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OBSERVATIONS AND RECENT APPELLATE DEVELOPMENTS IN WASHINGTON STATE EMPLOYMENT LAW©

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OBSERVATIONS AND
RECENT WASHINGTON APPELLATE
DECISIONS IN EMPLOYMENT LAW

I. OBSERVATIONS

A. How Do Judges Know What They Know?

The odds are that someone reading these materials is now or someday will be a judicial officer. How do judges know what to do? How do they know the law?

Certainly, judges, by virtue of their office, are not imbued with knowledge of the totality of the law. Were that the case, we would not need appellate courts. Rather, the legal system is a human system. Therefore, it is prone to mistakes. Thus, we have appellate courts.

Supposedly, the adversary process allows for the correct result to obtain after argument and advocacy by opposing sides. However, the volume of reported decisions, the prevalence of statutes, regulations and agency guidance make it impossible to comprehend all of our seemingly finite practice area.

Consider that there were 69 years between the first volume of F.2d and the last volume in that series, 999 F.2d, in 1993 - about 14.5 volumes per year. In the nineteen years since the start of F.3d there have been 700 volumes published - about 37 volumes per year. We can expect a volume per week of United States Court of Appeals decisions.

Thus, it should come as no surprise that a Washington appellate court could overlook a controlling Washington Supreme Court decision on a very distinct and everyday issue: Defense liability for retaliation in an action under RCW 49.60 where the plaintiff voluntarily quits employment.

In a decision discussed in Part III of these materials, Division II of the Court of Appeals decided that because a plaintiff in a state law discrimination case did not establish that the working conditions were "intolerable" she could not prove constructive discharge and therefore failed to establish an adverse employment action. ***Short v. Battle Ground School District***, 169 Wn. App. 188 at ¶ 37, 279 P.3d 902.

In ***Martini v. The Boeing Co***., 137 Wn.2d 357, 971 P.2d 45 (1999) a unanimous court examined the differences between RCW 49.60 and Title VII of the Civil Rights Act of 1964 and determined that it was necessary for a plaintiff only to prove proximate causation between unlawful discrimination and the decision to quit employment. *Id*. at 137 wn.2d at 371. It specifically rejected the constructive discharge analysis required under Title VII.

Are counsel or the Court at fault in ***Short*** for an error of assuming to know the law? Maybe there is too much law or maybe there is always the need to research whether basic assumptions can still be assumed to be correct.

What advocates and judges must always realize is that we may not really know what we should know.

The precedents and analyses of federal legislation, for example, should not be assumed to be transplanted into similar state legislation. Almost 25 years ago, Justice Brachtenbach wrote in ***Grimwood v. University of Puget Sound,*** 110 Wn.2d 355, 361-62, 753 P.2d 517 (1988), "While these 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."

B. The Supreme Court Visits RCW 49.52: Absence of Liability Where Issues Are 'Fairly Debatable.'

A *bona fide* dispute defeats liability in a claim made under RCW 49.52.050 and .070. ***Schilling v. Radio Holdings, Inc.,*** 136 Wn.2d 152, 160, 961 P.2d 371 (1998). Two lines of analysis have developed to establish whether the dispute was *bona fide*: When the employer reasonably believed that a wage was not due or that the amount was in dispute and when the issue is 'fairly debatable.'

In a decision discussed in Part II of these materials, the Supreme Court revisited RCW 49.52 in ***Washington State Nurses Association v. Sacred Heath Medical Center***, 2012 WL 5266132 (Oct. 25, 2012). There, the Court specifically adhered to the 'fairly debatable' standard. *Id*. at ¶ 25: "A bona fide dispute is a fairly debatable dispute over whether all or a portion of wages must be paid." *Id*. And, in a decision discussed at Part III of these materials, Div. I of the Court of Appeals noted that a defendant employer "assert[ed] that its state of mind is not relevant as to whether a "fairly debatable" dispute exists . . . ." ***Fiore v. PPG Industries, Inc.***, 169 Wash. App. 325 at ¶ 37, 279 P.3d 972 (2012).

The 'reasonable belief' analysis of a *bona fide* dispute would seem to require evidence of the state of mind of an actor while the 'fairly debatable' means of analysis seems more suited to objectively verifiable evidence of the dispute. *Compare* ***Dice v. City of Montesano***, 131 Wn. App. 675, 128 P.3d 1253, review denied, 158 Wn.2d 1017 (2006) (former employee claimed severance pursuant to contract; employer claimed no severance required because contract was not renewed and Court of Appeals determined that the dispute was not 'fairly debatable' as a matter of law and therefore liability under RCW 49.52 existed) *with* ***Zimmerman v. W8LESS Products, LLC,*** 160 Wn. App. 678, 248 P.3d 601 (2011) (issues as to whether plaintiff was an employee and whether alleged hiring authority had such authority amounted to questions of fact under ***Schilling***.) *See, also*, ***Fiore,*** *supra.*

What is clear, however, is that claims arising under RCW 49.52 are susceptible to summary judgment for either side. *See, e.g*., ***WSNA v. Sacred Heart***, *supra*, (reversing summary judgment for plaintiff on RCW 49.52 claim and finding for defendant as a matter of law); ***Cannon v. City of Moses Lake***, 35 Wn. App. 120, 663 P.2d 865, *review denied*, 100 Wn.2d 1010 (1983) (summary judgment for employer appropriate on RCW 49.52 claim; dispute centered on objectively verifiable facts - legislation regarding accrued PTO by uniformed municipal employee); ***Moran v. Stowell***, 45 Wn. App. 70, 724 P.2d 396, review denied 107 Wn.2d 1014 (1986) (summary judgment for employer affirmed under RCW 49.52 with respect to accrued leave time; failure of employees to exhaust grievance processes, provision of collective bargaining agreement and county ordinance "all of which posed fairly debatable issues." 45 Wn. App. at 81. Objectively verifiable facts of legislation and accruals of paid time off subject to

varying interpretations); ***Flower v. T.R.A. Industries, Inc.***, 127 Wn. App. 13, 36, 111 P.3d 1192 (2005) (error for trial court to deny Plaintiff's cross motion for summary judgment in claim made under RCW 49.52; 'fairly debatable' standard applied; objectively verifiable facts established that a signing bonus was due and payable) - no bona fide dispute extant.

II. WASHINGTON SUPREME COURT

A. Loeffelholtz v. University of Washington,

175 Wn.2d 264, 285 P.3d 854 (2012),
Sexual Orientation Bias; prospective application of 2006 amendments to RCW 49.60; evidence of hostile environment.

A defense summary judgment is affirmed in part and reversed in part.

Plaintiff claimed that the 2006 amendment to RC 49.60, prohibiting discrimination in employment due to sexual orientation, applied retroactively and that a single incident of post-amendment bias could, together with the pre-amendment evidence of bias, substantiate a claim for hostile work environment. ¶ 2.

A supervisor, who was also named as a defendant, made a remark about Plaintiff's sexual orientation pre-amendment and thereafter made remarks about his hatred towards others, said that he had a gun and had anger problems. ¶ 4. Plaintiff was denied flex-time, training opportunities and advancement. *Id*. The only post-amendment incident occurred before the supervisor was deployed to Iraq: He told a group meeting that he was going to return a "very angry man." And, after he left the University the supervisor told others that he disliked plaintiff because she was gay. ¶ 7

The Superior Court granted summary judgment for the defendants, ¶ 8, and the Court of Appeals reversed. ¶ 9. It determined that whether the "angry man" comment was discriminatory and connected to pre-amendment conduct was an issue of fact. ¶ 9.

A unanimous Supreme Court decision by Justice Owens first determined that the 2006 amendments were prospective in application only. ¶ ¶ 14-16. Before the effective date of the amendments, the supervisor's harassment based on sexual orientation "was merely reprehensible, not unlawful."

The decision rejected the claim by plaintiff that she was entitled to recover for pre-amendment conduct based on the cumulative effect of individual acts under ***Antonius v. King County***, 153 Wn.2d 256, 264, 103 P.3d 729 (2002). This is because the conduct occurring beyond the limitation period in this case was not unlawful when committed. ¶ 18. However, the pre-amendment conduct "is still admissible as background evidence to prove why post amendment conduct is discriminatory." ¶ 19. Therefore, plaintiff could use the "angry man" comment which occurred post amendment and attempt to link that with the pre-amendment conduct in order to establish sexual orientation bias. ¶ 20. This comports with the legislative command to construe the statute "liberally" ¶ 21.

Next, the Court tackled the issue of whether the "angry man" comment altered the terms and conditions of employment. ¶ 23. While this comment was made to a group meeting "he [supervisor] conceivably intended it to have special meaning for [plaintiff]. She knew that [supervisor] disliked lesbians . . . ." ¶ 25. Thus, that comment, standing alone, could be severe enough to alter the conditions of employment. ¶ 26

B. Anfinson v. FEDEX Ground Package System, Inc.,
174 Wn.2d 851, 281 P.3d 289 (2012),
Minimum Wage Act, RCW 49.46; distinction between contractor and employee; application of economic dependence test.

Any practitioner who has a client characterized as an 'independent contractor' or whose client is thinking of hiring service providers as contractors should pay special attention to this decision.

The case deals with ground delivery by FedEx Ground - the trucks that have the green FedEx logos on them. The drivers of the trucks are hired as contractors. A class action sought overtime wages and uniform expenses under the Industrial Welfare Act (RCW 49.12, a chapter of Title 49 that bears examination by any practitioner in labor and employment matters).

At trial, the Superior Court gave an instruction about determination of independent contractor status. This instruction focused on both the right of employer's control in light of economic dependence of the service providers on the employer for their work. A jury found the drivers were contractors. On appeal, the Court of Appeals held that the jury instruction regarding definition of contractor vs. employee status was misleading and prejudicial. ¶ 5.

There are issues here about preservation of error which will have interest to practitioners. They are fact intense, however, as to supposedly changed positions the service provider class took during the course of the litigation. ¶ ¶ 13-18.

What is of interest for our purposes is that jury instructions will be reviewed de novo for errors of law and when read as a whole, they must not be misleading. ¶ 10. The critical instruction given by the Superior Court stated that the distinction between employee and contractor "requires you to determine whether FedEx Ground controlled, or had the right to control, the details of the class members' performance of the work." ¶ 19. This was the error.

The definitions of "employ" and "employee" under the MWA, RCW 49.46.010 (2) and (3), are very broad and, the decision states, ambiguous. ¶¶ 27-28. The class argued that whether an individual is an employee should focus on whether s/he is "dependent upon the business to which he or she provides service." ¶ 28. This is the economic dependence test.

Because the MWA is similar to the federal Fair Labor Standards Act (FLSA), it was appropriate to look at the federal case law under the FLSA. ¶ ¶ 29-30. And, the federal cases at the time the MWA was adopted disfavored the 'right to control' test and embraced the economic dependence analysis. ¶ ¶ 30-33. *See, e.g.*, ***Bartels v. Birmingham***, 332 U.S. 126, 130 (1947).

The right to control analysis goes more to determination of whether vicarious liability exists for the master under common law. ¶ 34. The need to provide a liberal reading of the MWA, a

remedial statute, ¶ 33, required the Court to avoid dealing with the common law imperatives for attaching liability to the master for the torts of the servant. ¶ 34 (But by classifying the service provider as an employee, the determination is made, *ipso facto*, that the master will therefore be responsible for the servant's torts).

Justice Owens's opinion for the Court was joined by four other justices. Justice Charles Johnson dissented and was joined by Justice James Johnson. The focus of the dissent was on the issue of waiver of the class's right to claim entitlement to the economic dependence analysis by claiming, at times during the course of the Superior Court proceedings, that the right of control analysis applied.

C. Erdman v. Chapel Hill Presbyterian Church, et. al., ___Wn.2d___, 286 P.3d 357 (2012), First amendment, defense of religious institution against common law claims against church and church personnel by other church personnel.

A doctrinally divided Court deals with liability of a church and its clergy for tort and statutory claims made by a plaintiff who was, herself, subject to the rules and conflict resolution procedures of the church.

Justice Madsen wrote for a four Justice plurality, ¶ ¶ 1-58; Justice Alexander, pro tem, concurred in the result with Justice Fairhurst, ¶ 59; Justice Chambers dissented with two other justices. ¶ ¶ 60-81.

Plaintiff was an elder in a Presbyterian church and reported to the senior pastor, Defendant Tune. Plaintiff took ordination vows agreeing to be bound by the greater church discipline process including dispute resolution. ¶ 3.

A dispute arose between Plaintiff and Tune about whether certain of Tune's activities jeopardized the tax exempt status of the church. ¶ ¶ 4-7. Tune decided to have the church's governing body, the Session, look into the matter. This was consistent with the principles of the church's Book of Order. ¶ 8. Plaintiff's attorney apparently contacted a Session member and sought a severance package and Plaintiff was placed on leave without pay. ¶ 9.

Plaintiff made a grievance with the church's governing body in Olympia in which she claimed verbal abuse and intimidation by Tune. ¶ 10 Shortly after that, the Session Committee recommended that Plaintiff should be terminated for violating her ordination vows in a number of respects. Following that, Plaintiff submitted another complaint to the Olympia governing body and alleged that Tune was involved in misusing church property, harassing her and retaliating against her. An investigating committee looked into this and cleared Tune. ¶ 13-14.

Plaintiff had a further internal right of appeal but did not exercise it. Instead, Plaintiff sued the church and alleged common law claims of negligent supervision and retention and gender discrimination in violation of Title VII.

Superior Court granted summary judgment to the church and Tune on the common law claims due to First Amendment considerations. The Superior Court did not have sufficient facts to

determine whether the ministerial exception to Title VII coverage applied. ¶ 15. The Court of Appeals affirmed the Superior Court with regard to several of the common law claims but reversed dismissal of negligent supervision and retention and the Title VII claims against the church. The Court of Appeals applied 'neutral principles' analysis. This frees civil courts from being bound by ecclesiastical tribunals as to matters that go beyond religious discipline, faith or ecclesiastical rules or laws. ¶ 38.

In the plurality decision, concurred by Justices Alexander and Fairhurst, this majority remanded the Title VII claims in order for the Superior Court to create a more extensive record as to whether the ministerial exception to coverage under Title VII applies. ¶ 17.

The common law claims for negligent supervision and retention required extensive discussion by all of the opinions filed in this case.

According to the plurality opinion, the First Amendment implications are profound because churches should be free to determine their own hierarchies and spiritual leaders and to determine whether those leaders are fit to continue serving. ¶ ¶ 21-27 *and see* ***Hosanna-Tabor Evangelical Lutheran Church & School v EEOC,*** ____U.S. ____, 132 S. Ct. 694 (2012). Therefore, allowing a civil court to intrude into determinations of who should be a cleric necessarily involves state imposed standards of behavior with religious institutions. ¶ 42. The negligent supervision and retention claims were submitted to appropriate church authorities for investigation and resolution and they acted according to church doctrine and procedures. ¶ 52. Civil court interference with selection and supervision of clergy was therefore not warranted under the First Amendment. ¶ 55.

Curiously, the plurality opinion mentions a very narrow area where there could be tort liability of a religious institution: premises liability or negligent operation of a motor vehicle. ¶ 25. Conspicuously absent from this mention of potential civil liability for negligent supervision was sexual abuse of minors.

The concurring justices believed that the court had to accept the decisions of the church's governing bodies and leave it at that. The extended discussion by the plurality about what could or would happen in factually dissimilar cases was unnecessary.

The dissenting justices believed that the plurality opinion "implies that no claim of negligent retention or supervision, no matter how appalling the conduct, could ever go forward against a church based on misconduct of its clergy" and that the scope of plurality opinion in this regard "is breathtaking." ¶ 64. The dissenters noted that "we have already allowed cases against churches involving clergy sexual misconduct to go forward" and cited to ***C.J.C. v. Corp of Catholic Bishop of Yakima***, 138 Wn.2d 699, 728. (The plurality noted that ***C.J.C.*** was, itself, a plurality opinion. See, n.9.)

What seems to be necessary, perhaps, is a distinction between victims of negligent supervision and retention who are, themselves, part of the church hierarchy and those who are not. That fits the narrow area of tort liability mentioned by the plurality, *supra*, at ¶ 25 and would accommodate the notion that liability for sexual abuse could be imputed to a religious institution.

D. Washington State Nurses Association v. Sacred Heart Medical Center, ____Wn.2d___, ___P.3d____, 2012 WL 5266132,
RCW 49.46, Minimum Wage Act; work through required breaks, overtime liability

Here, the lesson is that an employer who requires employees to work through break periods is liable not only for payment for wages for the extra time worked but also for overtime if the employees work what is otherwise a scheduled forty hour week.

While the employer was tagged for overtime attributable to the additional time worked by its employees, it was not liable for double damages because it was 'fairly debatable' whether the overtime was owed due to an arbitrator's decision which seemed to sanction the employer's practice of not paying overtime when it required its employees to work through required break periods.

The employees are a class of nurses who were regularly scheduled to work through break periods which should have been on the employer's time. Two ten minute breaks are required in an eight hour shift due to a regulation of the Department of Labor and Industries, WAC 296-126-092(4), under authority of the Industrial Welfare Act. (The regulations at WAC 296-126 bear special scrutiny for any practitioner dealing with employment issues generally. *See, e.g.*, WAC 296-126-050). An arbitration arose under a labor agreement regarding payment for work through break periods of fifteen minutes required every four hours under the labor agreement. ¶ 2, 5-7. After arbitrator's ruling, the employer paid straight time for the missed breaks. Thus, if an employee had an eight hour shift, the employee was paid for 8.5 straight time hours or 42.5 straight time hours in a work week.

Chief Justice Madsen wrote the opinion for a unanimous court.

The Court affirmed the summary judgment in favor of the class except for liability found under RCW 49.52.050 and .070 and reversed the decision of the Court of Appeals found at 163 Wash. App 272 (2011). That the matter was resolved on the record created in a CR 56 motion has significance with respect to the RCW 49.52 claim. *See*, Part I.B, *supra*.

The decision rejected the employer's assertion that the class members did not have to work beyond an eight hour day. But the court reasoned that by working through rest periods which are to be on the employer's time, the class members worked beyond their eight hour shift and, if they worked five eight hour shifts, they should be entitled to overtime for this additional work. That they were not necessarily on the premises beyond eight hours was irrelevant. ¶ 15-17.

In the labor agreement arbitration the arbitrator required that the contractual break periods which were worked by the class members were to be compensated at straight time and not over time. ¶ 28. Because of this contract interpretation by a neutral, "the conflict at issue is a fairly debatable dispute over proper wages. [Employer] reasonably believed it was following the CBA, as interpreted by the arbitrator." ¶ 30. Therefore, the willfulness to deprive the class members of their wages was missing. *Id*.

Attorney fees were properly awarded to the class pursuant to RCW 49.48.030 and/or RCW 49.46.090(1)

III. WASHINGTON COURT OF APPEALS

A. Litchfield v. KPMG, LLP.,

___Wash. App.___, 285 P.3d 172 (2012),
Minimum age Act, RCW 49.46; exemption for professional employees, applicability of Public Accountancy Act.

The Superior Court determined that a class of about 200 'audit associates' could not qualify as exempt employees until each had the education and experience to qualify as Certified Public Accountants under the Public Accountancy Act, PAA. ¶ 1 and n. 5.

The named class representative has a bachelor's degree in accounting. He was paid a salary and did not receive compensation for work in excess of 40 hrs./wk. ¶ 2. In motion practice, the class persuaded Superior Court that in order for accounting professionals to be exempt, s/he must have the skill, education and experience required to seek a CPA license under the PAA. ¶ 5. The PAA requires a bachelor's degree plus work experience for a minimum of 2,000 hours over a year period in order to seek a license as a CPA. ¶ 5.

The case is in the Court of Appeals on discretionary review to determine whether audit associates must hold a CPA license in order to be exempt and whether audit associates must meet the PAA experience and education requirements to in order to be exempt 'professionals.' ¶ 6.

With respect to executive, professional or administrative jobs which are exempt from over time, the MWA delegated to the director of the Department of Labor and Industries the authority to promulgate appropriate regulations. RCW 49.46.010(1) and 5(c). Here, the issue is what is "knowledge of an advanced type in a field of science or learning" under a regulation found at WAC 296-128-530(1)(a).

A policy statement - not a regulation - of the Department distinguishes between general education and "knowledge of an advanced type." ¶ 9. And, the Department's policy states that accountants may be exempt even if they are not CPAs "if they actually perform work that requires the consistent exercise of discretion and judgment . . . ." ¶ 10.

The PAA and its requirements for licensing as a CPA does not conflict with the policies of the Department. ¶ 14. Thus, one can be an auditor and not a CPA and still be exempt from the overtime requirements of the MWA.

The case was remanded to Superior Court for further proceedings which will likely include a trial.

B. Eubanks v. Brown, et. al.,

___ Wash. App. ___, 285 P.3d 901 (2012),
Sexual Harassment, public employee, venue

Plaintiff worked for a Klickitat County deputy prosecutor and claims that he sexually harassed her. The suit was filed in Benton County against the County and the individual and then moved to Clark County pursuant to RCW 36.01.050(1), a statute which allows claims against a county to be made in certain adjacent counties.

The individual defendant claimed that he could be sued only in Klickitat County and the Court of Appeals granted discretionary review. ¶ 4. The individual defendant claimed that RCW 4.12.020(2) dictated venue in the county where the cause of action concerning performance of his official duties arose-Klickitat County. ¶ 7,9. However, the claim for sexual harassment did not concern performance of official duties. Rather it had to do with "personal misconduct in a workplace." ¶ 12.

The individual defendant also claimed that venue was proper in a personal injury claim only in the county where the claim arose or where the defendant resides. RCW 4.12.020(3).

Examining cases from the Supreme Court and the Court of Appeals, this decision noted that RCW 36.01.050(1) deals with a particular type of defendant - a county, while RCW 4.24.025 deals with particular types of claims. ¶ ¶ 15, 17. A plaintiff may sue a county where the cause of action arose, an adjacent county or a county where one of the defendants resides. ¶ 14. While RCW 4.24.025(3) could be applicable, venue against the individual defendant along with the county defendant under RCW 36.01.050(1) was proper.

While the decision did not deal with 'splitting' abuses of action, it should have done so in order to explain the consequence one might attend by requiring a separate cause of action to be asserted against each defendant in different counties. And, the decision points out a difficulty when naming an individual defendant.

C. Hill, et al. v. Garda CL Northwest, Inc.,
169 Wash. App. 685, 281 P.3d 334 (2012),
Minimum Wage Act, class actions, arbitrability of class claims

The Court of Appeals determined in this decision that Superior Court erred when it compelled arbitration of class claims for unpaid wages.

The employer has a labor agreement with a union which provides for arbitration of any claim under state or federal law "related to the employment relationship." ¶ 3. About one hundred employees claimed in a lawsuit that the employer altered time records to reduce wages, denied rest breaks and failed to pay them for 'off the clock' work. ¶ 2.

The employer asserted in its Answer to the Complaint that the claims had to be resolved in arbitration. ¶ 3. However, the employer engaged in significant discovery in the Superior Court. *Id*.

After The Superior Court ordered class arbitration, the parties filed cross motions for discretionary review and those motions were granted. ¶ 6. The employees contended that the arbitration agreements were unenforceable for a number of reasons including waiver by the employer through participation in the litigation process in Superior Court.

Waiver of arbitration is disfavored. ¶ 9 (This must be because arbitration is favored. Ask the United States Supreme Court.) During the period of time the case was pending in Superior Court, the decision notes that the parties engaged in substantial settlement discussions involving, at one point, a motion to continue the trial date. ¶ 10. Here, the employer timely invoked its claim for arbitration in its Answer. ¶ 13. And the discovery engaged in was not the intense litigation discussed in ***Steele v. Lundgren***, 85 Wash. App. 845, 935 P.2d 671 (1997). ¶ 14.

Further, arbitration was appropriate because the labor agreement clearly specified that all claims under state or federal law were subject to arbitration. ¶ 16.

The decision stated that the ***Stolt-Nielsen, S.A. v. Animal Feeds International Corp.***, ___U.S.___, 130 S. Ct. 1758 (2010) controls. ¶ 21. In this case, the contractual arbitration provision was silent as to whether the parties agreed to class arbitration as opposed to arbitration of individual claims. The matter was remanded for individual arbitrations and NOT for determination by either the trial court or an arbitrator as to whether the contract allows for class arbitration

D. Fiore v. PPG Industries, Inc.,
169 Wash. App. 325, 279 P.3d 972,
Minimum Wage Act, RCW 49.46, Exempt employees, Administrative/managerial Exemption

The issue in this test case of what apparently could be nationwide actions against this employer, ¶ 40, has to do with whether certain of the employer's sales employees are exempt from over time.

The employer claimed that the individual employee's primary duties consisted of promoting sales while the employee contended that he performed manual labor and individual retail sales and that he was therefore not exempt from the overtime requirements of the MWA.

The Superior Court award of summary judgment to the employees is affirmed. However, the Court of Appeals determined that a multiplier of .25 awarded to employee's counsel by the Superior Court was inappropriate - a multiplier was not warranted.

The employee was a 'Territory Manager' for the employer. This job title was changed from something less grandiose. He serviced various retail stores where the employer's products are sold such as 'big box' hardware stores. In going between these various stores, employees were not paid for their driving time. ¶ 4.

Apparently, the employer fired the employee which caused the overtime wage claim to be made. The case traveled to mandatory arbitration which resulted in an award favorable to the employer. ¶ 7. The employee sought trial *de novo* and as heavily litigated in the Superior Court. There, the employee prevailed to the extent that the Court awarded double damages for willful withholding of wages, $24,406.20. RCW 49.52.050 and .070. ¶ 8. In seeking trial *de novo*, the employee ran the risk that he could be liable for the employer's attorney fees if he did not improve his position.

The employer did not meet its burden of establishing that the employee performed administrative work. Here, the work performed was not substantially related to management or general business operations as described at WAC 296-128-520(4)(b). ¶ 16. Rather, the employer provided its employee with various tools with which to perform manual labor at displays of employer at various retail outlets. ¶ 17. That the employee and others like him might be asked for ideas did not qualify him as an administrative employee because then "all employees would be exempt . . . ." N.6.

In determining the amount of overtime to be paid to the employee, the employer contended the fluctuating work week, approved in ***Inniss v. Tandy Corp***., 141 Wn.2d 517, 7 P.3d 807 (2000), should apply. That concept, however, requires "a mutual understanding" between employer and employee that a fixed salary is compensation, apart from overtime, for all hours worked in a week, regardless of the number of hours. ¶¶ 31-32 and ***Monahan v. Emerald Performance Materials, LLC***, 705 F.Supp. 2d 1206 (WAD. Wash. 2010). Here, the evidence showed that the parties intended a 40 hour work-week, not one which fluctuated.

As for willful withholding of the overtime compensation, the Court of Appeals upholds the Superior Court determination on a CR 56 record that the employer was not entitled to the 'bona fide dispute' defense. ¶ ¶ 35-37. The evidence, including a change in job title from 'Retail Sales Representative' to 'Territory Manager' demonstrated that the employer "was intentionally attempting to evade the MWA's overtime wage requirements." ¶ 37.

The employee claimed over $500,000 in fees and costs in this 'test case.' ¶ 37. It was not error for the Superior Court to consider the employer's fees and costs in assessing the reasonableness of fees for the employee. ¶ 46-47. Rather, this "is probative of the reasonableness of a request for attorney fees by prevailing counsel." ¶ 47. Thus, comparing the time spent by the employee's lawyer with the time spent by the defense lawyer "in performing the same task" may be the best measure of what is reasonable. *Id*.

However, the award of a multiplier to the attorney fee was error. ¶ 49. The Court did not think that the case was 'high risk' or that it had novel problems of proof. ¶ 53. But the discussion here did acknowledge that this was a 'test case' and that there was aggressive litigation. *Id*. Rather, where, as here, liability and damages were resolved on summary judgment, a case such as this is the "least risky" of contingent fee cases. N. 20. But this assumes that it could be foreseen at the outset that the matter would be resolved either way on a motion.

The discussion about the multiplier is unsatisfying and may attract the attention of the Supreme Court in any petition for review.

E. Davis v. Fred's Appliance, Inc.,
___ Wash. App.___, 287 P.3d 51 (2012),
Discrimination, hostile environment due to sexual orientation; defamation

Employee/Plaintiff was a delivery driver for employer. A manager (the employer claimed this person was a supervisor) at the employer referred to employee as "Big Gay Al." ¶ ¶ 3-4. Employee asked manager not to refer to him in that manner. But it continued. ¶ ¶ 5-6. The employer's general manager was informed of all of this and arranged a meeting where the

manager would apologize. This occurred after the operations manager told the manager that the name calling was inappropriate. ¶ 9.

The meeting where the apology was presented did not go well. Some of those present or nearby contend that the employee used various epithets and directed them to the manager giving the erstwhile apology. The employee claimed that the apology was insincere and denied using profanity. ¶ ¶ 10-14. Various upper level managers decided that the employee's behavior could not be tolerated and the employee was fired. ¶ 15.

Employee sued on the basis of a hostile work environment. Employer obtained summary judgment. Employee appealed. Employer prevailed in the Court of Appeals.

The decision is suspect.

Employee contends that a letter from the Employment Security Department was improperly ruled inadmissible. However, RCW 50.32.097 is to the contrary. (This statute is often overlooked by both sides in employment litigation. It deserves more attention.)

Employee claimed that the hostile work environment was due to the perception of the employer that he was homosexual. The decision holds that "perceived sexual orientation is not a protected class and therefore [employee] is not a member of a protected class." ¶ 31. The Court reached this conclusion because in the 2006 amendments to RCW 49.60, 'gender expression or identity' includes perception of such. However, there is no like inclusion of 'perception' with regard to the mention of 'sexual orientation.'¶ 30. RCW 49.60.040(26). This seems at odds with what RCW 49.60.010 and .020 inform us - liberal construction of the statute and the necessity to eliminate discrimination in employment. Further, why wouldn't repeatedly calling someone 'Big gay Al' not be a part of gender expression or identity?

The Court also concluded that employee was referred to in an offensive manner on three occasions. "[W]e are led to conclude that the utterances were only casual, isolated, and trivial." ¶ 33. Compare this, however, with the Supreme Court decision in ***Loeffelholtz v University of Washington***, Part II.A, *supra*.

Further, the manager's conduct could not be imputed to the employer. The employer characterized this person as a supervisor with no authority to hire, fire or punish and this seems un-refuted in the context of this CR 56 motion. The employer claimed that it was not on notice of the offensive comments until they were all uttered. ¶ 36.

The decision easily disposed of the defamation claim by stating that employee had worked at the store for more than a year and that "co-workers were likely familiar enough with [employee] to know that he was not gay." This is appropriate for disposition under CR 56? This assumes quite a lot. As for customers who overheard the exchange, s/he "would have perceived that [employee] was the object of some teasing and not necessarily gay." This, according to the decision, defeats the notion that the utterances were meant to be assertions of truth. ¶ ¶ 45-46. This is breath-taking ion the context of a CR 56 motion.

Further there was no showing of special damage. Quitting a job apparently was not due to a hostile environment and thus likely could not support a claim for wage loss. Special damages would be required because the claim would not be for defamation *per se*, allowing recovery of general damages.

Judge Siddoway dissented on the defamation claim. She contended that the employer did not present evidence as to what listeners of the utterances understood them to mean. ¶ 66. While the utterances may not amount to defamation *per se*, they could lower the employee's standing among some members of the community. ¶ ¶ 67-68. "It oversteps our role to accept [employer's] invitation and hold as a matter of law, that an imputation of homosexuality is no longer defamatory." ¶ 70. Similarly, the dissent would hold that ***respondeat superior*** liability was a jury issue. ¶ 71.

This decision begs for review by the Supreme Court if only on the basis of examining the assumptions made by the Court about how the utterances were perceived by third parties.

F. Harrell v. Washington State DSHS,

___ Wash. App ___, 285 P.3d 159 (2012),

Disability discrimination, accommodation, night blindness; ADA, sovereign immunity

A jury verdict in favor of the employer is affirmed.

Employee has night blindness and sought and obtained work at a sex offender treatment facility as a counselor. A labor agreement provided that the counselors would be scheduled on various shifts in no "particular permanent manner." Employer believed this precluded it from scheduling counselors to the same prescheduled shifts over time.

After working a swing shift, employee felt that his vision presented difficulties when working along the outer perimeter of the facility. He did not tell anyone about this at the time. ¶ 4. After some time, employee determined he could only work day shifts and informed management of his vision impairment. ¶ 5. Employee was advised to go to 'call in' status to allow for greater flexibility in working day shifts. ¶ 6. This meant that employee could work day-shift in the event a person assigned to that shift called in ill or was absent due to vacation. Management was instructed "to make every effort to make any day shift on-call assignments" to employee. ¶ 8. On various occasions, records showed that management of the facility called employee to offer day shift work. They left voice mail. ¶ 11. The response of employee to these calls was minimal. Sometime after this, state budget cuts required a RIF of 60 employees including employee. ¶ 14.

Employee sued, claiming disability discrimination. Both sides moved for summary judgment and both motions were denied. On appeal, employee argued that as a matter of law, the employer failed to accommodate his impairment and that denial of summary judgment was, therefore, improper.

Here, however, the employer could not remove one employee from a shift and replace him or her with employee due to the employee's disability. And, the labor agreement prevented perpetual

assignment of employee to a day shift. Allowing employee to 'call-in' in the event of absences allowed an accommodation. ¶ 28. Employee was arguably allowed to avoid working nights and the denial of summary judgment and the adverse jury verdict were affirmed.

Employee asserted claims under the ADA. However, the state was successful in dismissing that claim due to sovereign immunity. The waiver of sovereign immunity found at RCW 4.92.090 did not waive the state's immunity to ADA claims filed in state court. ¶ 35. Such a waiver must be 'unequivocally expressed." ¶ 34. Ambiguities about immunity must be resolved in favor of maintaining immunity. ¶ 34. An example of waiver of sovereign immunity with regard to claims created by Federal law is the express waiver for Jones Act claims found at RCW 47.60.210. N. 6.

G. Fulton v. Washington State DSHS,
169 Wash. App. 137, 279 P.3d 500 (2012),
Discrimination, failure to promote

This exhaustive decision provides a primer of case law and analyses arising under RCW 49.60 and more specifically, with failure to promote claims.

Employee claimed gender bias when a male was promoted off of a promotion list and she was not even able to apply for the particular position she sought.

Employee was temporarily appointed Acting Operations Manager and then became an Acting Office Chief. Employee expressed an interest in being appointed as the permanent Operations Manager after her Acting Office Chief position came to an end. ¶ ¶ 3-4. However, this expression of interest was not made to the person who ultimately made the decisions about which employee complained nor is there evidence that this information was conveyed to that person by anyone else.

The employer posted a job opening announcement for the Office Chief position. Employee did not apply for that position. A woman was selected for the Office Chief position and a male was the runner-up. ¶ 5.

Management considered the candidates for the Office Chief position were outstanding and the male runner-up for that position was chosen for the Operations Manager job. ¶ 6. There was no opportunity for employee to apply for this position as it was not posted.

Almost three years later, employee sued for gender bias. The Superior Court ordered summary judgment for the employer and the Court of Appeals affirmed.

The ***McDonnell-Douglas*** burden shifting scheme is set out in great detail at ¶ ¶ 17-19. In order to establish a *prima facie* case, it is sometimes not necessary for employee to apply for the position the employee sought. ***Carmichael v. Birmingham Saw Works,*** 738 F.2d 1126, 1133 (11th Cir. 1984). ¶ 25. This is especially so where the employer does not provide an opportunity to apply. ¶ ¶ 27-32.

Having determined that it was not necessary for employee to apply for the position, the next inquiry in determination of the existence of a *prima facie* case is whether the employer can articulate a non-discriminatory reason for the action it took. ¶ 32. And here, the employer defeated the employee's establishment of a *prima facie* case. ¶ 33-37. The employer's evidence about the quality of the candidates and the desire to conserve time and money in a more formal process were not effectively rebutted by the employee. ¶ ¶ 38-39. That the manager who made the selection had a limited exposure to employee's skills and aptitude, which he deemed inferior to the male candidate, does not demonstrate pretext. ¶ 42 and *see* ***Parsons v. St. Joseph's Hosp. & Health Care Ctr.***, 70 Wash. App. 804, 811, 856 P.2d 702 (1993).

H. Short v. Battle Ground School District,
169 Wash. App. 188, 279 P.3d 902 (2012),
RCW 49.60, religious discrimination; lack of religious accommodation under state law.

A Superior Court's summary judgment for the employer is affirmed.

Employee is described as a devout Christian with deeply held religious beliefs. ¶ 2. Presumably, one of those beliefs is that she ought not to lie. That belief collided with what was apparently an office politics dispute between the employer's information officer and the Superintendent of the school district. Apparently, there was bad-mouthing going on between the information officer and the Superintendent. The Superintendent who was, apparently, employee's boss, told her to lie to the information officer about unflattering comments employee had attributed to the Superintendent. ¶ ¶ 3-8. Employee refused to do so and, according to employee, the Superintendent became hostile and her work situation became "increasingly intolerable." ¶ 11. At some point, employee quit. ¶ 11.

The employee's lawsuit alleged religious discrimination and unlawful retaliation.

In discussing the religious discrimination claim, the decision noted that employee was asserting a failure to accommodate claim. ¶ 17. However, it is not altogether clear what the accommodation would be. But such a theory has not been recognized under state law. ¶ 17. Rather, in ***Hiatt v. Walker Chevrolet Co.,*** 120 Wn.2d 57, 837 P.2d 618 (1992) the Supreme Court dealt with examining Title VII religious discrimination cases and concluded that the federal statute imposed a duty of employers to accommodate employee religious beliefs and practices. There is no such express requirement in the state law. ¶ 23. In Hiatt, the Court "specifically disapprove[d] the assumption" that the state law was identical to Title VII with regard to religious accommodation. N. 15. In addition, the state law was enacted in 1949, 25 years before Title VII was enacted. ¶ 24

Essentially, because there is no affirmative legislative mention of accommodation with regard to the definition of 'creed' in RCW 49.60, there is no affirmative duty to accommodate. ¶ 24.

The decision rejected the notion that the state law implicitly requires accommodation. ¶ ¶ 26-28.

With regard to the retaliation claim, the court determined that employee was unable to establish that the terms and conditions of continuing employment were 'intolerable.' ¶ ¶ 29-37. However,

as noted in Part I.A of these materials, this is simply an incorrect statement of Washington law under RCW 49.60. The decision observed that short periods of on-the-job stress and isolated acts of hostility do not rise to 'intolerable.' But would they rise to proximate causation under ***Martini v. The Boeing Co***., Part I, *supra*?

I. Rose v. Anderson Hay & Grain Co.,
168 Wash. App. 474, 276 P.3d 382 (2012),
Wrongful termination; adequate alternative remedy

Employee claims he was fired because he refused to do certain things prohibited by regulations adopted under the federal Commercial Motor Vehicle Safety Act (CMVSA). The case was initially filed in federal court but that case was dismissed because employee did not file a complaint with the Secretary of Labor as provided in CMVSA. Employee then filed an action in state court alleging wrongful termination in violation of public policy. That, too, was dismissed. ¶ ¶ 1-3.

The Court of Appeals finds ***Cudney v. ALSCO, Inc***., 172 Wn.2d 524, 259 P.3d 244 (2011) to be dispositive: There was another means of protecting the public policy expressed in the CMVSA - the complaint process with the Department of Labor. ¶ 7. That the time period for making such a claim elapsed by the time the state action was filed was of no consequence. ¶ 11.

J. Quedado v. The Boeing Co.,
168 Wash. App. 363, 276 P.3d 365 (2012),
Wrongful demotion, employer writings, need for specific promises of specific treatment.

Here, the employee claimed he was improperly demoted out of a management job by the employer in violation of what he perceived to be employer policies granting a type of corporate due process. The employee had improperly used his influence to have relatives hired by the employer. ¶ 5. This does not appear to be denied. Because of the demotion, the employee suffered a reduction in wages. ¶ 6.

Here, employee relied on an employer Code of Conduct which asserted that the employer would act with "integrity" and impartially. ¶ 15. However, it does not provide any specificity as to how employees will be treated and therefore does not rise to an enforceable promise with regard to how employee could expect to be treated. ¶ ¶ 16-17.

Employee also relied on other company 'procedures' and 'instructions' regarding investigations of alleged employee misconduct. However, these documents are phrased in generalities and do not promise any sort of progressive discipline. ¶ ¶ 18-19. That one of the documents stated that discipline should be consistent and that there was evidence that two other employees were treated less harshly than this one is of no consequence: The documents clearly allowed the employer "ample discretion to impose varying discipline." ¶ 20.

The employee's claim that he did not sign any receipt for a written disclaimer of contractual rights in the various documents on which relied is doesn't sit well. "Indeed, he claims to have

known enough about the specific contents of the two documents to rely on them. It is not plausible that he was . . . unaware of the conspicuous disclaimer." ¶ 25

There is a good discussion of handbook cases and principles in this decision. And, the decision is mercifully brief.

K. Moore v. Commercial Aircraft Interiors, LLC, et. al.,
168 Wn. App. 502, 278 P.3d 197 (2012)(Petition for Review Pending),
Tortious interference in potential employment, inevitable disclosure, blacklisting.

(The author of these materials was counsel for appellant)

The Court of Appeals affirmed a summary judgment for the employer. The Court's decision does acknowledge that the state anti-blacklisting statute, RCW 49.44.010, does allow for a civil cause of action.

Employee was employed by employer on two different occasions. In between these two stints, employee attempted to broker an acquisition of the employer with another firm. Each side to the transaction signed non-disclosure agreements with regard to confidential information. Employee was never asked to sign a post-employment restraint (PER). ¶ ¶ 2-6.

After employee was laid off following his second stint with the employer, he obtained a job offer from the firm which earlier sought to acquire the employer. The potential employer wrote to the past employer to learn if there was any PER in place. In response the attorney for the employer threatened suit because of employee's inevitable disclosure of employer's confidential information. Were it not for that threat, employee would have been hired by the potential employer. ¶ ¶ 7-9. Employee sued the former employer for tortious interference with his prospective employment. the Answer to the Complaint also raised the inevitable disclosure doctrine. The trial court and the Court of Appeals determined that employee had not established that the employer used improper means or had an improper motive in threatening suit. ¶ ¶ 15-16

Employee referred to the anti-blacklisting statute, RCW 49.44.010 as evidence of a rule of law making it unlawful to act to prevent a person from obtaining employment. However, that statute requires proof of malice and here there was none, according to the Court. ¶ 18. (However, the employer's Answer to the Complaint asserted a variety of counterclaims against employee ranging from bad faith to civil conspiracy with the potential employer).

The employee contended that the inevitable disclosure doctrine has never been approved in Washington and that the doctrine is inconsistent with employee mobility. ¶ 22. Employee also contended that where the doctrine has been applied, courts have determined that the employees in those cases were guilty of misconduct. However, this Court sees things differently. ¶ 24. See, especially, the discussion of ***PepsiCo v. Redmond***, 54 F.3d 1262 (7th Cir. 1995). You read and you decide.

As for the claim arising from the anti-blacklisting statute, the Court acknowledged that the statute, while criminal in nature, does provide a civil remedy but that it was inapplicable here.

L. Evergreen Moneysource Mortgage Company v. Shannon,
167 Wash. App. 242, 274 P.3d 375 (2012),
Duty of loyalty, duties of departing employee.

This decision affirms summary judgment for defendant Shannon in all respects except for the employer's claim for a common law claim of breach of duty of loyalty. The decision deals with issues of non-solicitation of clients and employees and provides a warning about timely pleading of claims: the Court affirmed a trial court order denying a motion to amend the Complaint to add a misappropriation of trade secrets claim due to prejudice to the plaintiff. It also provides a lesson in drafting of employment agreements.

Shannon worked as a mortgage lender. In 2007 he became an employee of Evergreen as did his employees. He signed an employment agreement which provided: "After Agent leaves Evergreen's employment, Agent shall not . . . .solicit or aid anyone in the solicitation of any employees . . . ." ¶ 21. Another part of the contract stated upon termination of employment, Shannon was to "surrender and deliver all documents and loan information to Evergreen." ¶ 29.

Shannon became disaffected with Evergreen. He became an employee of another company effective May 1, 2009. ¶ 4. In advance of that date, Shannon discussed his move with other of his co-workers. Some of them followed him to the new shop. And in advance of going to the new employer, Shannon shared with it certain of Evergreen's information such as profit and loss statements. ¶ 6.

Evergreen seemed upset with this turn of events. It sued Shannon for breaches of contract and duty of loyalty; tortious interference with business expectancy and contractual relations and a violation of the Consumer Protection Act, RCW 19.86. ¶ 1. All the claims were dismissed on Shannon's motion for summary judgment. Shannon was also ordered a healthy sum for attorneys' fees under a fee shifting provision of his employment contract. ¶ 17.

The breach of contract claim regarding solicitation of employees failed. Shannon did his solicitation while he was an employee. The non-solicitation provision, *supra*, applied only after Shannon left Evergreen's employment. However, there were factual issues to resolve as to whether this breached a common law duty of loyalty. ¶ 22, 26 and see ***Kieburtz & Associates v. Rehn***, 68 Wn. App. 260, 265, 842 P.2d 985 (1992).

As for solicitation or diversion of customers, the decision noted that the evidence demonstrated that the supposedly diverted customers all indicated a desire to remain with Shannon and finish their loans with the new outfit. This was not contradicted by Evergreen. ¶ 38.

The employees of Evergreen were at-will and they do not have an expectancy in continued employment. Therefore there could not be a tortious interference with any expectancy by Evergreen that it would have a further relationship with them. ¶ 53-57.

As for tortious interference with customers, the decision seems to rely on its analysis that because there was no contractual violation, there was no tort liability. ¶¶ 58-60. The evidence here seems not susceptible to summary judgment. At ¶ 31 the decision states how the parties "look[ ] at the matter differently . . . ." There seems no doubt that certain customers were listed in both Evergreen's pipeline and that of Shannon's successor employer. ¶ 36.

The Consumer Protection Act failed because there was not a *per se* violation of the statute and because Shannon's conduct "lacks the capacity to impact the public in general." ¶ 64. Because the date to amend pleadings passed and because Shannon claimed further expensive discovery would be necessary if a Uniform Trade Secrets claim was asserted, the trial court properly exercised discretion to deny a motion to amend to assert an UTSA claim. ¶¶ 70-77. the pleadings did not, in any event, appear to imply a misappropriation claim because they did not "give Mr. Shannon fair notice of the disclosure claim . . ." ¶ 48.

M. Diaz v. Washington State Migrant Council,
165 Wn. App. 59, 265 P.3d 956 (2011),
Corporate governance; board members, discovery from and about board members, sanctions, adverse inference instruction.

This decision should be read carefully by counsel bringing or defending a claim involving the conduct of board officers or board members in their 'personal' lives. A corporate board member choosing to invoke the Fifth Amendment may result in an instruction that a fact finder may make an adverse inference against the corporation due to that fact.

A newspaper published a story claiming that the board chair of a non-profit migrant worker rights advocacy group was himself an illegal immigrant. The board chair confessed to the executive director, Diaz, that the allegation was true. Diaz believed that further funding of the organization was jeopardized if board members were not legal residents and sought proof of their lawful residence in the United States. ¶ 4-5.

Diaz was fired, he then sued the corporation. It does not appear he sued the individual board members. In his suit Diaz sought discovery as to the board members' immigration status. ¶ 6-7. The corporation sought a protective order and Diaz moved to compel. The trial court denied the corporation's motion and granted Diaz's motion. ¶¶ 8-9.

After these motions, several board members invoked the Fifth Amendment when asked in depositions about their immigration status. ¶ 10.

Diaz sought and obtained an order of default on liability. ¶ 11. The trial court gave the corporation more time to discuss the consequences of further stonewalling by the recalcitrant board members. ¶ 11. In this regard, it was clear that the lawyer for the corporation "was conflicted from providing board members with personal legal advice." *Id.* But there is no mention as to whether these board members had personal counsel.

On the corporation's motion for reconsideration, the default was set aside and a lesser sanction of an 'adverse inference' instruction was instead imposed. The corporation sought discretionary

review. The case settled during the appeal. However, the Court determined that the issues were of continuing and substantial public interest and that an opinion should issue. ¶ 2, fn.1. The trial court rulings were reviewed for abuse of discretion. ¶ 18.

Salas v. Hi-Tech Erectors, 168 Wn.2d 664, 230 P.3d 583 (2010) was not helpful to the corporation. That case had to do with inadmissibility of evidence at trial that the plaintiff in a negligence claim was an illegal immigrant. "There is nothing in Salas that supports cutting off inquiry at the outset of discovery." ¶ 23.

It was appropriate for the trial court to reconsider its contempt order against the corporation. The corporation's ability to control its board members with respect to having them produce documentation to respond to a request for production as to their personal legal status is dubious. ¶¶ 28, 30. There does not appear to be any legal duty for a board member "to make personal records available to the corporation that he or she serves." ¶ 30.

However, responses to an interrogatory required the corporation to respond with respect to its directors' immigration status.

"Whether a corporation has reasonably responded to discovery is not measured solely by whether the lawyers . . . .tasked with drafting responses have included all of the information they have collected., It is substantially measured by whether corporate directors, officers, employees, and other agents who possess responsive information have provided it to be included in the corporation's response." ¶ 35.

Because a corporation has not been able to secure cooperation, there may be an explanation for an insufficient response. But that does not excuse the non-response. ¶ 36.

There is an interesting discussion of agency and whether a director of a corporation is an agent because a director "controls the corporation, not vice versa" ¶ 38, fn.7. Because it is questionable whether a director is an agent, it seems much of the discussion about imputing the agent's knowledge to the principal, the corporation, is unnecessary. See, ¶ 38 and fn.8. The notion of splitting knowledge of a director (as opposed to production of documents) into two bins, one personal and one corporate, gained no traction. ¶ 37.

The adverse inference instruction was appropriate not so much as a sanction "but simply because the inference is relevant and outside the scope of the privilege." ¶ 43. Rather, the instruction was a "reasonable response to the discovery problem in this case." ¶ 41. And, because the instruction was proposed by the corporation as a lesser sanction than a default order on liability, the corporation really can't complain about it.

N. International Union of Operating Engineers Local 286 v. Port of Seattle, 164 Wn. App. 307, 264 P.3d 268 (2011)(Review granted 3/27/2012, 173 Wn.2d 1026),
Arbitration, conflict with public policy; RCW 49.60 as source of public policy; remedy upon vacation.

Here, Division I mostly affirms the Superior Court's vacation of an arbitration award because the award conflicted with the policies of the Washington Law Against Discrimination, RCW 49.60. Of interest is that the Superior Court judge was Hon. Steven Gonzalez, now a justice on the Washington Supreme Court.

A Caucasian employee displayed a noose in a place where an African American employee would see it. The two employees had a falling out before this. ¶ 2. The Caucasian employee of twelve years was fired for violating the employer's zero-tolerance anti-harassment policy. The fired employee grieved through a union and the matter went to arbitration. ¶¶ 3-4.

The arbitrator determined that the display of the noose violated the employer's policy but that 'just cause' did not exist to fire the employee. ¶ 8. The arbitrator ordered a retroactive 20 day suspension and reinstatement with back pay and benefits. *Id*.

The employer sought review of the arbitration award in Superior Court by a writ of certiorari. ¶ 9. Judge Gonzalez ordered a suspension of six months and a four year probationary period. From this, the Union appealed.

Here, there are two conflicting and profound public policies: Arbitration of labor disputes as a means of their final resolution and elimination and prevention of discrimination. ¶ 12. An explicit and well defined public policy will allows a court to vacate an arbitration award. "We do not examine whether the employee's underlying conduct violates a public policy, but whether the arbitrator's decision does." ¶ 13. RCW 49.60 enunciates such a policy. ¶ 14-16.

The Court determined that the arbitrator's award "minimized society's overriding interest in preventing this conduct from occurring." ¶ 22.

However, the Superior Court improperly substituted its judgment for that of the arbitrator when it fashioned a remedy. ¶ 27-28. Rather, it should have remanded for further arbitration. ¶ 28. Therefore, this Court vacates the judgment of the court below and remands.

O. Pellino v. Brink's, Inc.,
164 Wn. App. 668, 267 P.3d 383 (2011),
Meal periods, rest breaks, liability of employer for wages when employees on duty.

After a bench trial, Superior Court determined that Brinks was liable to a class of drivers and messengers for failing to provide meal and rest breaks as required by the Washington Industrial Welfare Act, RCW 49.12. The Court of Appeals affirmed.

Brinks owns and operates armored trucks which carry cash, securities and other valuable stuff. Each truck has a driver and a messenger. A mandatory start time is set for each route. ¶ 5. Management also sets out in writing the various stops to be made for pick-ups and deposits. The company pays messengers and drivers for meal and rest breaks. ¶ 7. During those times, "operational rules and procedures . . . remain in effect at all times . . . ." *Id*. And, for meals, management exhorted the employees to 'eat on the run'. ¶ 20.

At all times drivers and messengers "must not only be alert, you must look alert." ¶ 8. To that end, these employees are forbidden to carry reading materials, radios, personal phones and the like. The employees may not engage in any personal business while on duty. ¶ 9. The claim was that the meal and rest periods were not legally sufficient because the employees were required to be on active duty during those breaks. ¶ 13.

The class consisted of 182 employees. ¶ 11. Cross motions for summary judgment were denied and a fourteen day bench trial ensued. ¶¶ 13-14.

Brinks argued that the class was improperly certified because the employees had discretion about when and how to take meal and rest breaks. ¶ 30. It was not necessary for there to be identical issues of law and fact with respect to each class member. ¶ 31. Rather, there needs to be a common nucleus of operative facts for each class member. *Id*. at fn.5.

The decision notes that Washington's labor legislation is progressive and protective of employee rights. ¶ 34. Part of that regimen consists of regulations enacted by the Department of Labor and Industries regarding meal and rest breaks, WAC 296-126-092. This regulation "imposes a mandatory obligation on the employer" to provide a meal break after five consecutive hours of work and a rest period of ten minutes of the employer's time for each four hours of work. ¶ 37. The regulation is, in turn, subject to various 'Administrative Policies' mentioned at ¶¶ 39-41. One of those policies describes a rest break "as a break that allows the employee to stop work duties or activities . . . ." ¶ 42. Likewise, the meal period should be uninterrupted and, if there is an interruption requiring work to be performed, the total time of the meal period is extended so that it consists of a minimum of thirty minutes. ¶ 40.

By being on duty and engaged in work activities, the employees did not receive their lawful entitlement to rest and break periods. ¶ 46.

While an employer may require an employee to be 'on call' during these periods, the employer may not require work to be performed. ¶ 51. Here, the employees had to be on alert at all times and did not have the opportunity for the requisite breaks. The decision distinguishes other cases where employees were on call or otherwise not 'on duty' at ¶¶ 52-56.

Thus, the employees were entitled to back pay for the meal periods and break periods they missed. The expert testimony regarding the methodology for determining the amount of back pay was appropriately admitted. ¶¶ 65-67. And, attorneys' fees were appropriate under RCW 49.48.030 and 49.46.090.
This decision should be read along with ***Washington State Nurse's Assn. v. Sacred Heart*** Medical Center, Part II.D, *supra*.

P. Lietz v. Hansen Law Offices,
166 Wash. App. 571, 271 P.3d 899 (2012),
CR 68, offers of judgment; necessity to specify fees, RCW 49.48.030

Here is a cautionary tale about offers of judgment under CR 68. Use of the singular has consequences when there are potentially multiple claims. Grammar matters.

A paralegal sued a law firm for unpaid wages of about $15,000. Attorneys' fees were sought under RCW 49.48.030. The parties attempted settlement. The law firm served an offer of judgment "pursuant to . . . .CR 68" in order "to settle the claim against defendants . . . .in the amount of $7,500." ¶ 5. There was no mention of fees or costs. The plaintiff accepted and moved for entry of the judgment and for fees of $36,545 which were claimed under RCW 49.48. ¶ 7. Superior Court determined that there was no 'meeting of the minds' as to whether the offer of judgment included fees and costs and refused to enter the judgment. ¶ 10. Plaintiff sought and was granted discretionary review. ¶ 12.

The Court of Appeals reversed, ordering entry of judgment and an award of fees.

CR 68 allows a party defending against a claim "to allow judgment to be taken . . . .with costs then accrued." The term 'costs then accrued' "may or may not include attorney fees depending on the underlying statute." ¶ 17.

"If the statute or contract provision defines "attorney fees" as 'costs' the court reads the offer . . . as including . . . fees . . . ." ¶ 17. If the contract or statue defines 'attorney fees as separate from costs, then there must be a separate award of fees in addition to the amount set out in the offer of judgment. *Id*.

Here, the offer of judgment was silent about 'costs.' That ambiguity will be construed against the offeror. ¶ 19. Likewise, RCW 49.48.030 does not mention costs nor does it state whether attorney fees are costs. ¶ 20.

The law firm employer relied on ***McGuire v. Bates***, 169 Wn.2d 185, 234 P.3d 205 (2010). There an offer was made to settle "all claims" "pursuant to RCW 4.84.250-.280" where one of the claims was for attorney fees. This was found to be enforceable in the amount of the offer only and not for additional fees. 169 Wn.2d at 190-191. ¶ 32. Here, however, the offer of judgment was with respect only to "the claim." The use of the article 'the' further suggests a single claim. ¶ 26.

In further support of its conclusion that fees were appropriate, RCW 49.48.030 states that a court "shall" award fees for any person who obtains a "judgment". Here, the CR 68 offer constituted a judgment. ¶ 39. Therefore, the statute was unfavorable to the employer's position especially because it is part of a mechanism to allow aggrieved employees to assert their statutory rights. ¶ 40.

Q. Nye v. University of Washington,
163 Wash. App. 875, 260 P.3d 1000 (2011) (review denied 2/08/2012),
Contracts; public university governance, modification of wage rates.

If you want to learn about how a public university in this state is governed, this is a must read.

Superior Court dismissed this suit for back pay based on a presumed minimum 2% salary increase for faculty per year. The Court of Appeals affirmed.

Plaintiff's case for a salary increase for the 2009-2011 biennium was premised on a portion of the university handbook and policies adopted thereunder. ¶¶ 1,4. The handbook constitutes a contract between the university and faculty. ¶ 16 and fn.13. With respect to the process for determining allocations of funds for salary increases, the president of the university retained final authority. ¶ 3. The process allowed for 2% salary increases each year for faculty who were "meritorious in performance." ¶ 4.

Governance of the university is shared by the Board of Regents, the university's president and the faculty. ¶ 17.

In 2009 the unpleasant aspects of state revenue led the legislature to reduce funding to the university. ¶ 6. This, in turn, led the university's president to reconsider the 2% automatic salary increase. To that end a committee was appointed to do just that. ¶ 6. Members were appointed by the chair of the faculty senate and by the president. *Id*. Based upon that group's work, the president issued an order which suspended the presumed 2% base salary increase. The Board of Regents adopted a resolution to the effect that this order superseded conflicting policy. ¶ 9. The president followed procedures in the handbook with respect to modification. Reliance by the plaintiff on salary increases simply was meaningless where the parties - faculty and administration - agreed to change the contract.

In many ways, this is essentially the same as an amendment to or modification of a collective bargaining agreement.

R. Westberry v. Interstate Distributor Co.,
164 Wn. App. 196, 263 P.3d 1251 (2011),
Minimum Wage Act; Truck Driver, overtime, DL&I approval of wage calculation

A truck driver was paid according to a compensation system approved by the Department of Labor and Industries as consistent with the Minimum Wage Act, RCW 49.46 (MWA). Plaintiff sued for overtime wages. He lost in Superior Court and Division II affirmed.

Plaintiff is a Georgia resident working for a Washington trucking company. He drove in and outside of Washington. He worked more than 40 hrs/week and was paid based on miles driven, loads and unloads and a per diem. ¶ 2.

The employer sought and obtained a determination from the Department that its wage system comported with the MWA. ¶¶ 4-5. The Department's process took into account the decision in ***Bostain v. Food Express, Inc.***, 159 Wn.2d 700, 153 P.3d 846, *cert. denied*, 552 U.S. 1040 (2007) which held that the MWA required overtime for hours a Washington resident spent driving intrastate and interstate.

The Department's approval of the employer's wage system was not part of an adjudicative process. That the employer had contact with decision makers was not *ex parte*, a concept which would apply to adjudications under the APA. ¶¶ 11-15.

The Department's determination of conformity of the employer's wage system with the MWA was entitled to "substantial weight." ¶ 18. The determination of conformity was not based upon a subjective opinion. Rather, its regulations provided guidelines for determination of conformity. ¶¶ 20-21. The agency action was, therefore, not arbitrary and capricious. ¶ 20.

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