (2006), opens the door for ergonomics-based safety enforcement under the general duty clause. Still, a general duty violation of WISHA requires L&I to show that an employer failed to render a workplace free of a recognized hazard that caused or was likely to cause death or serious injury, *as well as* that specific steps could have been taken to prevent the citation and were not. The bottom line is that employers should be attentive to workplace conditions that tend to produce repetitive-stress injuries or occupational disease.

2. Employers Must Ensure That Employees Use Required Safety Measures.

In *Washington Cedar & Supply Co. v. State Department of Labor & Industries*, 154 P.3d 287 (Wash. Ct. App. 2007), the Court of Appeals considered two consolidated cases for citations based on Washington Cedar employees not using fall safety equipment that was provided. In both cases, an L&I inspector had watched employees on roofs moving roofing materials without the required equipment. Therefore, L&I cited Washington Cedar for violations of regulations implementing WISHA, which require an employer to provide, install, and implement a fall restraint system anytime an employee works where he or she might fall more than 10 feet. On appeal from enforcement of the citation, Washington Cedar argued that the regulation should only require the employer to *provide* fall safety equipment that satisfies the regulation's technical requirements, rather than *ensure that the employees use* the protective equipment as L&I reasoned. The court agreed with L&I that the plain language of the regulation requires employers to (1) *ensure* that fall safety systems are provided, (2) *ensure* that they are installed, and (3) *ensure* that they are implemented. The court held that based on the dictionary definition of "ensure," the regulation required employers to "make certain" the protective systems were provided, installed, and implemented. Further, in response to Washington Cedar's argument that under WISHA, employees have a duty to comply with safety rules, the court held that imposing overlapping duties on employers and employees was consistent with the purpose of the statute to ensure a safe workplace. Finally, the court also held that the regulation was not so vague that Washington Cedar could not understand its meaning and therefore was not

unconstitutional. In application, the court affirmed the citations issued except for a citation for failure to hold required safety meetings. The court held that the meeting in which employees filled out a fall protection plan qualified as a safety meeting for purposes of the regulation.

3. Employer Violated Safety Law by Failing to Sufficiently Protect Workers in Excavations From Cave-In Hazards.

L&I cited Mid Mountain Contractors for failing to comply with WISHA by installing measures to protect against cave-ins for workers in a trench. A specific regulation requires employers to protect employees performing excavations from cave-ins, and makes limited exceptions for excavations in stable rock or in depths of less than four feet. The employer argued that the regulation did not apply because the workers were in a portion of the trench that was less than four feet deep when the violation occurred. The Court of Appeals found that argument unpersuasive because portions of the trench were deeper than four feet regardless of which portion the workers were in at the time, and employees had access to the hazard posed by the portion of the trench at issue. The court affirmed the Board of Industrial Appeal's decision. *Mid Mountain Contractors, Inc. v. Wash. Dep't of Labor & Indus.*, 136 Wn. App. 1, 146 P.3d 1212 (2006).

4. Industrial Insurance Premium Is Based on the Average Death Value Rather Than the Actual Cost of a Deceased Worker's Claim.

The Court of Appeals addressed an issue of first impression in *De Pietro Trucking Co. v. Department of Labor & Industries*, 135 Wn. App. 693, 145 P.3d 419 (2006)—whether an employer's increased industrial insurance premium following the work-related death of an employee can be based on the average death value of deceased workers in Washington rather than the actual cost of the deceased employee's claim. The WIIA provides workers injured on the job with monetary relief from money collected from employers according to calculations set by L&I. Accident and supplemental pension funds established by the WIIA pay benefits to workers injured on the job or to the families or dependents of workers who died from on-the-job injuries. In Washington, the state-administered workers' compensation fund is the sole means for obtaining industrial insurance coverage unless the employer qualifies for self-insurance. To maintain the fund's solvency, the Legislature requires employers to pay increased insurance premiums into the fund when an employee dies on the job. L&I promulgated a regulation for calculating an employer's premium following a death claim, WAC 296-17-870. Pursuant to that regulation, a work-related death claim is assigned an average death value based on the average cost of all industrial insurance death claims in Washington to calculate the employer's premiums for the next three years. If there are no additional death claims in the three-year period, the amount attributable to the death claim is removed. The employer in the case claimed that use of the average death value rather than the actual amount of the claim at issue exceeded L&I's legislative authority. The death claim at issue was much lower that the average claim, as the deceased worker had no dependents. The Court of Appeals affirmed L&I's use of the average death value, based in part on the Washington Supreme Court's reasoning in a prior case recognizing that the Legislature's 1971 amendment to the WIIA shifted the law from a classification-based risk and premium assessment system to a more generalized risk-pooling system. The Washington Supreme Court acknowledged risk pooling as an acceptable industrial insurance principle and rejected the idea that employer premiums must be strictly

individualized based on the employer's historical claims. Based on that reasoning, the Court of Appeals accepted L&I's practice of pooling the risk from all death claims to account for the unpredictability of the costs of future claims. The court noted that the regulation at issue had existed since 1973 and the Legislature could have prohibited the average death value calculation if it had wanted to.

M. PROCEDURAL BARS TO SUIT

1. Suit in Federal Court Barred Based on State Court Loss.

Following the principle that a claimant cannot bring a new lawsuit based on allegations she already lost at an initial trial, the Ninth Circuit recently affirmed dismissal of a case in which the plaintiff tried to rephrase her earlier wrongful discharge claim as a constitutional claim in federal court. In *Holcombe v. Hosmer*, 477 F.3d 1094 (9th Cir. 2007), a former state employee challenged her dismissal in an administrative hearing in which she was represented by an attorney, testified and presented evidence, cross-examined the State's witnesses and challenged the State's evidence. The administrative law judge presiding found that the State had just cause to fire the employee, who appealed the ruling to state court, where it was upheld. Trying a different angle, the former employee then sued in federal court alleging that her discharge violated her First Amendment rights. But the district court dismissed her claims because the facts at issue had already been litigated. The Ninth Circuit affirmed, concluding that the plaintiff had already had the opportunity to litigate her discharge and lost. The court rejected the argument that she did not originally litigate the First Amendment issue—the state court suit and federal action were based on the same facts and allegations, and the plaintiff could have brought her First Amendment arguments in state court if she had chosen to do so. Therefore, dismissal of her federal lawsuit was affirmed.

2. Dismissal of Harassment Claim on Procedural Grounds.

In *Wright v. Terrell*, 135 Wn. App. 722, 145 P.3d 1230 (2006), two employees of the Evergreen School District sued two supervisors for harassment and failure to supervise. Without even addressing the merits of their claims, the trial court dismissed the suit for failure to (1) pursue their arbitration and grievance procedures under the Public Employees' Collective Bargaining Act ("PECBA"), and (2) failed to exhaust their administrative remedies. The employees appealed. On appeal, the Court of Appeals reasoned that the right to be free from torts is independent of any contractual agreement or civil service law and held that the trial court therefore erred in concluding that the employees should have first pursued administrative or contractual remedies for their tort claims. Further, the court found that there was also no requirement to pursue contractual or administrative remedies for their unfair labor practices claims—the court reasoned that although the Public Employment Regulations Commission would have jurisdiction over the claims, the statute did not divest superior courts of jurisdiction. Nonetheless, the Court of Appeals affirmed dismissal of the employees' claims because they had not complied with the claim notice statute—a statute requiring individuals to file their claims with the government entity they are suing before filing the suit in court. The Court of Appeals held that the statute required them to file notice of their claims with the school district because they were suing the supervisors for acts committed in their official scope of employment.

N. ATTORNEYS' FEES

1. Prevailing Party Does Not Get All Fees Requested.

When a party seeks attorneys' fees, that party bears the burden of submitting evidence of its reasonable hours worked and rate paid. The Ninth Circuit also requires that the requesting party show that the rate requested is consistent with the prevailing market rate in the relevant community. In *Carson v. Billings Police Department*, 470 F.3d 889 (9th Cir. 2006), the prevailing party requested fees based on an hourly rate of $205. But the opposing party presented evidence that the prevailing rate for an experienced employment lawyer in Montana was between $115 and $175 per hour. Therefore, the trial court found that the appropriate rate was $150 per hour. The trial court also disallowed 21.5 hours of plaintiff's counsel's requested time spent on a motion that was premature and filed in the wrong venue as unreasonable. On appeal, the Ninth Circuit held that there was sufficient evidence to establish that the prevailing community rate was lower than the attorney's rate charged, and reasoned that the trial court should not uncritically accept the number of hours claimed by the prevailing party. The court affirmed the trial court's reduction of fees, as well as the reduction in hours.

Employers must keep attorneys' fees in mind in evaluating employment discrimination cases. Fees may equal or exceed the amount of damages awarded in a given case and, therefore, often factor into settlement decisions.

2. Availability of Attorneys' Fees Expanded.

Washington courts generally follow the rule that a prevailing party may not recover its attorneys' fees after litigation unless the award is expressly authorized by contract or statutes. RCW 49.48.030 authorizes an employee to recover attorneys' fees when he or she recovers damages for wages or salary owed to him. Washington courts have construed that statute to liberally apply to awards for back pay, front pay, and reimbursement of sick leave. The Washington Court of Appeals recently expanded the types of cases where attorneys' fees are available to also include the situation where an employee has no employment contract. In *Fraser v. Edmonds Community College*, 136 Wn. App. 51, 147 P.3d 631 (2006), Division One held that a plaintiff who succeeded in his claim of promissory estoppel—that he had relied on the defendant's promise they would rehire him after he retired to his detriment when they did not—was also entitled to attorneys' fees because his damages were equivalent to front pay for the period of time that he relied on being employed. Based on Washington Supreme Court precedent, the court held that the award in *Fraser* was for wages he "would have earned had it not been for the employer's wrongful act" and were therefore wages owed under the statute.

Before *Fraser*, the risk assessment for cases involving employment discrimination or breach of contract included the possibility of paying the plaintiff's attorneys' fees. But now that assessment must be conducted anytime an employer believes that potential damages available represent wages or salary the employee would have earned but for the employer's wrongful act.

O. TAX ISSUES

1. Damages for Tax Liability on Emotional Distress Damage Awards Rejected.

When employee plaintiffs receive damages for lost wages in a lump sum payment, they often pay taxes at a higher rate than they would have paid on the wages if they had earned them through their regular employment. Therefore, a few years ago, the Washington Supreme Court held that employers may also be liable for the additional taxes owed an employee plaintiff because of taxes on the lump sum payment. Recently, two successful plaintiffs against Seattle City Light sought to expand the tax liability damages theory to also include damages for the total amount of taxes they owed on their emotional distress damages. But in *Chuong Van Pham v. City of Seattle*, 159 Wn.2d 527, 151 P.3d 976 (2007), the court refused to extend tax liability to emotional distress awards. In doing so, the court examined the difference between economic damages based on lost wages and noneconomic damages based on emotional distress. Lost wages are intended to place the plaintiff in the same economic position as he or she would have been absent the discrimination, which includes any increased tax consequences of receiving wages in a lump sum payment. Damages for the tax consequences of the lump sum payment do not include the entire tax burden on the lost wages, only the difference between the taxes the plaintiff would have owed if he or she had received the wages during the regular course of employment and the increased burden in receiving them at once. The *Pham* plaintiffs sought their tax consequences on the entire emotional distress damages award. The court reasoned that Congress has declared that noneconomic damages should be taxable to the recipient, and the court found no reason to override congressional intent and erase plaintiffs' tax consequences of the awards by shifting the tax burden entirely to employers.