Perkins Coie

Employment Law Seminars

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Lynnwood, Washington
Wednesday, April 19, 2006
Embassy Suites Hotel
20610-44th Avenue West
Lynnwood, WA 98402

Tacoma, Washington
Thursday, April 20, 2006
Sheraton Hotel
1320 Broadway Plaza
Tacoma, WA 98402

Seattle, Washington
Wednesday, April 26, 2006
The Rainier Club
820 Fourth Avenue
Seattle, WA 98104

Bellevue, Washington
Thursday, April 27, 2006
The Bellevue Club
11200 SE 6th Street
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SPRING 2006 EMPLOYMENT LAW UPDATE

I. HIRING/REHIRING

A. Final Rules Guide Employers on Granting Leave to and Reemploying Uniformed Service Members

The Veterans' Employment and Training Service—an agency of the U.S. Department of Labor—has issued final regulations to guide employers on compliance with the Uniformed Services Employment and Reemployment Rights Act (USERRA). 20 C.F.R. § 1002 et seq. (2005).

USERRA is a federal law requiring all U.S. employers to grant unpaid leave to, reemploy, and maintain certain benefits for employees who are members of or who enlist in one of the uniformed services. USERRA also prohibits discrimination against members of the military and retaliation against them and anyone who helps them assert their rights under the Act. A brief summary of the final regulations follows:

- USERRA prohibits employers from discriminating against employees or job applicants because of their past or current military service or future military obligations. It is illegal to take adverse employment action against such employees if their military service is a *motivating factor* in the decision.

- USERRA generally requires employers to grant up to five years of unpaid leave to employees who are members of or join the military. Only days on which the employee is in active service are counted toward the five-year limit. There are other types of military service, such as regular National Guard and military reserve training, that do not count toward the five-year limit.

- Employers are not required to reemploy employees if (1) the employee's discharge from military service was less than honorable; (2) the employer's circumstances have so changed that reemployment is impossible or unreasonable; (3) reemploying the employee would impose an undue hardship on the employer; (4) the employee had no reasonable expectation that the job would continue indefinitely or for a significant period of time; or (5) in limited circumstances, the employee does not comply with USERRA's notice requirements.

- Employees must give reasonable notice that they are going to be absent from work for military service, unless advance notice is impossible or unreasonable under the circumstances. Also, employees whose military service is over must give their employers notice that they intend to return to work. The amount of notice required depends on how long they were absent because of military service. An employee's failure to comply with these deadlines does not necessarily entitle the employer to refuse to rehire him.

- In general, employers must reinstate returning employees within two weeks after they apply for reemployment (absent unusual circumstances) to the job they would have had if they had not taken any military leave. For example, if an employee comes due for promotion while on military leave, an employer must give him that promotion upon reemployment. This is commonly referred to as the "escalator position." In addition, if an employee becomes disabled during military service, an employer must provide reasonable accommodations to allow him to perform the escalator position, an equivalent position or the job that most closely approximates that equivalent position.

- Employees are entitled to continue their employer's health insurance for 18 months after their military service begins. This requirement is practically identical to the requirements imposed by COBRA. But unlike COBRA, there is no exemption for small employers. In addition, when employees *return* from military service, they are entitled to health insurance benefits as if they had not taken any leave at all.

- Employees who take military leave cannot be required to forfeit any benefits they have accrued under their employer's retirement plan or to requalify for participation in the plan upon returning from leave. When an employee returns from military service, employers are required to "catch up" on all contributions to the employee's pension plan that the employer would have made if the employee had not been absent on military leave. Employers must also allow returning employees to make up missed contributions over a period of up to five years, and must match those contributions as if they had been made during the employee's leave.

II. WAGE AND HOUR LAW

A. New State Rules Restrict Deductions That Employers May Take From Employees' Wages

The State Department of Labor & Industries has adopted new rules, effective January 1, 2006, restricting deductions from employees' wages. WAC 296-125-

025 (2005). The new rules differentiate between (1) deductions that may be taken only from an employee's final paycheck and (2) deductions that may be made on an ongoing basis. The rules also explain when the employee's agreement is required and whether the deductions may reduce the employee's pay below the minimum wage. A brief summary of the new rules follows:

1. Final Paycheck

a. With or without the employee's agreement. The following deductions may be taken from an employee's final wages without her agreement (even if the deductions result in the employee receiving less than minimum wage):

- deductions required by state or federal law;
- deductions for non-occupational medical, surgical or hospital care or service; and
- payments to satisfy a court order, judgment, wage attachment or the like.

b. With the written employee's agreement. The following deductions may be made from an employee's final wages even if they result in the employee receiving less than minimum wage, but only if specifically agreed to by the employee in writing:

- pension, medical, dental or other benefit plan contributions; and
- payment to a creditor (including the employer) or a third party, so long as the payment is for the benefit of the employee (such as repaying a loan).

c. Other permissible deductions, but not below the minimum wage. The following deductions may be made from an employee's final wages, but may not reduce them below the minimum wage:

- acceptance of a bad check or credit card in violation of procedures previously made known to the employee;
- cash shortage if the employee had sole access to the cash and participated in the cash accounting at the beginning and end of the shift;

- cash shortage, failure of customer to pay or breakage or loss of equipment if it was caused by "a dishonest or willful act" of the employee; and

- employee theft if it can be shown that the employee intended to deprive and the employer filed a police report.

These deductions are only permissible for incidents that occurred during the final pay period.

2. During Ongoing Employment

According to the new rules, deductions during ongoing employment are more limited.

a. With or without the employee's agreement. The following deductions during ongoing employment are permissible without the employee's agreement even if they result in the employee receiving less than minimum wage: (1) required by state or federal law; (2) for non-occupational medical, surgical or hospital care or service; and (3) to satisfy a court order, judgment, wage attachment or the like.

b. With the employee's written agreement. During ongoing employment, other deductions are permissible only if (1) the employee expressly authorizes the deductions in writing in advance, and (2) the deductions are for a lawful purpose for the benefit of the employee. Those would include such things as:

- pension, medical, dental or other benefit plan contributions;

- purchase of merchandise or services from the employer (so long as the price to the employee is the same as or less than it would be for the general public); and

- repayment of an employee loan or payment to a creditor, so long as the employer derives no financial profit or benefit (reasonable interest is okay).

Deductions for acceptance of bad checks, cash shortages and the like are not permissible during ongoing employment.

3. Adjustments for Overpayment

Finally, the new rules limit when a private sector employer may recoup wage overpayments. The new regulation, WAC 296-126-030, provides that

if an employer pays more than the agreed wage rate or pays for more hours than actually worked, the employer may recoup the overpayment, but only if it was (1) "infrequent and inadvertent," and (2) detected within 90 days. Recouping an overpayment is permissible even if it reduces the subsequent payment to below the minimum wage.

Before any adjustment is made, however, the employer must provide advance written notice to the employee, and the notice must describe the plan for recouping the overpayment and also provide documentation of the overpayment to the employee. (This regulation does not apply to public employers because a specific statute, Ch. 49.48 RCW, deals with that subject.)

If an overpayment cannot be recouped under the new regulation, the employer retains the right to recover it by filing a lawsuit. All wage deductions must be identified and recorded openly and clearly in the payroll records.

Care should be taken to comply with these rules. Improper wage deductions can result in an employee recovering double damages and attorneys' fees. There are also potential criminal penalties.

B. Employees Can Pursue Claims of Wage Payment Violations Under New Administrative Process.

Recent amendments to the state Minimum Wage Act establish a new administrative process to address employee claims of wage payment violations. The amendments, contained in SHB 3185, require the State Department of Labor & Industries (L&I) to investigate employees' claims of wage payment violations and issue citations and notices of assessment to employers who are found to have violated wage payment requirements. L&I can impose a civil penalty on employers who are found to have willfully violated wage payment requirements, including requirements to pay minimum wages, overtime compensation, or final wages, or the requirement to withhold only lawful deductions from wages.

The amendments provide a safe harbor for employers who make workers whole by paying them all wages and interest due, as well as a defense to penalties for employers who rely on L&I's advice or interpretations. An employee who has accepted payment of the wages owed, including interest, is barred from initiating or pursuing other actions based on wage requirements. An employee may elect to terminate the L&I administrative action and preserve a private right of action by providing written notice to L&I within ten business days of L&I's issuance of a citation. In that case, L&I must discontinue its action against the employer and

vacate any citation issued. The citation, and any related material, is not admissible in court or other proceedings.

The legislation also establishes procedures for administrative review of citations, as well as collection of unpaid wages and civil penalties. The amendments are effective June 7, 2006.

C. Employees Who Don or Doff Protective Gear Must Be Paid for Time Spent Walking to and From Production Areas.

The Fair Labor Standards Act (FLSA) requires employers to pay employees from the time they begin the workday until they finish, except for established breaks such as unpaid meal breaks. Under the FLSA, the workday begins when a worker (1) begins to perform a principal work activity or (2) gets to work if his employer required him to be there at a fixed time and ready to perform a principal work activity, as in the case of a firefighter. Employers generally need not pay for preparatory activities, such as commuting to the regular workplace or for "postliminary" activities, which occur after the last principal activity is performed. Some preparatory activities, however, are so indispensable to principal activities that they become principal activities themselves, and may start the workday. In IBP, Inc. v. Alvarez, 126 S. Ct. 514 (2005), the United States Supreme Court considered the question of what activity starts the workday and turns on the compensation clock.

IBP required its meat-packing plant employees to suit up in special protective gear in locker rooms and then walk to the production area. IBP paid the employees for four minutes of work for donning the gear, as required by an unrelated U.S. Supreme Court case, as well as for doffing it at the end of each shift. IBP contended that it did not have to pay the employees to walk from the locker room to the meat-packing floor—and back again at the end of the day—because their principal activities started and ended on the floor, not in the locker room.

The Supreme Court disagreed. Noting that its earlier decision recognized donning and doffing as principal work activities themselves, the Court held that IBP employees' workdays began when they performed the principal activity of putting on their protective gear. The Court also held that although employers may stop the paid-time "clock" for well-recognized times off, such as unpaid meal breaks, they cannot otherwise turn it on and off at will. Accordingly, IBP could not start the clock for donning, stop it for walking, and then start it up again at the meat-packing floor, the Court held.

In a companion case, Tum v. Barber Foods, 126 S. Ct. 514 (2005), the Supreme Court addressed the question of when does a preparatory activity become so integral to a person's job that an employer must pay him to do it? Barber Foods

employees would stand in line to pick up their protective gear, don it in locker rooms, walk to the production area, punch in on the time clock and start processing chicken. The Court held that the employees were not entitled to payment starting with the time they stood in line to obtain their gear. Waiting is "two steps removed from the productive activity on the assembly line," the Court reasoned, and therefore is not always integral in the same sense as donning protective gear. Moreover, the Court observed, the company did not require the employees to be at work at a required time and then make them stand in line. Thus, the employees' workday started once they donned the first piece of gear, not when they got into line.

Additionally, the Court ruled that the employees were entitled to be paid for waiting to take off the gear at the end of the workday. Stopping is the principal activity that ended the workday for those workers, so any waiting up to that time happened within the workday and had to be compensated, the Court said.

D. Workers Who Live and Sleep Where They Work Are Not Entitled to Minimum Wage, Even for Time Spent on Active Duty.

An individual must qualify as an "employee" under the Washington Minimum Wage Act (Act) to be entitled to minimum wage. Although that qualification seems easy enough to apply, not all workers are "employees." The Act contains an exception to employee status for individuals: (1) whose work requires them to reside or sleep at their place of employment, or (2) who spend a substantial portion of time on call. In Berrocal v. Fernandez, 155 Wn.2d 585, 121 P.3d 82 (2005), the Washington Supreme Court was presented the question of whether sheepherders, whose work required them to reside at the sheep ranch where they would work and be available 24 hours per day, 7 days per week, are employees entitled to minimum wage pay under the Act.

Plaintiffs, Chilean nationals who came to the United States through a temporary foreign worker program, entered into contracts with sheep ranchers that required them to reside at the ranch where they would work and be continuously available. In return, they were paid $650 per month plus room, board, health insurance, and two weeks' paid vacation, but no regularly scheduled time off. Believing that they were underpaid, the two quit and sued their employers, claiming that they were improperly paid less than the minimum wage. The trial court dismissed the claim, concluding that the Minimum Wage Act excluded workers who were required to reside or sleep where they worked. The state court of appeals reversed, stating that the exclusion applied to such workers only for the hours they were not on active duty.

On defendants' appeal, the Washington Supreme Court examined the Act's exception for workers who are required to reside or sleep where they work,

focusing its attention on a modifying clause in the exception that specified that the individuals in question are "not engaged in the performance of active duties." The sheepherders argued that the clause modified both parts of the exception, so that even though they resided at their place of employment, they should have been considered employees and received minimum wage for the time they were engaged in active duty. The ranchers argued that the active-duty clause modified *only* the exception for those who spend a substantial portion of time on call. According to the ranchers' argument, people who live or sleep where they work are not entitled to minimum wage for any of their time, including when they are engaged in active duty.

The court agreed with the ranchers, concluding that the active-duty clause modified only the second part of the exception—concerning individuals who spend a substantial portion of their time on call. The court reasoned that if individuals who live or sleep where they work could still receive minimum wage for active duty, there would be no exclusion at all since one normally receives wages for only time worked. The court took the opportunity in its decision to reiterate that entitlement to minimum wage is based on whether an individual comes within the statute's definition of "employee," which is a question of a worker's categorization, not what tasks she is doing at a given time.

III. EMPLOYMENT CONTRACTS

A. Employer's Policy Manual Promising Specific Treatment Supersedes Signed Employment Application Stating That Employment Is at Will.

In Korslund v. DynCorp Tri-Cities Services, Inc., 156 Wn.2d 168, 125 P.3d 119 (2005), three employees at the Hanford Nuclear Reservation sued their employer, claiming they had been harassed and retaliated against because they reported safety violations, mismanagement and fraud. All three claimed that the employer breached promises contained in employee handbooks stating that the employer would take disciplinary action against individuals who discriminated or retaliated against whistleblowers.

Generally, employment in Washington is "at will" unless there is a contract to the contrary. That means that either the employer or employee can end the employment relationship at any time for any reason, or no reason at all. Some years ago, the Washington Supreme Court recognized an exception to the employment-at-will rule if an employer creates an atmosphere of security and fair treatment with promises of specific treatment in certain situations. In that case, if an employee is induced to remain on the job and not actively seek other employment, those promises are enforceable. To establish that sort of claim, an employee must prove three things: (1) a statement or statements in an employee manual or handbook or similar document amount to a promise of specific

treatment in specific situations; (2) she justifiably relied on that promise; and (3) the promise was breached.

In this case, two of the three employees were represented by a union and covered by a collective bargaining agreement. One of the employees had signed an employment application stating that his employment was "at will." Applying the "specific treatment" doctrine to these facts the court first held that union employees can make a claim for breach of promise of specific treatment in specific situations.

Additionally, the court held that the fact that an employee signed an employment application saying his employment was at will did not bar his claim. While noting that the employment relationship can be altered by the employer's issuance of policy manuals after an employee is hired, the court stated that it would be inconsistent with Washington law "to conclude that once an application containing an at-will provision is signed, the employer is thereafter free to make whatever promises it wishes without any obligation to carry them out."

The court then addressed the question of whether there was sufficient evidence in this case that the employer made enforceable promises. The court looked at two employee manuals. The first included the following language: "[M]anagement must ensure that employees who raise concerns . . . are not harassed, intimidated, or subject to any discriminatory or retaliatory actions. Any employee who engages in or condones any of these actions against another employee *will be subject to appropriate corrective measures*."

The second document, a company ethics booklet distributed annually to employees, required employees to report ethics violations and stated that disciplinary actions "*will be taken*" when any supervisor retaliates or encourages others to retaliate against an employee who reports a violation.

The court rejected the employer's argument that these documents did not constitute enforceable promises of specific treatment in specific situations because they vested the employer with great discretion. The court found that the employer unequivocally promised to take *some* corrective action against management or other employees who harassed, intimidated or retaliated against employees. So although the employer had discretion about what action to take, it had promised to take some disciplinary action. That was enough to allow the employees to pursue their claim that the employer promised specific treatment in certain situations and then breached those promises by doing nothing.

This holding is potentially far-reaching in light of the fact that many employers maintain strong policy statements on business ethics and harassment. This case

makes it even more important that employers follow through and take actions they have promised to take.

IV. DISCHARGE

A. Employees Forced to Permanently Leave Work for Medical Reasons May Have a Claim for Constructive Discharge, Even if They Do Not Resign.

The Washington Supreme Court's decision in Korslund also expanded the law on constructive discharges. Two of the three employees alleging harassment and retaliation against them for whistleblowing also claimed that their employer's failure to stop or correct the behavior caused them physical and emotional injury. After two of them were placed on disability leave, they claimed they had been constructively discharged in violation of public policy.

On appeal, the court addressed whether a constructive discharge claim can be brought where the employee leaves his job on medical leave, but does not quit or resign. An employee forced to permanently leave work for medical reasons may have been constructively discharged, the court determined. Deliberately creating conditions that are so intolerable that they make an employee ill enough to permanently leave work is functionally the same as forcing him to quit, the court said.

The court made it clear, however, that if the employee continues to receive employment benefits and is still considered an active employee while on disability leave, or if his ability to return to work is protected in some other way, he cannot claim constructive discharge. Because those facts were not present here, the employees could bring a claim for constructive discharge.

B. Whistleblowers May Not Sue for Wrongful Discharge in Violation of Public Policy Where an Adequate Alternative Process Is Available for Whistleblower Complaints.

Having determined that two of the employees at Hanford had been constructively discharged, the Washington Supreme Court in Korslund proceeded to address the question of whether the discharges were in violation of public policy. A wrongful discharge in violation of public policy may occur when an employer discharges someone for reasons that violate a clear mandate of public policy. Employees who claim they were discharged in violation of public policy must prove three things: (1) a clear public policy existed; (2) discouraging the conduct they engaged in would jeopardize the public policy; and (3) they were discharged because of their conduct. If an employee is successfully able to prove these three elements, the employer must then show it had an overriding justification for the discharge.

The Hanford employees relied on the retaliation provision in the federal Energy Reorganization Act, which protects whistleblowing activities in nuclear industry operations. The court found that was a clear public policy on which the employees could rely. However, the employees failed to satisfy the second element of the test, the need to show that discouraging the employees' conduct would jeopardize public policy. The second element requires an analysis of whether there are other means of promoting the public policy in question and whether they are adequate. If there are adequate alternative means for promoting the public policy, the second element is not satisfied and the claim fails.

Here, the court found that there were adequate alternative means. The Energy Reorganization Act itself provides an administrative process for adjudicating whistleblower complaints with remedies like reinstatement with back pay. Because the law provides comprehensive remedies that serve to protect the public policy identified by the employees, they could not pursue a separate legal claim that they were wrongfully discharged, the court concluded.

C. Employee Who Cooperated With Law Enforcement When Asked May Bring Claim for Wrongful Termination in Violation of Public Policy.

In Gaspar v. Peshastin Hi-Up Growers, 128 P.3d 627 (Wash. Ct. App. 2006), the state court of appeals reversed the trial court's dismissal of an employee's complaint contending that his termination for assisting a police investigation was in violation of public policy. The plaintiff, the general manager at Peshastin Hi-Up Growers ("PHU"), was contacted by a county sheriff detective about a PHU employee. The employee had unlawfully bought postage stamps for discounted prices from a defective machine at the local post office. The employee eventually admitted to purchasing the stamps at the malfunctioning machine, but then paid back the post office by altering a pretyped check.

Plaintiff notified the PHU board of directors to discuss whether and how to terminate the employee. Over the next two months, plaintiff met with the detective and a prosecutor six times regarding the illegally obtained stamps and the altered check. After voting to place the offending employee on administrative leave, the board then voted, without prior notice, to terminate plaintiff's employment. The trial court dismissed plaintiff's wrongful termination in violation of public policy claim because it said plaintiff had failed to establish a clearly mandated public policy for helping law enforcement.

Washington courts have recognized four general exceptions that give rise to the public policy exception for termination at will: discharge (1) for refusing to commit an illegal act; (2) for performing a public duty or obligation; (3) for exercising a legal right or privilege; and (4) in retaliation for reporting employer misconduct. Applying that framework to the facts of this case, the court of

appeals determined that plaintiff fell within the "public duty" exception when he cooperated with the criminal investigation of the employee.

In reaching this decision, the appeals court relied on an earlier decision by the Washington State Supreme Court which found that state statutes encouraging citizens to assist law enforcement established a clear public policy of encouraging citizens to cooperate with law enforcement when requested or clearly required by law. Because plaintiff was approached by law enforcement for help with the investigation of the employee's alleged theft of postage stamps, the court of appeals found that he satisfied his burden of proving that his conduct was protected by a clear mandate of public policy. The court reversed the trial court's decision and sent the case back for disposition.

V. ARBITRATION AND ALTERNATIVE DISPUTE RESOLUTION

A. Employers Who Agree to Arbitrate Must Participate in the Process or Lose Their Right to Arbitrate.

In Brown v. Dillard's, Inc., 430 F.3d 1004 (9th Cir. 2005), the Ninth Circuit (which covers Washington and Oregon) affirmed a district court's denial of defendant employer's motion to compel arbitration. The district court's denial was based on its determination that the arbitration agreement was unconscionable and therefore unenforceable under state law. The appeals court based its denial on different grounds, deciding that defendant breached the arbitration agreement by refusing to participate in the proceedings plaintiff initiated and thereby deprived itself of the right to enforce that agreement.

Shortly after starting work for defendant, plaintiff was directed to sign a form acknowledging receipt of the arbitration rules and told that her job would be in jeopardy if she did not sign the form immediately. The form stated that employees were bound by the arbitration agreement if they continued working for the company. Following her termination over a year later, plaintiff filed a notice of intent to arbitrate with the American Arbitration Association (AAA) along with her fee, as required by the program. She claimed that she was wrongfully terminated for falsifying a time sheet and sought actual damages, removal of negative statements regarding her termination from her personnel file, a letter of apology and punitive damages. Having apparently determined that plaintiff's claim was meritless, defendant did not respond to AAA's letters or pay its portion of the filing fee. The AAA could not compel defendant to pay its share of the filing fee and proceed with arbitration, and so, several months later, plaintiff filed a complaint in state court. Defendant removed the case to federal court and sought to compel arbitration.

Finding it unnecessary to decide whether the arbitration agreement was, as the district court determined, unconscionable, the Ninth Circuit determined that defendant forfeited its right to enforce the arbitration agreement by its actions breaching the agreement—refusing to participate in the arbitration proceedings initiated by plaintiff. The Federal Arbitration Act provides that the enforceability of arbitration agreements is determined based on contract law. "A bedrock principle of [state] contract law" is that the party seeking to enforce a contract must have complied with it, the court said.

The court then found that defendant clearly breached the arbitration agreement, which explicitly covered the wrongful discharge claim plaintiff cited in her notice of intent to arbitrate. The court added that, while it found it more accurate to describe defendant's behavior as breach of contract, were it to approach this as a waiver case, it would have had no "difficulty" finding that defendant waived its right to arbitrate plaintiff's claims. The company knew of its right to arbitrate, acted inconsistently with that right and harmed plaintiff by causing her delay in resolving her dispute, attorneys' fees and costs, and the loss of potential evidence and witnesses due to the passage of time, according to the court.

VI. FAMILY AND MEDICAL LEAVE

A. Federal Family and Medical Leave Act (FMLA) Protections Have Been Incorporated Into State Family Leave Law.

The 2006 Legislature amended portions of the state Family Leave Law (FLL) to conform, in substantial part, to the federal Family and Medical Leave Act (FMLA). The legislation, SSB 6185, arose out of concern by leave advocates that the federal government may seek to curtail federal FMLA requirements. Consistent with legislative intent, however, the FLL amendments will not be enforced unless and until the FMLA becomes less protective than state law.

The FLL entitles eligible employees, upon their return from leave, to reinstatement to jobs at workplaces within 20 miles of their original workplaces. The FLL also entitles employees to leave for sickness or disability related to pregnancy or childbirth in addition to leave provided under federal law. The amendments retain these entitlements and add provisions derived in substantial part from the federal FMLA and accompanying federal Department of Labor Regulations. A brief summary of these provisions follows:

- Eligible employees of covered employers are entitled to up to 12 weeks of unpaid leave in a 12-month period to care for specified family and medical reasons.

- Covered employers include all employers in the state, including local governments that employ 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. The FLL also applies to the states, state institutions and state agencies, regardless of size.

- Any person returning from leave must be restored to his or her original position or to an equivalent position with equal benefits, pay, and other terms and conditions of employment. Employees maintain the employment benefits they accrued before taking leave and may opt to continue the benefits during the leave period at their expense.

- L&I shall investigate complaints of wrongful discharge or discrimination under the FLL and impose civil penalties for violations. Employees may also bring suit directly against the employer for violations and recover damages, including liquidated damages, or seek equitable relief, such as employment, reinstatement and promotion.

- Leave taken under the FLL must be taken concurrently with FMLA leave.

- The FLL must be construed to the extent possible consistent with similar provisions of the FMLA.

- The provision suspending enforcement of the FLL is repealed.

B. Employer Did Not Violate FMLA by Firing an Employee Who Threatened His Supervisor After Being Denied Leave.

In Denny v. Union Pacific Railroad Co., 2006 WL 561241 (9th Cir. Mar. 9, 2006), the Ninth Circuit affirmed judgment for defendant on plaintiff's FMLA retaliation claim. A year after defendant employer approved plaintiff's request for intermittent medical leave to address his chronic shoulder and back problems, plaintiff awoke with severe back pain and telephoned his employer to request medical leave. His supervisor denied the request on the basis that plaintiff was authorized to use medical leave only for treatment by a chiropractor.

Shortly thereafter, plaintiff and his wife met with his supervisor in his office. Plaintiff asked the supervisor why he was "hassling" him about the leave request. His supervisor said he was just following the restrictions on plaintiff's FMLA leave. Plaintiff said, "the f_ _ _ you're not" and turned to leave. The supervisor thought he heard plaintiff say, "f_ _ _ you," and told him not to talk to him that way. The supervisor told plaintiff he was on company property and was subject to company rules. Plaintiff then suggested they "take it outside, off property."

Plaintiff was terminated later that day. Plaintiff sued, claiming that defendant had retaliated against him for requesting FMLA leave.

The district court found that plaintiff was fired for insubordination, not in retaliation for using FMLA leave. The Ninth Circuit affirmed the district court's finding because it was one of two permissible views of the evidence. "Even if [the employer] had been unjustified in denying leave, an issue that we need not resolve, the district court's findings are not clearly erroneous," the appeals court said. It found that an employee's conduct in opposing illegal activity is protected only if it is reasonable in view of the employer's interest in maintaining a harmonious and efficient operation. In other words, "[A]n employee's insubordination and fighting words are not protected merely because the underlying subject is protected," the court said.

The dissenting vote in this 2-1 decision stated that "while a threat of physical violence may be unprotected," there is Ninth Circuit precedent stating that "the use of profanity cannot be the basis for an adverse employment decision when a profanity is in response to an employer's interference with protected activity."

VII. WORKERS' COMPENSATION

A. Off-Duty Employees Injured in Mixed-Use Parking Area Are Not Covered Under Industrial Insurance Act.

In Ottesen v. Food Services of America, Inc., 131 Wn. App. 310, 126 P.3d 832 (2006), plaintiff, the personal representative of a fatally injured employee, filed a wrongful death action against defendant after the employee was struck and killed by a company truck in the company's parking area. The parking area was also used for storing trailers and for loading and unloading at defendant's warehouse loading dock. After arriving to work and parking his car in the parking area, the employee began walking toward the warehouse in a crosswalk when a company vehicle fatally injured him. Defendant moved for summary judgment, arguing that the employer was covered by Washington's Industrial Insurance Act (IIA), and therefore limited to workers' compensation benefits.

On defendant's appeal, the Washington Court of Appeals affirmed the trial court's determination that plaintiff's suit fell within the "parking area" exception of the IIA. Under the IIA, employers are immunized from civil tort actions for workplace injuries when the employee was injured "in the course of his or her employment." "Acting in the course of employment" means the worker was acting at his or her employer's direction or in the furtherance of the employer's business, which includes time spent going to and from work on the job site in areas controlled by the employer, "except parking area."

The court stated that the "parking area" exception to workers' compensation benefits under the IIA is not an absolute bar to coverage because some employees do perform work-related activities in parking areas and should be covered by the IIA. The court first determined that the primary use of the parking area where the accident occurred was "mixed-use" to which the IIA may apply. (The court contrasted the "mixed use" parking area in this case to "pure" parking areas to which the IIA does not apply and "job site" areas to which the IIA does apply.)

In "mixed-use" cases, the applicable test is whether the employee was performing job-related activities in the area. The appeals court found that the employee in this case was merely walking to work at the warehouse at the time of the accident. Thus, as to this employee, the "mixed-use" site of the accident was a "parking area" because he was not performing work duties, the court said. Accordingly, the parking area exception of the IIA applied, precluding coverage and allowing plaintiff's lawsuit.

B. Volunteer Firefighters Are Not Covered Under Workers' Compensation for Work-Related Injuries.

In Doty v. Town of South Prairie, 155 Wn.2d 527, 120 P.3d 941 (2005), plaintiff was injured while serving as a volunteer firefighter for the town of South Prairie and filed a negligence suit against the town seeking damages. During plaintiff's time as a volunteer firefighter, the town paid her a stipend and premiums on her behalf for medical, disability and pension benefits under the Volunteer Fire Fighters' and Reserve Officers' Relief and Pensions Act ("VFFA"). Following her injury, plaintiff applied for and received benefits under the VFFA. The superior court dismissed her negligence suit on the grounds that plaintiff was subject to the IIA thereby precluding her civil lawsuit. The state court of appeals reversed, holding that the IIA did not cover plaintiff.

On defendant's appeal, the Washington Supreme Court held that volunteer fire fighters are not covered by the IIA despite receiving medical benefits under the VFFA. The court found that the IIA encompasses "all employments . . . within the legislative jurisdiction of the state." Moreover, the IIA requires state volunteers, and permits local government and nonprofit charitable volunteers, to be "deemed employees and/or work[ers]" but only "*for all purposes relating to medical aid benefits.*"

Defendant contended that the IIA covers all employments, unless expressly excluded, including volunteer firefighters. Framing the coverage issue as one of statutory interpretation, the court held that, while the IIA includes within its broad scope "all employments," it does not cover volunteers. The court reasoned that the very existence of the provision permitting "volunteers" to be deemed employees and/or workers for limited medical aid benefits presupposes the notion

that absent such a provision, volunteers would be entitled to *no* IIA benefits. Volunteers may be brought under the IIA, the court said, but "only for purposes relating to eligibility for medical aid benefits." The court thus rejected defendant's argument that the IIA covers volunteer firefighters.

The court also rejected defendant's argument that plaintiff was an "employee" under the IIA because she received wages for her services, and was under the direction and control of the town, and is a public officer. The court determined that plaintiff met the definition of a "non-employee volunteer" because she provided service voluntarily and the small stipend and benefits she received from the Town did not constitute remuneration for services performed. As such, plaintiff is not subject to the IIA and the IIA does not provide the town with immunity from civil suit, the court concluded.

VIII. SEX DISCRIMINATION

A. 15-Employee Threshold for Determining Title VII Coverage Is Element of Plaintiff's Claim and Not Determinative of Whether Federal Courts Have Jurisdiction Over Title VII Claims.

The United States Supreme Court in Arbaugh v. Y & H Corp., 126 S. Ct. 1235 (2006), held that the 15-employee threshold limitation on Title VII's scope does not limit the jurisdiction of federal courts to hear Title VII claims, but rather is an element a Title VII claim that a plaintiff must prove.

In Arbaugh, plaintiff sued defendant under both Title VII and state law, alleging that she was constructively discharged as a result of sexual harassment and assault by a company owner. Plaintiff asserted federal court jurisdiction of her Title VII claims and supplemental jurisdiction over her state-law claims. The pretrial order signed by the parties and the trial judge stated that the federal district court had jurisdiction over both the Title VII and state-law claims.

After a two-day trial, a jury ruled in plaintiff's favor on both her Title VII and state-law claims and awarded her back pay, compensatory damages and punitive damages. Two weeks after the trial court entered judgment, defendant sought to dismiss the case on the grounds that the federal court lacked jurisdiction to hear the Title VII claims. The company alleged, for the first time, that it had fewer than 15 employees during the relevant time period. After confirming that defendant had fewer than 15 employees, and thus too few for Title VII coverage, the trial judge vacated the judgment and dismissed the action based on lack of federal "subject matter" jurisdiction. The Fifth Circuit affirmed, stating that it was bound by precedent that failure to meet the 15-employee threshold deprived the federal court of jurisdiction to hear Title VII claims.

In reversing the Fifth Circuit decision, the Court adopted a bright-line rule that a threshold limitation on a statute's scope will only be treated as jurisdictional if Congress clearly labels it as such. The Court noted that whether the 15-employee requirement determines federal court jurisdiction or is merely an element of a plaintiff's Title VII claim has important consequences. For example, federal court jurisdiction cannot be waived, and federal courts have an independent obligation to determine whether it exists. If federal court jurisdiction depends on disputed facts, the trial judge is authorized to review the evidence and resolve the dispute on her own, the court said.

In contrast, the jury resolves contested facts regarding an element of a claim for relief, the Court said. In addition, when a federal court finds that it lacks jurisdiction, the court must dismiss the complaint in its entirety, including, as here, state-law claims that were fully tried by a jury and determined on the merits, the Court said. When, however, a federal court dismisses a federal claim for lack of proof, the court generally retains discretion to exercise supplemental jurisdiction over the state-law claims. The Court concluded that, in light of the "unfair[ness]" and "waste of judicial resources" entailed in tying the 15-employee threshold to federal subject-matter jurisdiction, it was the "sounder course" to refrain from constricting federal court jurisdiction in Title VII cases and to "leave the ball in Congress' Court."

B. Pregnancy Discrimination Act Does Not Apply Retroactively to Pre-1979 Pregnancy-Related Leaves of Absence.

In Hulteen v. AT&T Corp., 441 F.3d 653 (9th Cir. 2006), plaintiffs brought claims under Title VII and the Employee Retirement Income Security Act, alleging that defendant's "Net Credited Service" ("NCS") date system, which is used to determine eligibility for and the amount of pension, early retirement and other benefits, discriminated against women who took pregnancy leave prior to the enactment of the Pregnancy Discrimination Act of 1978 ("PDA").

Specifically, they contended that because the benefits plans maintained prior to the PDA by AT&T's predecessor, PT&T, did not fully credit pregnancy-related leave in computing a worker's NCS date—the employee's original hire date as adjusted for periods of leave for which no service credit was allowed—they did not or will not receive the full benefits to which they otherwise would be entitled. The trial court granted plaintiffs' summary judgment motion on their Title VII claims because it considered itself bound by a prior Ninth Circuit ruling that applied the PDA retroactively.

On defendant's appeal, the appeals court determined that it was not bound by the prior ruling because it is inconsistent with a later United States Supreme Court's decision that established a "default rule" against the retroactive application of a

statute in the absence of a clear expression of congressional intent to the contrary. Thus, the prior Ninth Circuit decision is no longer binding circuit precedent, the court held. The appeals court also noted that, unlike the case relied on in the prior decision, which held that each new paycheck delivered by the employer for the same discriminatory reason was a fresh wrong occurring after the PDA's enactment, there is no ongoing "pattern or practice" to be pointed to, and no current continuing violation here. "The effect of [the employer's] initial accounting method is felt only at the end point, when retirement and other specific benefits are finally calculated based on those initial actions," the court said. Without an act of alleged discrimination that occurred after 1979, plaintiffs only could state a valid claim if the PDA applied retroactively, which it does not, the court said.

The court also rejected plaintiffs' alternative argument that, as applied to them, the NCS system was facially discriminatory and thus each application of the NCS system to calculate their benefits was a new act of pregnancy bias under the PDA. The problem with plaintiffs' position is again that it necessarily depends on a retroactive application of PDA, the court said.

C. Employers Can Avoid Trial if They Took Steps to Prevent and Remedy Harassment and the Employee Did Not Take the Opportunity to Report and Correct the Situation.

The vast majority of sexual harassment claims are filed by women, although men also are protected by law from unwanted sexual advances. In one of the rare cases filed by a man, the Ninth Circuit recently affirmed the principle that an employer may get rid of such a claim without a trial.

In Hardage v. CBS Broadcasting, Inc., 427 F.3d 1177 (9th Cir. 2005), plaintiff, an advertising account executive, claimed that he had been subjected to unlawful sexual harassment and retaliation under Title VII. Plaintiff had expressed general concerns to his immediate supervisor about the inappropriate conduct of his station manager toward him, but did not provide specifics. The supervisor promptly contacted an executive vice president, who in turn called plaintiff. A representative from the Human Resources department then contacted plaintiff who told him that the manager had made unwanted sexual advances that were denied. He was uncomfortable with the situation, and the manager had lost her temper and was jeopardizing the success of the team. Plaintiff acknowledged that he did not share any of the "so-called gory details" of the harassment. The HR representative offered to talk with the manager without disclosing plaintiff's identity, but plaintiff asked him not to. When the HR representative followed up later, plaintiff told him that there had been no further events with the manager and that he still wanted HR to refrain from intervening.

Around the same time, plaintiff's direct supervisor began to call plaintiff's job performance into question and also admonished him for insubordination, after which plaintiff acknowledged that he had been insubordinate. Eventually, plaintiff's supervisor told him in writing that failure to improve could result in termination. Plaintiff believed that the focus on his performance was retaliation because of his refusal to submit to the station manager's overtures and his complaints about her conduct. After submitting a letter of resignation, plaintiff sued defendant.

In analyzing plaintiff's claims on appeal, the Ninth Circuit set forth the defense to claims of sexual harassment. An accused employer may defend against a claim of sexual harassment if the employer (1) has exercised reasonable care to prevent and correct promptly any sexual harassing behavior and (2) can show that the employee unreasonably failed to take advantage of the protective or corrective opportunities available. This defense, often referred to as the Ellerth/Faragher defense, is available to defendants only if there had been no tangible employment action taken against the complaining employee, such as discharge or demotion.

Here, plaintiff had never had any decrease in compensation, hours, title, duties or benefits and had chosen to quit. Although plaintiff claimed that he had been constructively discharged, the court concluded that he could not show that he had been forced to quit because of intolerable and discriminatory conditions. The court then observed that defendant had established an anti-harassment policy with which plaintiff was familiar. That was sufficient to establish the "preventative" part of the Ellerth/Faragher defense, the court said.

The court rejected plaintiff's claim that defendant could not make out "the corrective" part of the test, that it had taken prompt corrective measures in response to his reports. The court noted that defendant employer had responded to plaintiff's complaint. The HR representative offered to intervene, but was rebuffed by plaintiff.

Under these circumstances, the appeals court concluded that plaintiff had failed to avail himself of the remedies that the company offered and upheld the dismissal of his claim. The court subsequently filed an amended opinion noting that the mere fact that the employee told the employer not to take any remedial action may not always relieve the employer of the obligation to do so. Here, however, it is uncontested that plaintiff did not want defendant to take further action, and that plaintiff's wishes were not insincere or uninformed. Moreover, plaintiff did not disclose the details of the harassment, so defendant had no way to know of its severity. Hardage v. CBS Broadcasting, Inc., 436 F.3d 1050 (9th Cir. 2006).

IX. RACE DISCRIMINATION

A. Employer's Use of the Term "Boy" When Addressing an African-American Employee Was Possible Evidence of Discrimination, Even Without a Racial Designation.

The United States Supreme Court in Ash v. Tyson Foods, Inc., 126 S. Ct. 1195 (2006), held that, even absent a racial designation, an employer's use of the term "boy" when addressing an African-American employee is possible evidence of racial discrimination. The Court's decision reversed a decision by the United States Court of Appeals for the Eleventh Circuit, which held that "[w]hile the use of 'boy' when modified by a racial classification like 'black' or 'white' is evidence of discriminatory intent, the use of 'boy' alone is not evidence of discrimination." The Supreme Court stated that "[a]lthough it is true the disputed word will not always be evidence of racial animus, it does not follow that the term, standing alone, is always benign. . . . Insofar as the Court of Appeals held that modifiers or qualifications are necessary in all instances to render the disputed term probative of bias, the court's decision is erroneous."

The Supreme Court said the Eleventh Circuit also erred in articulating the standard for determining whether the employer's asserted nondiscriminatory reasons for defendant's hiring decisions were a pretext for discrimination. In finding that plaintiffs' evidence regarding their job qualifications was insufficient to establish pretext, the Eleventh Circuit held that pretext can be established only when the disparity in qualifications is so apparent "as virtually to jump off the page and slap you in the face." Finding the slap-you-in-the-face standard to be "unhelpful" and "imprecise," the Court found that qualifications evidence may suffice, at least in some circumstances, to show pretext, and sent the case back to the Eleventh Circuit for further consideration.

The case stemmed from race discrimination claims by two black superintendents at a poultry plant. In 1995, when both were rejected for shift manager positions in favor of two white employees, they sued under Title VII. In seeking Supreme Court review of the decision, Ash argued that the word "boy" in addressing an adult African-American man is "one of the most infamous racial epithets that continues from the era of Jim Crow." In arguing against review, the employer responded that the term "can be used in a manner that suggests racial animus by the speaker," but that in this case, there was no evidence that the manager—who although "rude and curt in his dealings with both African-American and Caucasian employees"—had ever used racial epithets.

B. Circumstantial Evidence Need Not Be Better Than Direct Evidence to Withstand Summary Judgment on Race Discrimination Claim

In Cornwell v. Electra Central Credit Union, 439 F.3d 1018 (9th Cir. 2006), the Ninth Circuit reversed a district court's grant of summary judgment to defendant on the ground that plaintiff had not produced "specific and substantial evidence" that race discrimination was the reason for his demotion or termination, or that defendant's stated reasons for its actions were false. The appeals court held that plaintiff, an African-American executive, could go forward with his Title VII claim that he was demoted because of his race because, in the context of summary judgment, "Title VII does not require a disparate treatment plaintiff relying on circumstantial evidence to produce more, or better evidence than a plaintiff who relies on direct evidence," the court said. In its ruling, the court expressed its disapproval of a prior Ninth Circuit decision in Godwin v. Hunt Wesson, Inc., 150 F.3d 1217 (9th Cir. 1998). In Godwin, the court held that if a plaintiff relied on circumstantial evidence, that evidence must be "specific" and "substantial" to survive summary judgment. Relying on the United States Supreme Court decision in Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003), the court determined that a Title VII plaintiff may rely successfully on either circumstantial or direct evidence to defeat a motion for summary judgment.

The appeals court agreed with the trial court that plaintiff presented a prima facie case of race discrimination. It also agreed that defendant offered a legitimate, nondiscriminatory reason for demoting plaintiff—that the company wanted him to focus on correcting problems in its lending business. However, the court disagreed with the district court's conclusion that plaintiff did not produce sufficient evidence to raise a question whether defendant demoted plaintiff because of his race. The court found that the record would permit a jury to conclude that a new chief executive officer treated plaintiff differently because of his race. Plaintiff was the only African-American member of defendant's management team, and he was the only one the CEO demoted. Between the CEO's arrival and plaintiff's demotion three months later, the CEO excluded plaintiff from management meetings that involved topics within his responsibility. The court said that the fact that the CEO promoted a less experienced white employee to manage defendant's offices, formerly managed by plaintiff, also could support a jury's conclusion that the company's explanation for the demotion was a pretext for discrimination.

X. DISCRIMINATION BASED ON SEXUAL ORIENTATION

A. Amendments to Washington Law Against Discrimination Prohibit Sexual Orientation Discrimination in Employment.

Amendments made by the 2006 Washington Legislature to the Washington Law Against Discrimination ("WLAD") prohibit sexual orientation discrimination in employment and other contexts. The amendments are effective June 8, 2006, unless delayed due to the referendum process.

The amended law defines "sexual orientation" broadly to include "heterosexuality, homosexuality, bisexuality, and gender expression or identity." The phrase "gender expression or identity" means "having or being perceived as having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth."

The prohibition on sexual orientation discrimination will apply to all aspects of employment currently covered by the WLAD, including recruiting advertisements or job postings, application forms or preemployment inquiries, hiring, discharge, and compensation or other terms and conditions of employment. "Terms and conditions of employment" include workplace harassment based on sexual orientation. Sexual orientation also will be a prohibited basis for discriminating against someone in other business relationships like independent contractors or vendors.

The amendments specifically state that they do not "modify or supersede state law relating to marriage." But the amendments do not expressly speak to the issue of welfare and fringe benefits that involve marital status or the issue of benefits for domestic partners. The amendments clarify that they do not require employment goals or quotas relating to sexual orientation. All of the remedies of the WLAD, including lost wages, emotional distress damages, and attorneys' fees, are available to employees who prevail in sexual orientation discrimination cases.

A referendum repealing the amendments prohibiting sexual orientation discrimination has been proposed. If, by June 8, 2006, enough signatures are gathered to place the referendum on the next general election ballot, then the operation of the amendments will be suspended until the election. If the referendum is defeated, the amendments will be effective immediately after the election.

XI. DISABILITY DISCRIMINATION

A. Employer's Refusal to Reinstate Former Employee With Mental Disability Violates the ADA, Despite His Violent History.

In Josephs v. Pacific Bell, 2006 WL 903224 (9th Cir., April 10, 2006), plaintiff applied for a service technician job which entailed unsupervised telephone installation and repair at customers' homes. On the defendant's application form, plaintiff answered "no" to a question of whether he had been convicted of felony or misdemeanor. When defendant subsequently obtained his criminal history, plaintiff was terminated for lying on his application. The background check revealed that plaintiff had been arrested for attempted murder of a quadriplegic friend, found not guilty by reason of insanity, and later convicted for a misdemeanor battery on a police officer. Further investigation revealed that plaintiff had been committed to a state mental hospital, where he spent two and a half years.

Plaintiff, who had been performing well on his job before the discharge, filed a union grievance. Defendant denied the grievance at each prescribed step, officially confirming that plaintiff's discharge was based on the false statement on the application, but also acknowledging concerns about letting someone with plaintiff's "background" work unsupervised in customers' homes. When the union suggested reinstatement to a job not requiring customer contact, defendant indicated that it was "not going to bring someone like that back . . . [, that it] had an image to uphold." Plaintiff later filed a disability discrimination lawsuit under the Americans with Disabilities Act ("ADA").

At trial, plaintiff detailed the mental health problems that lead up to the attempted murder and his commitment to the state mental hospital, his treatment and recovery, and his successful employment with another utility before being hired by defendant. In addition, plaintiff presented evidence that defendant's motivation for firing and refusing to reinstate him was that it regarded him as mentally disabled.

For example, although it previously had reinstated three other employees who had lied about their criminal records after they had their records expunged, defendant refused to allow that with plaintiff. When the union asked why, a manager said that the other employees had not spent time in a "mental ward" and that defendant could not afford to have people out there who had been released from a mental institution. The jury determined that defendant's firing of plaintiff was not discriminatory, but found that the company had refused to reinstate him because it regarded him as disabled in violation of the ADA.

On appeal, defendant argued that its refusal to reinstate plaintiff should not be analyzed separately from the decision to fire him. The jury had found plaintiff's firing nondiscriminatory, and the company urged that its refusal to rehire him was in essence the same decision. Although the two actions might not be separated in many cases, the Ninth Circuit held that a refusal to rehire could be considered separately if it involved "new elements of unfairness, not existing at the time of the original violation." In this case, defendant had fired plaintiff for the false statements on his employment application. Only during the grievance procedure seeking reinstatement did company managers state concerns about his mental health history. Under such circumstances, the refusal to rehire was properly deemed a separate claim.

XII. UNION RIGHTS AND EMPLOYEES

A. Employer Violated Federal Labor Law by Subcontracting Work on the Eve of an Election Deciding Union Representation.

In Healthcare Employees Union Local 399 v. NLRB, 441 F.3d 670 (9th Cir. 2006), the Ninth Circuit overturned a National Labor Relations Board ("NLRB") decision in favor of defendant hospital, holding that there was insufficient evidence to support the NLRB's finding that anti-union animus was not a motivating factor in defendant's decision to subcontract out the work of respiratory care ("RC") workers two weeks before an election to decide whether they wanted union representation.

Plaintiff began organizing defendant's technical employees in early 1999. RC workers made up about 25% of the employer's technical staff. Most of the RC employees were pro-union and many played an active role in organizing employees in other departments. When the union distributed a flyer stating it was a few weeks away from filing a petition for a representation election, RC managers met eight days later to discuss subcontracting. They received authorization the following day to investigate potential contractors.

In late December 1999, after RC workers collectively protested the implementation of new overtime rules, the hospital's president approved the subcontracting plan and, five days later, an RC manager announced the decision to outsource their work in approximately 30 to 60 days. The union filed an election petition, and the election was scheduled for February 18, 2000. The hospital received a joint proposal from two companies, which it approved on the same day it was received, and on February 1, 2000, announced that effective February 5, 2000, one of the contractors would directly employ the RC workers. The union filed an unfair labor practice charge alleging the hospital violated federal law by subcontracting out the RC department work to prevent the RC employees from voting in the election.

An administrative law judge ("ALJ") found that the hospital knew that the RC employees were the "core" of the organizing drive, that the timing of the subcontracting was "suspicious" and that the asserted business justification appeared to be a fabrication. However, based on evidence that the subcontracting had largely solved long-standing performance and administrative problems in the RC department, the ALJ concluded that the hospital would have contracted out the work even in the absence of the union organizing activity. The NLRB summarily affirmed the ALJ's findings.

In determining whether an employer who has subcontracted work has violated the National Labor Relations Act, protected conduct, such as union organizing, must be shown to have been a motivating factor in the employer's decision. The employer then has the opportunity to show that it would have made the same decision even in the absence of the protected conduct. Noting that the motive can be shown through direct and circumstantial evidence, the appeals court found that, in this case, "[c]ircumstantial evidence of anti-union animus is compelling." There was ample evidence of the hospital's knowledge of union activities, and the inference of anti-union animus raised by the timing of the hospital's decision to subcontract was "stunningly obvious," the court said.

The court held that the ALJ erred in relying on evidence of the RC department's improved conditions to conclude that defendant was not motivated by anti-union animus in subcontracting out the department. Whether the business decision turns out to be good or bad is irrelevant, the court said. Instead, the crucial issue is whether the employer actually was motivated by the cited business reasons. In light of the strong evidence of anti-union bias, the court concluded that the ALJ improperly credited evidence of post-subcontracting improvements in the RC department as a basis for dismissing the case.

B. Unions Need Not Obtain Affirmative Authorization Before Using Nonmembers' Agency Fees for Political Purposes.

While union membership is voluntary, a collective bargaining agreement may require both member and nonmember employees of a bargaining unit to contribute to the union for costs related to collective bargaining. In State ex rel. Public Disclosure Commission v. Washington Education Ass'n, 130 P.3d 352 (Wash. 2006), the Washington Supreme Court invalidated on constitutional grounds a state law requiring unions to obtain "affirmative authorization" from nonmembers before using any part of their cost contributions, or "agency" fees, for political purposes. Enacted in 1992 as part of a voter initiative, the Fair Campaign Practices Act ("Act") provides, among other things, that a union may not use nonmember agency fees for political purposes "unless affirmatively authorized" by the nonmember employees.

It was the practice of the Washington Education Association ("WEA") to notify nonmembers of their right to receive a rebate of that portion of their fees spent by the union on political activities. WEA's "opt-out" process was intended to comply with the approach established by the United States Supreme Court in Chicago Teachers Union—Local No. 1 v. Hudson, 475 U.S. 292 (1986). After a complaint was filed with the Washington Public Disclosure Commission, the state attorney general sued WEA alleging violation of the Act.

In its decision, the court observed that the First Amendment protects both the freedom to associate for the purpose of advancing beliefs and ideas and the right not to be compelled to support political or ideological causes with which one disagrees. The Supreme Court balanced these competing rights by adopting an approach that accommodates the dissenting nonmembers by providing an "easy and prompt method" of opting out and recouping any portion of fees which might otherwise be used for political purposes. At the same time, the Court made it simple for one who supports the union's political causes, whether member or nonmember, to assert that person's right to associate.

Here, in contrast, the Act's "affirmative authorization" requirement upsets the balance of members' and nonmembers' constitutional rights by "presuming the dissent of nonmembers" and shifting to the union "the burden of the nonmembers' rights," which inhibits the political speech of the union, members, and supporting nonmembers, the court found. The court determined that the Act's burden on WEA's constitutionally protected expressive activity was not justified by a compelling state interest, as there was no indication that WEA was compelling nonmembers to support political activities or preventing them from asserting their own First Amendment rights. Additionally, the court concluded that any compelling interest in protecting the rights of dissenters could be met by less restrictive means. The "opt-out" procedure used by WEA was a constitutionally permissible alternative that adequately protected both the union and the dissenters, the court said.

XIII. PUBLIC EMPLOYERS

A. Administrative Decisions May Not Block Employees' Lawsuit, if Standard of Proof in Administrative Proceeding Was Different Than It Would Be in Civil Litigation.

In Dias v. Elique, 436 F.3d 1125 (9th Cir. 2006), the Ninth Circuit considered the question of whether an administrative decision in defendant's favor should block plaintiffs' wrongful discharge lawsuit. Plaintiffs were police officers at the University of Nevada at Las Vegas. Following their termination for allegedly falsifying their time records, an ALJ determined that defendant had "just cause" to terminate and could find no evidence of wrongful motive, as plaintiffs claimed.

Plaintiffs filed a lawsuit claiming wrongful termination, retaliation, and a variety of other claims under state law. Defendant asked the trial court to dismiss the case on the grounds that the ALJ already had decided those issues. The trial court agreed with defendant and dismissed the lawsuit.

On plaintiffs' appeal, the Ninth Circuit considered whether the administrative decision should block their lawsuit. The court noted that state law would control, which the court determined would permit such a block if three factors were satisfied: (1) the issue presented in the prior proceeding was identical to the one issued in the lawsuit; (2) the initial ruling was on the merits and final; and (3) the party against whom the prior ruling was entered was the same as the party in the subsequent lawsuit. The court found that the latter two requirements were met in this case.

However, the first requirement was not met, the court said, because the standard of proof at the administrative hearing was different from what it would be in civil litigation. At the hearing, the ALJ was permitted to uphold the dismissals if he found that defendant's decision was supported by "substantial evidence." In other words, if there was substantial evidence that defendant had a valid reason for the dismissals, the ALJ was not required to engage in a further weighing of the parties' positions. By contrast, a "preponderance of the evidence" standard would apply in the lawsuit. Thus, plaintiffs must be provided an opportunity to persuade a trial judge or a jury that when all the evidence was weighed, they more likely than not were fired because of retaliation or other wrongful motives. The administrative hearing, which focused only on defendant's reasons, did not provide plaintiffs that opportunity. Given the different standards of proof, the Ninth Circuit reversed the trial court's dismissal of the lawsuit.

B. A Prison Nurse Fired Shortly After Raising Concerns About Her Workplace Is Entitled to Trial on Retaliation and Wrongful Discharge Claims

Plaintiff worked at Washington's Monroe Correctional Complex as an "intermittent" nurse. Plaintiff began to have serious conflicts with another registered nurse at the correctional facility. Although plaintiff admitted that the conflict might have stemmed partly from a personality conflict, she also expressed her lack of trust in the nurse, and over the course of the next two months made a series of written complaints to her supervisors about the other nurse's performance, accuracy in maintaining medical records, errors in counting out narcotics, and other workplace misconduct. Just over two weeks after plaintiff gave a letter of concern that she had drafted with other employees to one of her supervisors, she was fired. Although defendant told her that she had been fired because of her unavailability or because all of the intermittent nurses were being fired, she later provided evidence that disputed both contentions.

Plaintiff filed a lawsuit claiming that the prison had deprived her of her free-speech rights by firing her in retaliation for voicing her concerns. In addition, she asserted a claim for wrongful discharge in violation of public policy, claiming that she had been fired for exercising her state and federal rights to participate in self-organization and concerted activities for the purposes of mutual aid and protection among the labor force. Finally, she asserted claims against her supervisors individually for the retaliatory behavior. The trial court dismissed all her claims.

On plaintiff's appeal, the Washington Court of Appeals found that plaintiff's workplace statements were protected free speech because they addressed issues of public concern related to the safety of inmates and employees, prison management, the confidence in public officials, and violation of health care practices. The court went on to weigh her free-speech rights against the government's interests in operating efficiently and found that her letter was not unduly disruptive. Additionally, the court found that the proximity and time between the submission of plaintiff's letter and her discharge was sufficient to allow the case to go forward to trial. Plaintiff's wrongful discharge claim similarly was sufficient to go to trial. Firing an employee for raising workplace and public safety concerns as she did would, if proven at trial, be sufficient to make out such a claim, the court held.

Finally, the court reversed the trial court's dismissal of plaintiff's claims against her individual supervisors. If her letter of concern "was a substantial or motivating factor in the decision to terminate [plaintiff], the Supervisors are not entitled to qualify for immunity" and can be personally liable, the court held.

XIV. SETTLEMENTS

A. Moneys Received in Settling an Employment Law Claim Typically Will Be Deemed "Wages" and Are Subject to Relevant Tax Requirements.

In Rivera v. Baker West, Inc., 430 F.3d 1253 (9th Cir. 2005), plaintiff filed a lawsuit under Title VII and other civil rights statutes against his former employer, claiming that he had been subjected to a hostile work environment because of his race and national origin, and wrongfully discharged, and that the company later provided unfavorable references about him.

As in most federal lawsuits, the parties were required to engage in settlement efforts. They met with a magistrate judge for a settlement conference and reached an agreement that the company would pay plaintiff $40,000 "less all lawfully required withholdings." The company then issued the settlement check to him in the amount of $25,140, having withheld $14,860 for various taxes, including state and federal income taxes. When plaintiff realized he was not going to receive the entire $40,000, he refused to dismiss the lawsuit. Defendant asked the trial court

to enforce the settlement agreement and dismiss plaintiff's claims. The court granted the request, and plaintiff appealed.

In reviewing the case, the Ninth Circuit began with the proposition that the Internal Revenue Code defines gross income as "all income from whatever source derived." Amounts will be excluded from gross income—and are not taxable—only if the individual can show that they fall within a clear exception to the Code's general definition. One exception is for payments made "on account of personal physical injuries or physical sickness." Plaintiff urged the Ninth Circuit to treat the $40,000 within the personal-injury exception because he claimed to have suffered emotional injuries as a result of defendant's treatment. He also argued that even if he did not come within the exception, wages recovered under Title VII should not be subject to withholding.

Both arguments failed. The Ninth Circuit noted that Congress acted several years ago to clarify that damages for emotional distress, unlike those for physical injury, would not be excluded from income. Thus, the appeals court looked to the parties' agreement and the paying party's intent to determine whether the settlement payment was in fact meant to compensate plaintiff for personal physical injuries. The settlement agreement's recognition of withholding suggests that the parties had only back pay in mind, the court said. In addition, defendant's action in treating the entire amount as wages was a clear indicator of its intent.

The Ninth Circuit also rejected plaintiff's claim that back-pay awards under Title VII should not be subject to withholding. Citing rulings from other circuits, the court noted that proceeds from various employment claims have been deemed wages and subject to withholding. If claims arise from the employer-employee relationship, as plaintiff's did with defendant, the proceeds are generally for back pay and lost wages. The fact that the moneys are paid in a settlement context does not change their basic character as wages. The appeals court concluded that plaintiff's lawsuit was properly dismissed by the trial court.