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OBSERVATIONS AND RECENT APPELLATE DEVELOPMENTS IN WASHINGTON STATE EMPLOYMENT LAW©

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The views expressed in this paper are mine and ought not to be attributed to any client or organization with which I am or was affiliated nor should they be attributed to my law firm.

OBSERVATIONS AND
RECENT WASHINGTON APPELLATE
DECISIONS IN EMPLOYMENT LAW

I. OBSERVATIONS

A. Revised And New Pattern Jury Instructions

The WPI sub-committee on employment instructions proposed to the full WPI Committee revised instructions for discrimination claims and new instructions on after acquired evidence, joint employment, independent contractor status and wrongful discharge in violation of public policy.

The sub-committee (Judge Bruce Heller, David Eldred, Kelby Fletcher, Cliff Freed, Jeff James, Beth McIntyre and Becky Roe) met in 2016 to review current instructions and to revise them, where necessary, along with notes on use and comments. The proposed new instructions deal with expanding case law in statutory and common law claims.

B. Discrimination Doesn't Mean Animus

The recent events in Charlottesville, VA led many commentators to discuss discrimination as the equivalent of hatred or dislike [animus] and that those who discriminate are racists or misogynists or supremacists or worse.

Unlawful discrimination is none of this. Rather, it is simply to treat a person adversely due to membership in a protected class. Our Supreme Court addressed this in ***State v. Arlene's Flowers, Inc.,*** 187 Wn.2d 804, 389 P.3d 543, *cert. petition filed* (No. 17-108, July 21, 2017). A business owner in a public accommodation case asserted that she did not have any animus toward gay people but that her religious beliefs prevented her from providing certain services to them.

In footnote 4, the unanimous opinion by Justice Gordon McCloud stated, "[w]e have already addressed this question of an animus requirement with regards to the WLAD [RCW 49.60] and have held that it contains no such requirement." Footnote 5 stated, "*See also Blackburn v. Dep't of Social & Health Servs*. 186 Wn.2d 250, 258-59, 375 P.3d 1076 (2016) (discrimination on basis of race occurs even where racially motivated staffing decision might have been based on benign reason.)". See Part II. C, infra.

C. Washington's "Long Proud History" As A Pioneer In Protecting Worker Rights

By now, it should not surprise any practitioner that Washington statutes and Washington courts will go beyond what federal statutes and courts provide in creating employer liabilities toward their employees.

The Court in ***Drinkwitz v. Alliant Techsystems*** observed that this state enacted a requirement for an eight hour work day in 1899 and enacted a minimum wage statute in 1913, 25 years before the FLSA. 140 Wn.2d 291, 300, 946 P.2d 582 (2000). That led to the observation that this state has a "long and proud history of being a pioneer in the protection of employee rights."

The state Minimum Wage Act, RCW 49.46, differs from the FLSA in many respects, chief among them the higher minimum wage.

The Washington Law Against Discrimination, RCW 49.60, includes this statement of policy at section .010: "The legislature hereby finds and declares that practices of discrimination against any of its inhabitants . . . .are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state." There is nothing similar in a federal anti-discrimination statute. And, unlike any declaration in a federal law, the Washington legislature stated, "this chapter shall be construed liberally for the accomplishment of the purposes thereof." RCW 49.60.020.

In its recent unanimous decision in ***Zhu v. North Central Educational Service District - ESD 171***, ___ Wn.2d ___, 2017 WL 5181183 (Nov. 9, 2017) the Court again observed the "WLAD's provisions must be given 'liberal construction.'" Id. at ¶ 13.

In his opinion for the Court in ***Grimwood v. University of Puget Sound***, 110 Wn.2d 355, 753 P.2d 517 (1988), Justice Brachtenbach wrote, "While [ ]federal cases are a source of guidance, we bear in mind that they are not binding and that we are free to adopt those theories and rationale which best further the purposes and mandates of our state statute." Id. at 361-62. We see that carried out in ***Blackburn***, See Part II. C, infra where the Washington court reached a result which likely would not occur under a federal claim.

Indeed, under the WLAD, independent contractors are covered due to the decision in ***Marquis v. City of Spokane***, 130 Wn.2d 97, 922 P.2d 43 (1996).

A practitioner who does not take into account the differences between state and federal remedial employment statutes and court decisions does so at her peril. And this, of course, includes advice to clients and briefing to the courts.

II. WASHINGTON SUPREME COURT

A. *Cooper v. Alsco, Inc.*

186 Wn.2d 357, 376 P.3d 382 (2016)
Minimum Wage Act; exemptions, Retail Service Establishment.

A trial court summary judgment in favor of employees bringing a minimum wage claim is reversed. A unanimous Supreme Court decision held that the employer was a "retail service establishment" (RSE) under RCW 49.46.010(6) and exempt from overtime.

The RSE exists if more than half of the employee's income is from commissions "on goods or services" and the "regular rate of pay is in excess of one and one half" the minimum wage. If those conditions are met, overtime is not required. ¶ 11.

The employer provided various goods and services to other businesses. ¶ 3. The employees contended that another statute, RCW 49.46.010(6), defining an RSE as one that sells

more than 75% of goods or services "not for resale" and is also "recognized as retail sales or services in the particular industry," prevented this employer from claiming the RSE exemption. In granting summary judgment to the employees, the trial court reasoned that the sales to businesses under long term contacts were not retail in nature. ¶ 13.

The opinion observed that the retail sales tax was collected by the employer. ¶¶ 15-18. This seems to be determinative as to employer's status under RCW 49.46.010(6).

Cases and regulations under the FLSA relied upon by the employees were found to be supplanted by later amendments to the statute and regulations. ¶¶ 19-27

B. ***Arnold v. City of Seattle***
185 Wn.2d 510, 374 P.3d 111 (2016)
RCW 49.48.030; "action," award of fees.

(The author of these materials was chair of a committee which filed an *amicus* brief in support of plaintiff.)

When is resolution of a dispute an "action" for purposes of applying attorney fee-shifting under RCW 49.48.030? This decision for eight justices, Chief Justice Madsen concurring only in the result, gives a broad answer.

Plaintiff was demoted in her employment by the City of Seattle. She appealed to the city's Civil Service Commission and prevailed with an award of back pay in a decision by a hearing examiner. The hearing examiner would not award attorneys' fees due to a provision in the city's municipal code stating that an employee may be represented "by a person of his or her choice" but that must be "at his/her own expense." ¶¶ 3, 5.

In a separate Superior Court action, the employee sought an award of fees and was rebuffed. The Court of Appeals reversed and the Supreme Court affirmed.

The statute, RCW 49.48.030, allows a successful claimant in an "action" for wages to recover fees.

Because "the hearing [with the hearing examiner] resembled a judicial proceeding in many ways" fee-shifting was appropriate. ¶ 23. This includes the ability to call and cross-examine witnesses, etc. Id. And RCW 49.48.085, added in 2006, refers to the "right of any employee to pursue any judicial, administrative or other action . . . ." ¶ 25

The municipal code provision, while applicable to the city's civil service commission, would not apply to the separate action brought in superior court, even when that case is based on the result through the commission. ¶ 31. And the city's ordinance conflicts with the state statute in any event because "it forbids what state law permits." ¶ 39.

C. ***Blackburn v. State***

186 Wn.2d 250, 375 P.3d 1076 (2016)

RCW 49.60; disparate treatment, adverse action.

(The author of these materials was chair of a committee which filed an amicus brief in support of plaintiffs.)

African-American employees of a state hospital were sidelined for a weekend from attending a delusional patient who threatened violence if they attended him. The employees were assigned other work during that same weekend. There is no evidence of wage loss or change in a job position.

Superior Court determined that the re-assignment for a weekend was not severe enough to be actionable as disparate treatment because safety was the overriding factor in the decision. As for harassment, the reassignment was not so severe or pervasive as to constitute a racially hostile work environment.

A unanimous Supreme Court determined that the disparate treatment claim was established, reversed the trial judge and affirmed on the harassment claim. ¶ 10.

The findings of fact of the trial judge were not effectively challenged. ¶ 13.

But the "race-based directives affected staffing decisions in such a manner as to constitute discrimination in 'terms and conditions of employment because of . . . .race . . . .'" ¶ 18. However, the Court did not discuss how this constituted a "tangible adverse action." See, *e.g*., WPI 330.01.

There was "no valid legal justification for its discrimination." ¶ 19. Without any discussion of why, The Court's opinion states that the Bona Fide Occupational Qualification (BFOQ) exception found in RCW 49.60.180(1) does not apply. And even it did, "which is doubtful, the state waived it." ¶ 20.

Certainly, the mere preference of a patient (or customer) for an employee of a particular race or gender would not allow an employer to accommodate that preference. But here, should the impaired status of the patient ought to be taken into account, at least for the purpose of examination of how that status is to be disregarded? One can imagine, for example, disregarding that status and an injury to the employee(s). Could that then result in a negligent supervision claim in addition to the industrial insurance claim?

This "doubtful" conclusion that a BFOQ defense did not exist is troubling and deserved examination. It is undisputed that the patient was admitted to the hospital after a criminal trial resulted in an adjudication of not guilty by reason of insanity. ¶ 4. The patient was delusional and was often restrained and was making credible threats against an African American attendant. ¶¶ 4-5. Failing to discuss why it did not cheapens jurisprudence under RCW 49.60.

The workplace harassment claim was not established because it was not sufficiently pervasive as to alter the terms and conditions of employment. ¶ 21. "[T]he staffing decision over the course of a single weekend did not rise to the level of severe or pervasive harassment." ¶ 22.

The conclusion of the unanimous court regarding harassment does not seem to mesh with the notion that there was a tangible adverse action taken against the employees justifying relief under the disparate treatment claim.

The omissions in this opinion are bothersome.

D. ***Dep't of Labor and Industries v. Lyons Enterprises, Inc.***
185 Wn.2d 721, 374 P.3d 1097 (2016)
Industrial insurance; applicability to franchisees; RCW 51.08.180.

A master franchisor was liable for industrial insurance act (IIA) premiums because some franchisees that did not employ subordinates met the IIA definition of "worker" at RCW 51.08.180 and not otherwise exempt under RCW 51.08.180.

The franchisor obtained cleaning contracts with third parties and offered performance of the contracts to its franchisees. The franchisor owned the contract and directed from whom franchisees obtained equipment and supplies. ¶ 7. While the franchisee might supply the labor, the franchisor received 15% of the contract price. ¶ 35.

The Department assessed premium deficiencies against the franchisor with respect of those franchisees who had no subordinate workers. The definition of "worker" found at RCW 51.08.180 includes individuals "working under an independent contract, the essence of which is his or her personal labor . . . ." ¶ 28.

Despite the franchisor/franchisee relationship and contract, the franchisees who themselves did not employ subordinates were workers of the franchisor for which IIA premiums had to be paid. ¶¶ 28-30. The "reality" of the relationship was that the franchisees were 'workers' regardless of the contractual relationship. ¶ 36.

E. ***Newman v. Highland School District***
186 Wn.2d 769, 381 P.3d 1188 (2016)
Attorney-client privilege; applicability to former employees.

In a 5-4 decision, the majority held that the attorney client privilege does not extend to former employees who are interviewed by counsel for the employer.

This is a must-read for anyone doing investigations, preparing for trial and interviewing former employees.

> Without an ongoing obligation between the former employee and employer that gives rise to a principal-agent relationship, a former

> employee is no different from other third-party fact witnesses to a lawsuit and may be freely interviewed by either party.
>
> * * *
>
> The underlying purpose of the corporate attorney-client privilege is to foster full and frank communications between counsel and the client (i.e., the corporation), not its former employees. This purpose is preserved by limiting the scope of the privilege to the duration of the employer-employee relationship.
>
> Id. at ¶¶ 16-17 (citations omitted).

A different rule obtains in the federal courts. See, *e.g.,* ***Admiral Insurance Co. v. U.S. District Court,*** 881 F.2d 1486, 1493 (9th Cir. 1989) (privilege extends to former corporate employees).

This dichotomy places counsel in a difficult position if there is litigation that could be brought in a federal court. For example, imagine a case begun in federal court but later remanded to state court due to lack of federal jurisdiction. If counsel in the federal case contacted former employees under the assumption of the existence of a privilege, would the state court later have to recognize that assertion?

F. ***Zhu v. North Central Educational Service District - ESD 171***
___ Wn.2d ___, 2017 WL 5181183 (Nov. 9, 2017)
RCW 49.60.210, retaliation by potential employer, opposition to employment practice by former employer.

Here, the unanimous Supreme Court determined that a potential employer unlawfully retaliates when it does not hire based upon opposition by the applicant to employment practices of a previous employer.

This is a case of first impression in this state. It is here on certification from the Eastern District of Washington.

Plaintiff, a US citizen but born abroad, was formerly employed by a school district. He was fired but reinstated in an arbitrator's decision. ¶ 3. He brought a claim of race discrimination in US District Court. The case settled and he resigned from the district. ¶ 4. He then applied for a position with Defendant and was one of three finalists. Members of the hiring committee were aware of the earlier lawsuit against the former employer. Plaintiff was not hired and he claims the person who was hired was less qualified. ¶ 5.

Plaintiff's lawsuit against this Defendant is based on unlawful retaliation under RCW 49.60.210. He prevailed in a jury trial. ¶ 6. Defendant moved for a new trial or, alternatively, for certification to the Supreme Court as to whether the claim was cognizable under the statute.

The "plain language" of the statute dictated a result in Plaintiff's favor. ¶¶ 13. The anti-retaliation statute applies here if the Defendant is an "employer," the Plaintiff is a "person," the refusal to hire is discriminatory and the underlying activity is "opposition to practices forbidden by WLAD . . . " ¶ 14.

Defendant asserted that RCW 49.60.210 only applies to a current employer, not a prospective one. ¶ 20. But the definition of "employer" at RCW 49.60.040(11) is very broad - "any person acting in the interest of an employer . . . .." This "clearly includes prospective employers . . . ." ¶ 22.

And, the statute also prohibits retaliation by employment agencies and unions which do not have an employment relationship with a possible plaintiff. ¶ 30.

"If prospective employers are allowed to engage in retaliatory refusals to hire, a reasonable employee might well be dissuaded from opposing discriminatory practices for fear of being unofficially "blacklisted" by prospective future employers." ¶ 30. [See also the Washington statute against blacklisting at RCW 49.44.010.]

Any doubts about the plain meaning of the statute are undercut by the legislative command to construe the WLAD liberally. RCW 49.60.020. ¶ 41.

G. ***Mikkelsen v. Public Utility District No. 1 of Kittitas County***

___ Wn.2d ___, 2017 WL 4682306 (Oct. 19, 2017)

RCW 49.60, age/gender bias; *McDonnell-Douglas* burden shifting; replacement by person outside protected class not required; Employee handbooks, ambiguities of employer writings creating for-cause termination requirement.

(A partner of the author of these materials argued the case for defendant.)

Summary judgment in the trial court, affirmed at the Court of Appeals, is partially reversed.

Plaintiff was a manager of the Defendant and reported to various general managers during her tenure. She was offered the job of general manager but declined and served as an interim general manager. During that time, she adopted a Corrective Action Policy adapted from a neighboring utility. ¶¶ 4-5.

A new general manager, a male, was hired. Over time, Plaintiff found that she was disregarded by being excluded from management meetings and no longer tasked with being acting general manager in his absence. ¶ 9. Plaintiff, in her lawsuit for gender and age bias, claimed that the general manager referred to women at the office as 'girls' and that the general manager "would regularly rearrange his genitals [in his pants] when was around her or sitting in front of her."¶ 10.

Plaintiff conducted a survey, with a Board member's approval, of the employees to learn their views about the work environment. ¶ 12. The results were sent to the Board members

and not to the general manager. When he learned of this, he accused Plaintiff of going behind his back and fired her because he felt the survey instrument was designed in a way to make him look bad. ¶ 14. Plaintiff was 57 when she was fired and was replaced by a woman aged 51. ¶ 16.

This unanimous decision by Chief Justice Fairhurst observed that "[s]ummary judgment for an employer is seldom appropriate in employment discrimination cases because of the difficulty of proving discriminatory motivation." ¶ 23.

In applying the ***McDonnell-Douglas*** burden shifting, it is not necessary to establish that a plaintiff was replaced by someone outside of his or her protected group. ¶ 24. What follows is a lengthy examination of federal and state appellate decisions about this. ¶¶ 25-32.

There was evidence, even from Plaintiff, that the relationship she had with the general manager was dysfunctional. ¶ 34 That would be a legitimate, non-discriminatory reason for a termination. Id. However, the evidence, taken as a whole, demonstrated that the breakdown in the relationship occurred because of Plaintiff's gender. ¶ 39. She was excluded from certain managerial meetings and the general manager "spoke over her during meetings" and denigrated her in front of subordinates. ¶ 37.

Summary judgment on the sex discrimination claim was improper.

Dismissal of the age discrimination claim was appropriate. Plaintiff asserted that the general manager once referred to some employees as "old and stale." ¶ 39. This ordinarily would be inadmissible as a 'stray comment'. However, ***Scrivener v. Clark College***, 181 Wn.2d 439, 334 P.3d 541 (2014), did away with that and allowed such evidence.

No mention why ***Scrivener*** was not followed. Here, the Court noted that the testimony about "old and stale" "suggests that [general manager] was simply marveling that some employees had worked for the same employer for so long" and that there was no evidence that older workers were treated differently. That seems a premise in search of a foundation given the reluctance to grant summary judgment in discrimination cases and ***Scrivener's*** abandonment of stray comments.

Plaintiff also claimed she was not an 'at-will' employee due to the written corrective action policy. That policy granted discretion to impose various disciplinary actions but it emphasized that employees "should be treated fairly." ¶ 41. A stated goal of the policy is to "correct unsatisfactory behavior or performance." ¶ 44. A disclaimer referred to the policy as providing guidelines only and that they do not provide any guarantee of employment. ¶ 48.

The policy was lengthy "and contains many provisions suggesting the district has broad discretion . . . [b]ut these provisions are at odds with other parts . . . that promise fair treatment and arguably establish a for-cause requirement . . . ."¶ 47.

The fact issue is whether an employee "has a reasonable expectation the employer will follow the procedure based upon the language used in stating the procedure and the pattern of practice in the workplace." ¶ 46. Summary judgment for the employer on the claim that Plaintiff was at-will was improper.

> **PRACTICE TIP: In any employment case, counsel for each side must examine employer writings to determine whether they create the sort of ambiguity found in this case. Some policies are so lengthy that they create more problems than they solve.**
>
> **ANOTHER PRACTICE TIP: The decision in this case seems to be at odds with itself. Affirming dismissal of the age bias claim seems inappropriate with the Court's observations about summary judgment and abandonment of the 'stray comment' doctrine. There is something for each side in this decision.**

H. ***Brady v. Autozone Stores, Inc., et al***.
188 Wn.2d 576, 397 P.3d 120 (2017)
Meal break waivers; burden of proof on employer

This is another case certified from a United States District Court. The issue is whether non-agricultural employees or employers have the burden of proving why the employee skipped a meal break otherwise required by WAC 296-126-092.

Employees may choose to waive a meal break. ¶ 5. They may not waive rest breaks. ¶ 5. But waiver of the meal break is an affirmative defense for which the employer has the burden of proof. ¶ 7.

Alternatively, the employer may establish that no violation occurred. ¶ 10. The employee establishes a prima facie case by showing a timely meal break was not provided.

I. ***Killian v. Seattle Schools***
___ Wn.2d ___, 403 P.3d 58 (Oct. 12, 2017)
Duty of Fair representation; limitation period

Here, the Court determined that a duty of fair representation (DFR) claim arising from a public employee collective bargaining agreement has a two year limitation period. The Court rejected Court of Appeals precedent that a six month limitation period applies and likewise rejected the six month limitation period for DFR claims arising under labor agreements subject to the National Labor Relations Act.

The majority opinion by Justice Madsen reasoned that the six month limitation period at RCW 41.56.160(1) and RCW 41.80.120(1) only applies with respect of complaints to PERC of unfair labor practices. ¶¶ 21-32. The majority determined there were "sound reasons" to depart from the six month limitation period for DFR civil actions under the NLRA set out in

DelCostello v. Int'l Brotherhood of Teamsters, 462 U.S. 151, 165-71, 103 S. Ct. 2281, 76 L. Ed. 2d 476 (1983). ¶ 29. "Consistency with federal law is not a persuasive policy rationale . . . ." ¶ 30. This comports with what the Court said in ***Grimwood v. University of Puget Sound***, Part I.C, *supra*, about adherence to federal precedent with respect of anti-discrimination legislation.

Chief Justice Fairhurst concurred on the basis that a DFR claim "is a judicially imposed standard, not a statutory right." ¶ 35. PERC does not have jurisdiction over such a claim, only the courts do. Id. Thus, it is appropriate to impose the catch-all two year limitation period found at RCW 4.16.130.

Justice Gordon McCloud dissented in part.

J. ***Allen v. Dameron***
187 Wn.2d 692, 389 P.3d 487 (2017)
RCW 49.52.050, .070; evidence of liability; proof of scienter

This is yet another case certified to the Supreme Court from a federal district court.

This decision probably changes what is required to prove a violation of this statute.

In order best to understand the apparent change, start with the concurring opinion by Justice Gordon McCloud in which Justice Gonzalez concurred. She wrote that the statute imposes criminal, and civil, liabilities. ¶ 42. The scienter requirement of the statute is the same regardless of whether civil or criminal liability is sought. This changes what is required by proof.

No longer is there automatic liability when a wage is not paid subject to an affirmative defense of *bona fide* dispute or clerical error. Rather, a plaintiff must prove the defendant willfully withheld a wage with the intent to deprive the worker of wages. The affirmative defenses remain.

The majority, by Justice Wiggins, seems grudgingly to acknowledge the civil/criminal duality of the statute. In footnote 13, the majority stated that neither party "argues that the mental element of [RCW 49.52.050] should be given a narrow construction . . . .As a result, we do not comment here on the proper construction of the mental element . . . ." And, in footnote 15, the majority observed, "[t]he criminal aspect of the statute was not briefed by the parties and is not before us." But the Court did not request supplemental briefing from the parties. RAP 10.1(h). The qualified language used by the majority in its discussion of liability seems contrary to these footnotes. See, *infra*.

Employer's directors put it into Chapter 7 bankruptcy. Before doing so, some corporate officers resigned. The remaining directors decided to pay various non-wage liabilities, including insurance premiums totaling $33,790.08, just before the Chapter 7 filing. ¶ 9. Most employees were terminated and were notified that they would receive their final pay on a payroll date which was the day after the bankruptcy filing. ¶¶ 8, 10. However, that was for wages earned through a date which preceded the filing.

Plaintiff was the interim CFO of the corporation and was not terminated with the filing of the bankruptcy. ¶¶ 3, 8. Between severance pay, accrued paid time off and wages earned before and after the bankruptcy filing, he was owed $78,303.17. ¶¶ 12 and fn. 8. The pay periods for these elements occurred after the bankruptcy filing. But the Court was "concerned with the withholding of earned wages on the date of filing, regardless of whether the established payday date comes after the employer entered bankruptcy." ¶ 21 [Note that the Court's concern was with what was "earned" before the bankruptcy filing.]

The seven justice majority, discussed the remedial nature of RCW 49.52.050. While an unpaid wage may be a preferred claim due to RCW 49.52.010, that only would allow recovery from the estate of the bankrupt. Fn. 11. RCW 49.52.050 instead provides for personal liability to further the legislative intent that employees "recover *all* the wages they have earned." Fn. 12 (Italics in original). .

Because the directors made decisions regarding payment of other liabilities from corporate assets, they are "potentially liable under the statute." ¶ 28. What next had to be decided was whether that class of persons acted willfully. ¶ 29.

The usual analysis would be that absent clerical error or a *bona fide* dispute, willfulness is established and that the inability of the employing entity to pay wages is not a defense.

However, the majority hedges on that, apparently due to the influence of the concurring opinion. "[P]articipation in the decision to file chapter 7 bankruptcy . . . **makes it more likely that an officer may be held liable** . . . because it shows willfulness . . . ." ¶ 29 (emphasis added). "[F]iling a chapter 7 petition **tends to show** their willful withholding of wages . . . . As a result, individuals **may be held liable** for their decision not to pay wages accordingly." ¶ 34 (emphases added).

The majority did not discuss the "clerical error" or "*bona fide* dispute" defenses to willfulness in this part of the decision. It does seem that a defense of "good faith" could now exist with respect to financial distress even if there is no dispute as to the amount of compensation owed to the employee.

The concurring opinion agreed that individuals "may" be personally liable under the circumstances of this case. However, a plaintiff "must still prove the statute's mental element: that the deprivation of wages was done '[w]illfully and with intent to deprive.'" ¶ 39. Because the statute provides both a civil and criminal remedy, the rules regarding intent applicable to other criminal statutes apply. Concurring op. at fn. 1.

For these justices, the employing entity's inability to pay defense cannot be completely rejected due to U.S. Supreme Court precedent outlawing criminalization of inability to pay a fine. ¶ 45.

Assuming that the statute now requires more of a plaintiff, is that consistent with the broad remedial purposes of Washington's employee-friendly employment statutes? See, Part

I.C, *supra*. Or, as seems more likely, is that inherent with a statute which provides both civil and criminal liabilities?

III. WASHINGTON COURT OF APPEALS

A. *Emerick v. Cardiac Study Center, Inc., P.S.*

189 Wn. App. 711, 357 P.3d 696 (2015), *review denied,* 185 Wn.2d 1004 (2016)
Post-employment restraint; equitable tolling of temporal scope; reformation of contract.

This deserves special attention by any practitioner dealing with either side of a post-employment restraint (PER). Most notably the decision deals with a PER substantially modified by Superior Court and ratifies equitable tolling of the temporal scope of the PER until the plaintiff comes into compliance with the modified PER.

This decision is from Division I. However, it follows a remand to Superior Court by Division II, 170 Wn. App. 248, 286 P.3d 689 (2012) (***Emerick I***). We are not favored with an explanation as to why Division I is involved. A call to the clerk's office informed us that Division II is allowing some of its cases to migrate to Division I.

Plaintiff was a shareholder in the Defendant medical practice. To obtain that status he was required to sign a shareholder agreement which contained a PER: no practice of cardiac medicine for five years in Federal Way or all of Pierce County following his departure from the practice. ¶¶ 2-3.

The practice group ended the relationship with Plaintiff in September 2009. Plaintiff sued for a declaration that the PER was invalid. Pierce County Superior Court agreed. Plaintiff then set up a practice a quarter mile away from his former practice in Pierce County. ¶¶ 4-5.

A year after setting up this competing practice, Division II in ***Emerick I***, reversed Superior Court and remanded. On remand, Pierce County Superior Court substantially reformed the PER: It reduced the temporal period to four years starting in September, 2009 and limited the geographic scope to a two mile radius from his former practice. ¶¶ 6-7. The Superior Court also allowed him to practice at any hospital and to treat his former patients. ¶¶ 25-26, 32. However, the four year period was tolled by the twenty months Plaintiff was in compliance with the PER. The remaining 28 months of the PER period would begin only when Plaintiff relocated his practice to conform to the reformed PER. ¶ 41, 47-48. Superior Court awarded fees and costs to the practice group. Plaintiff loses on appeal.

The decision rejects the Plaintiff's argument that material facts were in dispute over whether his practice caused actual harm to the practice group. ¶ 12. Whether there is actual harm and competition "has no bearing on the reasonableness . . . " of the PER. ¶ 13. Rather, the former employer must demonstrate "a protectable interest exists and that [Plaintiff] could pose a threat if not adequately restrained." ¶ 22. "It is the potential to compete—not the actual competition—that make the non-compete necessary." *Id.*

Plaintiff did not establish that the substantially reformed PER would infringe on his ability to practice his specialty or earn a living. ¶ 32. The reformation also takes into account the public interest: he can treat patients in a hospital setting, he can have a practice more than two miles away from the former practice group, and he can see his former patients. ¶¶ 35-37.

As for the temporal scope, Plaintiff claimed that injunctive relief is not available after a PER contract expires. ¶ 43. However, Superior Court reformed the contract and tolled the start of the temporal scope within the five year term of the PER. The equitable tolling was necessary because otherwise, Plaintiff would have used the litigation process to his advantage. ¶ 47.

What is left open is whether a court in Washington could - or should - equitably extend a PER if it does so outside of the contractual temporal period of the PER. The litigation process being what it is, one can easily imagine why this might be tempting. Or are actual damages an adequate - and only - remedy in that circumstance?

B. ***Romney v. Franciscan Medical Group [Romney I]***
186 Wn. App. 728, 349 P.3d 32, *review denied,* 184 Wn.2d 1004 (2015)
Arbitration.

Medical professionals contested the validity of an arbitration provision in their employment contracts. They lose.

Plaintiffs sued in Superior Court on various claims including unpaid wages. They sought to set aside the requirement to arbitrate and the employer sought to compel arbitration. Superior Court ruled that the arbitration provision was unconscionable. ¶¶ 2-6.

Review of a Superior Court decision to compel or deny arbitration is *de novo*. ¶ 9

Either substantive or procedural unconscionability will void an arbitration provision in Washington. ¶ 10.

That employees were presented with an adhesion contract and that they had no bargaining power does not equate with procedural unconscionability. ¶¶ 13-15. Here, the arbitration provision "was not buried in fine print." ¶ 15. Rather, the "key inquiry" is whether the employees lacked meaningful choice. ¶ 20. But, these employees could work elsewhere and they signed multiple versions of the same contract over the years. *Id.* Substantive unconscionability also did not exist.

The contract allowed the employer to seek injunctive relief in court. This is not so one-sided or harsh as to amount to substantive unconscionability. ¶¶ 23-24. The parties are not required to have "mirror obligations" in a contract. ¶ 24. Even if unconscionable, this provision is severable—"the usual remedy for allegations of unconscionable provisions . . . " ¶ 25.

Employees also claimed the arbitration provision limits exemplary damages, such as those afforded by RCW 49.52.070. However, the arbitrator's authority in that regard was constrained by the contract: "unless otherwise required by law . . . " ¶ 27.

A confidentiality provision in the contract did not make it substantively unconscionable. This, contended the employees, would hinder their ability to learn of patterns of discrimination. ¶ 30. For this, they relied on ***Zuver v. Airtouch Communications, Inc.***, 153 Wn.2d. 293, 315, 103 P.3d 753 (2004). ¶ 31. However, employer agreed to waive that provision. ¶ 33. And, the contract allows for waiver by agreement in any event.

Because the arbitration agreement allowed waiver of a requirement for splitting the arbitrator's fees based upon an employee's financial status, this provision was not objectionable. ¶ 37.

Finally, shifting of the parties' attorneys' fees in favor of the prevailing party "unless otherwise required by law" was appropriate. This did not offend statutes evidencing profound public policies which allow only a successful Plaintiff to obtain fee shifting. ¶ 39.

C. ***Romney, et al. v. Franciscan Medical Group, et al. (Romney II)***
199 Wn. App. 589, 399 P.3d 1220 (2017)
Arbitration, class actions, threshold disputes, waiver of individual arbitration in favor of class action by inconsistent conduct in litigation.

Previously, Division I held that the arbitration agreements between various medical professionals and their employers were enforceable. 186 Wn. App. 728, 349 P.3d 32, *review denied,* 184 Wn.2d 1004 (2015) [See Part III.B, *supra*]. The employer was allowed to defend in an arbitration, not court. In this decision, the court determined that the employer's conduct in the litigation waived its objection to the plaintiffs pursuing a class action in the arbitration.

This is a must-read for anyone drafting an arbitration provision or litigating an arbitration issue.

Courts usually determine the threshold issue of whether a dispute is within the agreement to arbitrate. Here, after remand from the first trip to the Court of Appeals, Superior Court determined whether a class action could be maintained in the arbitration. Plaintiffs contend that is for the arbitrator to decide.

The Court affirms that whether an arbitration agreement allows for class actions is for a judicial officer to determine. ¶ 14. The opinion surveys state and federal appellate decisions and states that the "trend" in federal courts is to treat this as a threshold issue. ¶ 13.

Consent to class actions cannot be inferred from the fact that the arbitration agreement is silent on the issue. ¶ 19. The employer successfully argued that the arbitration agreements specifically refer only to the individual party to the agreement and thus negated the notion that class actions are permissible. ¶ 24.

Despite winning on the scope of the arbitration agreement, the employer was stymied because its conduct in the case amounted to a waiver of single party litigation in arbitration. ¶ 30. Its inconsistent acts consisted of:

- Not including any objections to class arbitration in its original motion to compel arbitration. ¶ 34.

- Arguing that it was appropriate to wait until enforceability was resolved before raising the issue of individual arbitration. ¶ 35

In an important observation that merits consideration by the Supreme Court, the decision stated, "whether there is evidence that [employer] consented to class arbitration is not the same question as whether [employer] waived a right to compel individual arbitration." ¶ 41.

Defeat snatched from the jaws of victory.

D. ***Acharya v. Microsoft Corp.***
189 Wn. App.243, 354 P.3d 908 (2015), *review denied,* 185 Wn.2d 1006 (2016)
Employment contracts; forum selection, validity.

Here, Division I rejected a recent U.S. Supreme Court holding on contractual forum selection provisions and adheres to long-standing Washington precedent to determine if a contractually chosen forum is "unreasonable."

The employee worked for employer in King County for many years. She did work with an international team and was ultimately stationed in London. ¶ 2.

In London, employee signed an employment agreement with a foreign subsidiary of the employer. These contracts required dispute resolution in Switzerland and use of Swiss law in resolving disputes. ¶ 4.

While on assignment in London, the employee claimed she was discriminated against by her manager because of her gender. ¶¶ 6-7.

Employee returned to King County and brought suit against her original employer for its discrimination. The employer unsuccessfully moved to dismiss based on the contractual choice of law and forum non conveniens. ¶¶ 12-15.

The employer relied on ***Atlantic Marine Const. Co. v. U.S. District Court,*** 134 S. Ct. 568, 187 L. Ed. 2d 487 (2013), which held that "when parties agree to a forum selection clause, they waive the right to challenge [it] . . . " 134 S. Ct. at 582. ¶ 21.

But the contract in ***Atlantic Marine*** "was between two corporations on equal footing." ¶ 23. Here, the contract was between "an individual and a powerful corporation (or its subsidiary)." ¶ 23. On those facts, the Court declined to adhere to ***Atlantic Marine*** and reverted to determining whether the forum selection was "reasonable." ¶¶ 25-27.

The right to be free from discrimination is non-negotiable and can't be waived. ¶ 27. Under the forum selection and choice of law provisions, employee would be prevented from applying Washington law and therefore were contrary to public policy. ¶ 27.

As for the claim that litigation in Washington was a *forum non conveniens*, the Court determined that it must first decide whether an adequate alternative forum exists. ¶ 34. None of the acts occurred in Switzerland and lawyers there generally don't work on contingency. ¶ 35. Employee's financial inability to pursue litigation in Switzerland outweighed the employers interest in uniform application of its subsidiary's contract. ¶ 36.

E. ***Kries v. WA-SPOK Primary Care, LLC***
190 Wn. App. 98, 362 P.3d 974 (2015)
Disability discrimination; employer policies and ambiguities therein; employer defenses to disability claims; reasonable accommodation, unpaid leave, reassignment.

A 2-1 split on Division III reversed a summary judgment for an employer and remands a disability discrimination case. The issues have to do with inconsistencies believed by the majority to exist with respect of employer policies regarding ability of employees with 'open wounds' to remain at work.

The former employee, a medical assistant, had surgery and a long lasting wound. ¶¶ 2-10. A policy of the employer, a health care provider, prohibited employees with "an open or draining wound" to be in the work place. ¶ 11. Other policies of the employer prohibited employees from doing direct "patient care" if they had sutures or open wounds on "hands or forearms." Another policy stated that an employee in patient care "may be allowed" if sutures or wounds "can be completely covered, other than hands/forearms." And, in non-patient care work, an employee would be allowed to work if "sutures or wounds [ ] can be completely covered." ¶ 12.

A seemingly endless discussion of the evidence in the summary judgement motion, followed. ¶¶ 13-38. In short, the majority determined it was a fact question whether the various employer policies were ambiguous or inconsistent. ¶ 57. While the employer contended that compliance with the infection control policy was an essential function of the job, the majority was wary of a "policy that presumably applies to every employee of the clinic." ¶ 58. There follows a discussion of what constitutes an 'essential job function' - a term that is undefined at RCW 49.60, the Washington Law Against Discrimination. ¶¶ 63-68.

The majority determined there is a question of fact as to whether the plaintiff could meet the essential job functions of a medical assistant. The employer's position that the policies in question were a "safety based qualification standard" was treated with skepticism by the majority. These two judges believed that this defense is similar to a BFOQ defense which is not available under the ADA. ¶¶ 69-70. However, they do conclude that the BFOQ defense is available under the WLAD, RCW 49.60. ¶¶ 72-74. Then, the majority takes the next twenty five paragraphs to decide that the employer's concerns about prevention of infection in the work

place are factual matters for a trial. ¶¶ 75-100. This involved discussion of a number of federal cases including decisions from "the Evergreen State high court." ¶ 85.

The business necessity defense is applicable only in pregnancy discrimination cases, according to the majority. ¶¶ 101-03. Reasonable accommodation can include unpaid medical leave, and job reassignment however. ¶ 112-13.

Judge Korsmo's dissent takes but twelve paragraphs to challenge the majority. This judge determined there are no ambiguities in the employer's policies. He concludes that the plaintiff had a closed wound that required draining. The majority, it is contended, would put other employees and patients at the facility in risk of developing infections. ¶ 129

If brevity is not just the soul of wit, it may also be evidence of the exercise of judicial discretion.

F. ***Farah v. Hertz Transporting, Inc.***
196 Wn. App.171, 383 P.3d 552 (2016), *review denied,* 187 Wn.2d 1023 (2017)
RCW 49.60; pretext instruction not required.

A jury verdict and judgment for defendants in this disparate treatment case is affirmed. Plaintiffs claim the jury should have been instructed on whether the employer's reasons for discharging them was a pretext for unlawful discrimination.

The WPI does not contain a pretext instruction. According to the Comment to WPI 330.01, such an instruction would be inappropriate in a trial. ¶¶ 15-16.

In a summary judgment context, however, rebuttal of pretext is part of the burden shifting mechanism long recognized by federal and state courts. (At fn. 6 and in ¶ 18, the Court observed that Washington courts construe RCW 49.60 using federal precedent under Title VII of the Civil Rights Act of 1964. This is a dangerous assertion in view of ***Martini v. The Boeing Co***, 137 Wn.2d 357, 971 P.2d 45 (1999) and ***Grimwood v. University of Puget Sound,*** 110 Wn.2d 355, 361, 753 P.2d 517 (1988) Part I. C, supra "[w]hile . . . .federal cases are a source of guidance, we bear in mind that they are not binding and that we are free to adopt those theories and rationale which best further the purposes and mandates of our state statute").

After noting a split in federal circuits dealing with whether a pretext instruction is appropriate in a Title VII case, this court agrees that the instruction is not "required." ¶¶ 20-23. But it hedges: "While the instruction might be appropriate, the arguments in its favor are not compelling enough to hold that it is an abuse of discretion to refuse to give the instruction." ¶ 23

G. ***Sprague v. Spokane Valley Fire Dep't.***
196 Wn. App.21, 381 P.3d 1259 (2016), *review granted,* 187 Wn.2d 1031 *(*2017)
RCW 49.60; religious discrimination; neutral policies.

In a 2-1 decision a summary judgment for the employer is affirmed in this case alleging termination in violation of state and federal constitutional rights and religious discrimination under RCW 49.60. The dissent, prefaced with an excerpt from the New Testament, clocks in at 73 paragraphs with extensive block quotes. A concurring opinion attempts to rebut the dissent.

Plaintiff was a captain in a fire department. He used the employer's e-mail system to distribute newsletters and meeting notices for a religious group which he established. He was told that according the department policy, the email system was for business purposes only. Plaintiff persisted in sending more religious content. Progressive discipline led to termination. This led to a civil service appeal which was unsuccessful. This was not appealed. Instead, he started a separate Superior Court action.

In Superior Court, plaintiff conceded Insubordination *vis a vis* the email policy but alleged the email policy was unconstitutional because it was anti-religion and not content neutral. Both sides moved for summary judgment. Superior Court determined that plaintiff was collaterally estopped by the civil service commission factual and held the policy to be constitutional.

The majority determined the employer's email policy was content neutral. "It distinguished between communications related to the [employer's] business and those that are personal to the employees. It is the nature of the communications, not the viewpoint expressed in them, that matters." ¶ 19. Because the policy was in a non-public forum, the governmental employer could impose restrictions that are reasonable and neutral in viewpoint. ¶ 16.

In addition, the state ethics in public service laws, RCW 42.52, requires public resources to be used only for official business. ¶ 18.

The findings in the unappealed civil service commission hearing were binding on the Superior Court and the Court of Appeals. ¶¶ 21-27. These findings were that Plaintiff was fired for non-religious reasons and that there was no evidence the email policy was applied unevenly. ¶ 27.

The dissenting judge believes that mixed issues of law and fact implicating constitutional rights ought not to be subject to collateral estoppel. ¶ 70. And, the dissent argued that the employer's use of the email system to broadcast mental health information should allow a "Christian" perspective about the same topics. ¶ 72. A court, therefore, ought to address whether the employer "unlawfully discriminated against [Plaintiff] because of his spiritual message." ¶ 73. The government, therefore, was favoring a particular viewpoint at the expense of others, religiously based. ¶¶ 83, 97.

H. ***Schuster v. Prestige Senior Management, L.L.C.***
193 Wn. App. 616, 376 P.3d 412 (2016)
Arbitration; waiver by litigation in Court.

If you want an exhaustive, and perhaps exhausting, discussion of waiver of arbitration through use of the civil justice system, this is it. The entire opinion, 36 pages in the reports, is neatly summarized in the first paragraph: "*Put more succinctly, at some point a party seeking to enforce an arbitration agreement must use it or lose it*." ¶ 1 (citation omitted; italics in original.)

While this is not an employment case, the authorities marshaled make additional research on the topic of waiver unnecessary.

Suffice it say, a nursing home operator had an arbitration agreement with respect of a resident. The resident apparently died. ¶ 7. The family sued. Pre-suit discussions occurred and the litigation went down a long path before arbitration was sought. ¶¶ 9-14.

The answer to the complaint did not mention arbitration as a defense or otherwise. ¶ 9. The original Complaint was amended several times and only with respect of the third amendment was there an answer mentioning arbitration. ¶ 14. More than 18 months after the case was filed in Superior Court, one of the defendants sought to compel arbitration. Superior Court denied the motion.

An appendix to the decision summarize Washington Supreme Court decisions dealing with waiver of arbitration. The Court of Appeals deals with countless federal appellate decisions which deal with waiver, estoppel, inconsistent conduct, and prejudice (not pride).

I. ***Marcus & Millichap v. Yates, Wood & MacDonald, Inc.***
192 Wn. App. 465, 376 P.3d 503, *review denied,* 185 Wn.2d 1041 (2016)
Arbitration; association by-laws; RCW 7.04A.070 procedure.

If you are bound by the bylaws of an organization and if they provide for arbitration of disputes, you are bound to arbitrate without an express contract to do so.

Plaintiff and Defendant belong to a commercial organization which has bylaws requiring arbitration. A dispute arose between the two members as to a commission. One party initiated arbitration. ¶ 5. The other party started an action in Superior Court alleging that there was no enforceable agreement to arbitrate. The party who sought arbitration moved to stay the civil proceedings and to compel arbitration. ¶ 6. The court compelled arbitration. Id. the Court of Appeals affirmed.

The Uniform Arbitration Act at RCW 7.04A.070 requires a "summary proceeding" to decide the validity of an arbitration agreement. ¶ 8. Summary judgment principles should apply. ¶ 9. An evidentiary hearing is only required where material facts are disputed. ¶ 8.

An express contract to arbitrate is not required. "Voluntary membership in a professional organization establishes assent to an arbitration agreement contained in that organization's bylaws." ¶ 15.

J. ***Henry Industries, Inc. v. Dep't of Labor and Industries***
195 Wn. App. 593, 381 P.3d 172 (2016)
Industrial insurance; contractors, RCW 51.08.150, .195.

A service provider may not be an 'employee' under common law tests or for purposes of the Minimum wage act. But she may still create a liability for industrial insurance as a 'worker'.

Here drivers of a courier service which contracted with pharmacies was assessed penalties due to its failure to pay premiums. The relevant statute, RCW 51.08.180, defines 'workers' for whom premiums must be paid. Part of the definition is that the individual is "working under an independent contract, the essence of which is his or her personal labor."

The courier service contended that personal labor was not the "essence" of the contract. Rather, use of a vehicle was the essence: The individuals had to pick up and deliver to various locations; without use of a vehicle timely performance of duties was not possible. ¶ 37, 69. This did not find much favor with the court.

An exception to the general rule of RCW 51.08.180 is found in RCW 51.08.195(1)-(6). Unless all sub-parts are met, the exception will not apply. ¶ 90. Some of these sub-parts codify the common law of master/servant. Here for example, the courier service had each driver agree to a contractual "Manner of Performance of Service." ¶ 95. Among other things, this required a driver to complete services within a customer's time frame limited somewhat the ability of a driver to have other work. Together, these and other provisions showed that the service directed the manner in which services of the drivers were to be performed and therefore outside the scope of the exception. ¶¶ 95-101. That customers of the courier service set the requirements included in the driver contracts was unavailing. ¶ 101.

K. ***Emeson v. Dep't of Corrections***
194 Wn. App. 617, 376 P.3d 430 (2016)
Discrimination; federal and state lawsuits, *res judicata.*

This case demonstrates the perils of filing successive claims in both state and federal courts over the same, or virtually the same, operative facts.

Plaintiff alleged in a case in US District Court that an undefined disability was not reasonably accommodated and that the employer created a hostile work environment, all in violation of federal anti-discrimination statutes. The employer moved for summary judgment. Plaintiff sought to dismiss the case but the Court granted judgment to the employer.

Plaintiff then filed in Superior Court and alleged claims arising under state anti-discrimination statutes. He also asserted an invasion of privacy claim not asserted in the

federal case. Superior Court dismissed on the basis of *res judicata* with respect to the discrimination claims and expiration of the limitation period on the invasion of privacy claim.

Court of Appeals affirmed.

There is a solid discussion of the factors required to establish *res judicata* and determines that all were satisfied. In its discussion about the similarity of the federal and state causes of action, the Court observed that under the ADEA, there is not the "qualifier that the motivating factor needs to be "substantial"" as is true with the state law. ¶ 31-33. Thus, the burden of production at the summary judgment stage in the federal court action was "lower than [the] burden of production in [the] state court action." ¶ 31.

While Plaintiff was correct that the claims in the state action did not wholly mesh with the claims in the federal action because of the privacy claim, application of *res judicata* will exist with respect of claims that could have been litigated in the earlier action. ¶ 36 at fn. 7.

L. ***Lodis v. Corbis Holdings, Inc.***
192 Wn. App. 1246, 366 P.3d. 30, *review denied,* 185 Wn.2d 1038 (2016)
RCW 49.60; after acquired evidence; applicability of law of the case.

This is an appeal from the third jury trial of this case. Again, a verdict in favor of the employer is affirmed. See also, 172 Wn. App. 835, 292 P.3d 779 (2013).

While this is a fact intense case that deals with a lot of procedural and evidentiary wrangling, what is most interesting is the discussion of after acquired evidence and the law of the case doctrine. The issue arose because of the employee's efforts to introduce evidence of a breach of fiduciary duty claim that was previously litigated adversely to him. ¶ 41. Superior Court would not admit that evidence.

The opinion examines, and differentiates, law of the case and *res judicata*. ¶¶ 44-51. The former "applies to successive proceedings in the same case, whereas [the latter] is applicable to successive proceedings in different cases." ¶ 46. Therefore, until entry of a final judgment, the law of the case doctrine and RAP 2.5 apply. The appellate rule allows, but does not require, successive court of appeals panels to apply law of the case while a trial court is bound to do so. ¶¶ 48-50.

With respect of after acquired evidence prevents or limits the employee from receiving remedies if the former employer later learns of evidence of wrongdoing that would have led to the termination of the employee if the evidence was known by the employer. This is an affirmative defense. ¶ 58

M. ***Chism v. Tri-State Construction, Inc.***
193 Wn. App. 818, 374 P.3d 193, *review denied,* 186 Wn.2d 1013 (2016)
RCW 49.52.050; employment of attorney, fee or wage; disgorgement.

Former outside counsel went in-house. He negotiated compensation with an owner who was later diagnosed with early onset Alzheimer's disease. ¶ 26. Lawyer noted the declining health of that individual and offered to replace him as president of a subsidiary company. ¶ 27.

Lawyer raised the prospect of a bonus with the impaired person and drafted an agreement about it. The impaired person signed it. Company did not pay the bonus. Lawyer sued and claimed willful withholding under RCW 49.52. ¶ 40. Jury verdict for lawyer on breach of contract claims. ¶ 42. Trial judge reserved until after trial the equitable issue of disgorgement due to employer's claims that lawyer violated various Rules of Professional Conduct (RPCs). The Court held in favor of employer on disgorgement.

Court of Appeals reverses on the disgorgement and affirms on the breach of contract claim.

The Court distinguishes between a "fee" and a "wage" in its discussion of disgorgement. ¶ 53. At ¶ 65, it determined that a "wage" was involved in the case, not a fee.. And the Court held that there was no clear guidance from the Washington Supreme Court as to whether RPC 1.5, regarding reasonableness of fees, applied to "wage contracts." ¶ 67. The Court also determined there was a lack of authority for the proposition by the employer that the lawyer engaged in a conflict of interest in violation of RPC 1.7. ¶ 70.

The disgorgement order, in short, "raise[d] the question of whether a trial court is empowered to disgorge an attorney's *wages* as opposed to an attorney's *fees*." ¶ 90.

What seems to be missing is whether it was appropriate for the lawyer to be negotiating at all with a person he knew to be suffering from a degenerative neurological disorder.

N. ***Floeting v. Group Health Cooperative***
___ Wn. App. ___, 403 P.3d 559 (Oct. 9, 2017)
RCW 49.60; public accommodation, employer liability for sexual harassment of patron by employee

The WLAD prohibits discrimination in places of public accommodation. RCW 49.60.030(1)(b), .215(1). Here, the Court of Appeals reversed a summary judgment in favor of an employer whose female employee harassed a male patron on several occasions at one of its clinics. ¶¶ 3-8.

Section .215 of the WLAD provides in part that it is unlawful "for any person . . . .or employee to commit an act which . . . results in any . . . discrimination . . . in any place of public

accommodation ....” [Why is it that this decision has to spend several paragraphs and citations to inform us that harassment is an unlawful form of discrimination? See ¶ ¶ 16-21.]

The analysis for a public accommodation claim was set out in ***State v. Arlene's Flowers, Inc.***, 187 Wn.2d 804, 389 P.3d 543, *cert. petition filed* (No. 17-108, July 21, 2017): 1) Plaintiff's membership in a protected class; 2) defendant's operation of a public accommodation; 3) discrimination by defendant of plaintiff; 4) the discrimination occurred due to plaintiff's membership in a protected class. ¶ 22.

A place where medical care or services are provided is one of public accommodation. RCW 49.60.040(2). ¶ 29.

An employee's act of harassment or discrimination of a patron imputes liability to the employer because of the plain language of RCW 49.60.215(1) *supra.* “[T]he legislature chose to fight discrimination in public accommodations by making employers directly responsible for their agents' and employees' conduct.” ¶ 36. That the harassment or other discrimination will be a “solitary or fleeting event” is of no importance in this analysis. If the patron were simply to leave and not return to the business that would “undermine the legislature's goal of eliminating all such acts of discrimination.” ¶ 39. Direct liability makes the employer liable “for all acts of sexual harassment occurring on its premises-including the first [act].” ¶ 40.

While the WLAD is not a civility code, ¶ 49, discriminatory conduct must be objectively so. ¶ 50. Such acts are foreseeable. ¶ 51. Plaintiff must also establish his or her subjective perception of being a victim of discrimination. ¶ 52. But the acts need not be severe and pervasive as might be true with harassment of an employee. ¶ 54. The decision specifically rejected the employer's assertion that the analysis of ***Glasgow v. Georgia Pacific,*** 103 Wn.2d 401, 693 P.2d 708 (1985), should apply such that the harassment must be a term or condition of use of the accommodation. ¶¶ 57-64.

> **PRACTICE TIP:** Employers must take care that employees are instructed that they must not discriminate against patrons, clients and customers. Training and information about harassment must state that patrons, clients and customers are not to be harassed under any circumstances.

O. ***Raven Offshore Yacht, Shipping, LLP v F.T. Holdings, LLC***
199 Wn. App. 534, 400 P.3d 437 (2017)
Arbitration; threshold disputes, resolution by court, ability to contract otherwise

This case involves a damage claim. The parties had a contract which incorporated the arbitration rules of the Maritime Arbitration Association. ¶ 2. Those rules give to the arbitrator the authority to determine whether a dispute is arbitrable. Id. Rule 9(a) stated that the arbitrator was to determine “any issues with respect to the jurisdiction of the arbitral tribunal and the existence, scope or validity of the . . . arbitration agreement.” ¶ 8.

Superior Court denied a motion to compel arbitration.

Ordinarily, a court determines the scope of an arbitration agreement. RCW 7.04A.060(1). ¶ 7. Delegation to the arbitrator by clear and unmistakable evidence of that delegation can occur. RCW 7.04A.040(1). ¶ 7.

What had not been decided by a Washington court or the Ninth Circuit is whether incorporation of rules of an arbitration association providing for arbitrator determination of a threshold issue is enforceable. ¶¶ 10-11.

The contract here specifically incorporated rules allowing an arbitrator to determine its jurisdiction. ¶ 14. That was "clear and unmistakable" evidence to be bound by the rules.

> **NOTE:** This case involved commercial parties. Would the same result apply to a consumer adhesion contract? What about engagement letters from lawyers to individuals providing for the same jurisdiction of an arbitrator?

