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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. The Lawfulness/Awfulness Of Non-Solicitation And Non-Hire Agreements

The difference between awful and lawful is a single consonant. Let your clients know.

A key feature of most post-employment restraints, many employment and severance agreements, and some settlement and release of claims agreements, is a commitment not to solicit or hire the former employer's employees for a stated period.

This commitment of A employee with B employer, of course, does these things:

It impedes B's other employees, XYZ, to terminate employment at-will;
It hinders mobility of labor;
It restrains trade;
It may have the effect of reducing wages.

How can all these things be lawful? The usual response is that these are 'reasonable' in the over-all scheme of things. But are they? The Washington constitution and state statutes may provide answers.

The commitment is by A who was employed by B and affects XYZ employees of B without their knowledge or consent.

In other words, XYZ are prevented from having a possible economic opportunity through A because of B's contract with A. XYZ are potential third-party losers in the transaction between A and B.

Thus, B, the employer, can terminate XYZ at will. The termination may be due to the economic distress of B. Or it may be due to poor performance or simply dislike of XYZ. But XYZ's ability to terminate at will to obtain a possible benefit through A is compromised through no agreement with B.

Regardless of the reason for their termination, XYZ may have better opportunities for income, advancement in a trade or profession, or better working conditions if they work for A or A's new employer.

One could say that the obligation of A not to ***solicit*** XYZ is a reasonable restraint on A's future action. In that situation, A can make known contact information and XYZ could approach A and seek employment. ***Nowogroski v. Rucker,*** 137 Wn.2d 427 at fn.4 (1999). But this assumes XYZ know of A's contact information. And some employers propose contracts which prevent A from publicizing contact information generally. How is that 'reasonable'?

But an obligation not to ***hire*** XYZ even if they initially approach A—how is that reasonable?

The recent Washington legislation on post-employment restraints finds "that workforce mobility is important to economic growth and development." RCW 49.62.005. This is important in any discussion of post-employment restraints.

The statute deals in part with non-solicitation agreements: A franchisor may not restrict a franchisee from hiring any employee of another franchisee only in this context: the same franchisor. *Id.* at § 7.

If non-solicitation of employees in the franchise industry is pernicious, why is the practice not pernicious in other contexts?

Certainly, this legislation does not champion non-solicitation and non-hire agreements outside of the franchise world. Instead, the statute "does not revoke, modify, or impede the development of the common law." RCW 49.62.090(2). In that vein, perhaps the statute's prohibition against non-competes for individuals earning less than the statutory threshold (now $100,000/yr.) gives guidance to courts and contract drafters about what would be tolerable for a non-solicitation or non-hire agreement.

If nothing else, RCW 49.62.010, provides a useful definition of what constitutes 'solicitation': "solicitation by an employee upon termination of employment: (a) of any employee of the employer to leave the employer . . . ." RCW 49.62.010(5).

A contractual provision prohibiting A from "aiding, assisting, or promoting . . . .[XYZ] seeking other employment . . . ." may run afoul of the simple definition in the statute.

But the larger issue remains: By restricting XYZ from other employment opportunities, is B unlawfully restraining trade in violation of the Washington's constitution at art. 12 § 22 and RCW 19.86.030?

The Washington constitutional provision prohibits "any contract . . . . for the purpose of fixing the price or limiting the production . . . of any product or commodity . . .." The statute declares unlawful "[e]very contract . . . in restraint of trade." The Washington Supreme Court adopted those as the bases for analyzing non-competition agreements. ***Sheppard v. Blackstock Lumber Co., Inc.,*** 85 Wn.2d 929 (1975). Earlier cases determined that labor is a 'commodity'.

A contract limiting the ability of an employer to hire XYZ seems a "contract…for the purpose of…limiting production…."

Since ***Sheppard***, there has been no appellate decision in Washington which explores the state's constitutional basis for analyzing a post-employment restraint. And Washington maybe unique in basing that analysis on a constitutional basis.

Non-solicitation and non-hire agreements should be subject to even greater scrutiny under the constitution and RCW 19.86.030 because they involve third parties - XYZ - not subject to the contract between A and B.

B. Are Some Appellate Decisions Deciding More Than What Needs To Be Decided?

Footnote 4 in ***Burnett v Pagliacci Pizza***, 196 Wn2d 38 (2020), Part II.E of these materials, observed that "[t]his court need not decide every issue raised but only those that are dispositive of the case." This was in the context of an invitation form an *amicus* to determine that the contract in that case was illusory. *Id*. But the footnote sets out the employer's writings and cites appellate authorities regarding illusory contracts. Without 'deciding' this issue, the decision certainly seems to engage in an advisory opinion that the employer's contract was, indeed, illusory.

Burnett first determined that a contract to arbitrate disputes was not formed due to lack of mutual asset. It then goes on to decide that the if there was a contract, it was procedurally and substantively unconscionable.

Why did the Court do that?

If a contract was not formed, what was the purpose of deciding unconscionability? Is that discussion *dicta* and therefore not controlling precedent? See, *e.g*., ***DCR, Inc. v. Pierce County,*** 92 Wn.App. 660 at fn. 16 (1998) *rvw. denied* 137 Wn2d 1030, *cert. denied*, 529 U.S. 1053 (2020). Is the discussion about unconscionability also an advisory opinion about arbitration contracts found in employee manuals and the like?

There seems to be a proclivity in appellate decisions for deciding matters beyond what needs to be decided for the disposition of an appeal. That may, in part, account for the increasing length of decisions. And that requires more lawyer time to research and therefore greater fees to the client. Judicial officers also must take more time to wade through lengthier decisions, more and more of which seem to be published.

Consider that there were 999 volumes of F2d between 1924 and 1994 – seventy years or about 14 volumes/yr. Since 1994 there are at least 970 volumes of F3d or about 37/yr. – more than three a month. A similar abundance of words is true with state appellate decisions.

Of course, the greater role of the regulatory state accounts for some of that. Word processing software also has a role.

But the point is that if courts decide more than they need to, they add to the burden of lawyers and judicial officers.

The wonderful *New Yorker* writer and author John McPhee notes that skilled writing means knowing what to leave out. Lawyers and judicial officers should take note.

C. Discrimination In The Work Place Against Non-Employees And By Non-Employees Against An Employee.

Two decisions of the Washington Supreme Court establish that employers are strictly liable for discrimination by their employees of customers, clients, patrons who are on the employer's premises. See ***Floeting v. Group Health***, Part II.F and ***W.H. v Olympia School District***, Part II.B.

These decisions are likely unique to Washington due to the way the part of RCW 49.60 deals with discrimination in public accommodation.

Can we even imagine a federal court dealing with the 1964 Civil Rights Act in the same manner when construing Title II of the 1964 Civil Rights Act?

Employers must take care to inform all levels of employees that harassment and discrimination of non-employees on the employer's premises are prohibited. And employers should ascertain whether EPLI and CGLI coverage includes liabilities towards customers, clients, etc.

And consider ***LaRose v King County***, Part III.F of these materials: Liability of the employer for tortious acts of a non-employee towards an employee. There, the standard seems to be whether the employer knew or should have known of the non-employee's conduct. The general notion is this: the employee is entitled to a safe work-place.

II. WASHINGTON SUPREME COURT

A. *Jeoung Lee v. Evergreen Hospital Medical Center*

195 Wn.2d 699 (2020)

Arbitration; *de novo* review, waiver by litigation, prejudice to opposing party

It will come as no surprise that extensive litigation will waive a party's right to invoke contractual arbitration.

Whether arbitration is waived is reviewed *de novo* on appeal. ¶ 14.

Here, a class alleged a public employer failed to provide meal and rest breaks. ¶ 5. Employer had a collective bargaining agreement (CBA) with a union. Employer pled affirmative defenses which included failure to exhaust remedies, including arbitration, under the CBA. ¶ 7.

Plaintiff moved for class certification and the parties engaged in discovery. ¶¶ 9-10.

Ten months after filing, employer moved to compel arbitration. This came about, according to employer, because discovery allowed it to understand that the claims arose under the CBA. ¶ 11.

Superior Court denied the motion to compel arbitration. Court of Appeals affirmed. ¶11-12.

Here, employer claims that an amended complaint added a current employee and that was a 'game changer' because the CBA was directly involved. ¶ 18. Employer was trying to assert that the claims arose under the CBA and not the statutory right to have meal and rest breaks.

Justice Pro-Tem Wiggins' opinion for a unanimous Court declined to decide whether the claims are statutory or contractual. A footnote observed that public employees may have CBAs which vary the statutory rules regarding breaks, RCW 49.12.187. ¶ 19, fn. 3. Employer contended that the CBA governed because it varies from what state regulations require for breaks. Id.

Employer "chose to litigate for approximately nine months and therefore behaved inconsistently with a party seeking to arbitrate." ¶ 20. Because the plaintiff class had incurred six figure attorneys' fees, compelling arbitration would "cause severe prejudice" to the class. Compelling arbitration would also allow employer to relitigate class certification. ¶ 23.

B. ***W.H. As Guardian. et al. v. Olympia School District, et. al***
195 Wn.2d 779 (2020)
RCW 49.60.215; public accommodation; strict liability of employer

This comes to the Supreme Court on certification from the 9th Circuit. The decision builds on its earlier decision in ***Floeting v. Group Health Cooperative***, 192 Wn.2d 848 (2019), Part II.F, *infra*.

This is a must read for anyone advising an employer about the liabilities its employees can create with third parties. This will likely also evoke examination of the employer's insurance coverage – whether insurance will indemnify against strict liability claims.

Here, it is undisputed that a school bus driver employed by the school district abused child passengers on a school bus. ¶ 3. Whether gender of plaintiffs was a substantial factor in the abuse was a fact question in the United States District Court proceedings. ¶ 7.

This case was originally filed in Superior Court before ***Floeting*** was decided. Afterwards, plaintiffs amended their complaint to assert that they were victims of sex discrimination in a public accommodation. ¶ 5.

The evolution of what is now RCW 49.60 dating back to 1890, the year after statehood, is set out at ¶¶ 9-14. It is useful to know that history.

The opinion by Justice Wiggins, pro-tem, for a unanimous Court, determined there is no reason here to deviate from *stare decisis* nor is there any reason why strict liability should not attach to a public employer in this circumstance. ¶¶ 16-26.

Sexual abuse and sexual assault may constitute sex discrimination. ¶ 29. The school district claimed because its employee sexually assaulted both boys and girls the case was not about sex discrimination but about age. ¶ 30. But the certified question from the federal court asked whether discrimination includes sexual misconduct. It does. *Id.*

C. ***Sampson v. Knight Transportation, Inc***.

193 Wn.2d 878 (2019)
Minimum Wage Act, RCW 49.46; piece-rate, non-productive time;
inapplicability outside of agricultural work.

This comes to the Supreme Court on certification from the Ninth Circuit. The issue is whether the state Minimum Wage Act requires a non-agricultural employer to pay a minimum wage for outside of piece-rate work? "The answer is no." ¶ 2.

In ***Carranza v. Dovex Fruit Co.,*** 190 Wn. 2d 612 (2018), the court determined that agricultural workers paid on a piece work basis should be paid at least the minimum wage for non-productive time—moving ladders; going to different orchards, etc.

Here, truck drivers, paid by the mile, sought pay for their non-productive time weighing loads, vehicle inspections, paperwork, loading and unloading. ¶ 4. But a regulation, WAC 296-126-021, applies only to non-agricultural workers: It requires payment of at least the minimum wage for each "work week" if the employee is paid in commission or piece work basis. Ag workers are in a different situation as ***Carranza*** held.

Piece work incentivizes workers differently in the agricultural and non-agricultural workspaces. ¶ 27-30.

Agricultural workers are incentivized to work harder and faster and they are a class of "historically vulnerable workers" who are closely supervised. ¶¶ 27-28. Truckers are incentivized "to make productive use of their day," not to drive faster. They also work remotely from supervision.

The characterization of non-agricultural workers may be compelling for truckers, but it seems inapplicable to garment workers who are paid by the piece. And there are some in this state.

A dissent by Justice Owens for herself and Justices Wiggins and Gordon McCloud contended that WAC 296-126-02(1) is contrary to the plain meaning of the Minimum Wage Act at RCW 49.46.020(1). The statute, as ***Carranza's*** majority took note, requires employers to pay not less than a minimum wage per hour. ¶ 40. The statute makes no distinction between agricultural and non-agricultural employment. ¶ 42. Thus, "*all*

employees who are paid on piece-rate basis [must] be entitled to separate hourly compensation for time spent preforming tasks outside of their piece-rate work." ¶ 43 (emphasis in original).

D. ***Burgess v. Lithia Motors, Inc.,***
___Wn.2d___, WL5241273 (9/3/2020)
Arbitration; judicial review of arbitrator interim ruling

Will a court engage in review of interim rulings by an arbitrator? Not surprisingly, a unanimous Supreme Court in an opinion by Justice Johnson answers: NO.

In an arbitration of employment claims under the Federal Arbitration Act [FAA] 9 U.S.C § 1-16, employee moved to compel discovery. Arbitrator denied the motion and employee brought a civil action to vacate the order and terminate the arbitration. ¶¶5-6.

Superior Court denied relief to employee due to lack of jurisdiction; Court of Appeals granted discretionary review and certified the matter to the Supreme Court. ¶ 7.

Federal appellate decisions under FAA generally limit judicial review of arbitration to 'bookends' of that process – whether an agreement to arbitrate was formed and/or the dispute is subject to arbitration (a 'gateway' dispute) and whether the award is enforceable. ¶¶ 9, 12-13.

"Once arbitration begins under the FAA, the court's authority to resolve the dispute is transferred to the arbitrator." ¶ 21.

While acknowledging that the trial court is "precluded from reviewing" interim rulings by the arbitrator ¶ 22, we do not know if that is because of judicial abstention or lack of jurisdiction.

E. ***Burnett v. Pagliacci Pizza, Inc.,***
196 Wn.2d 38 (2020)
Arbitration; employee handbook, formation of contract; unconscionability, burden of proof.

The Conclusion of this decision by Justice Madsen for a unanimous Court tells us that a contract for arbitration was not formed but that even if it was, it is procedurally and substantively unconscionable. ¶ 44. See also discussion at Part I.B, *supra*.

After determining that a contract was not formed, the Court decides other matters unnecessary to the disposition of the case. And extensive footnotes deserve attention as they may be more important than the text.

As in ***Jeoung Lee v Evergreen Hospital Medical Center***, Part II.A., *supra*, motions to compel arbitration are reviewed de novo. ¶ 10.

Employee obtained an "Employee Relationship Agreement" [ERA] during orientation. It did not mention arbitration. An employee Handbook, "Little Book of Answers," is 23 pages [not so little]. It contains a Mandatory Arbitration Policy [MAP] which is part of "Mutual Benefits Section" at page 18. The MAP is not listed in the table of contents. ¶¶ 3-7.

The ERA informs employee to learn and comply with The Little Book of Answers.

According to MAP, employee [not employer] must submit disputes to the informal grievance resolution policy and then to arbitration. ¶ 5. But employee cannot go to arbitration unless s/he/they have complied with the dispute resolution policy. Failure to do so waives the right to raise the claim. ¶ 6.

After employee was fired, he brought a class action alleging wage payment claims. ¶ 7. Superior Court denied employer's motion to compel arbitration and Court of Appeals affirmed, determining a contract was formed but that it was not enforceable. 9 Wn.App.2d 192.

A contract to arbitrate was not formed, according to the Supreme Court because employee did not knowingly consent to arbitration. Here, citation with approval is made to ***Nelson v Cyprus Bagdad Copper Corp***., 119 F.3d 756 (9th Cir 1997): That waiver of a right to a judicial forum – which is a constitutional right, after all – must be express. ¶¶ 19-21. Footnote 3 dives into this at great length.

Footnote 4 discusses the arbitration provision in the context of an illusory promise: Employer unilaterally retained the right to change all the terms in The Little Book of Answers which incorporated the arbitration provision. This was raised by an amicus. The Court noted that "[w]hile we do not disagree with [amicus] we need not reach this issue to resolve the case.

> **Odd that the Court does not 'disagree' – therefore, it agrees – but does not need to reach the issue.**

> **This is a reminder about drafting in general and drafting arbitration agreements in particular: Be careful about reservations of unilateral change and be certain that any Arbitration provision is expressly called out.**

After determining the contract to arbitrate was not enforceable, the opinion proceeds to discuss whether, if a contract did exist, it was unconscionable. This is in direct opposition to the teaching of footnote 4: Eschewing issues that are not dispositive of the matter.

While paragraphs 23-43 are likely *dicta*, they are useful as a primer for understanding the two-pronged doctrine of unconscionability and why they apply in this case. Note that either procedural or substantive unconscionability, but not necessarily both, will invalidate a contract in Washington. This is not universally true. Because a non-competition agreement for a Washington resident must be adjudicated in Washington, this discussion of unconscionability is especially important. See RCW 49.62.050(1).

Procedurally, the employer documents are unconscionable because employee lacked meaningful choice. ¶ 29. Employee had "no knowledge or notice that [employer's] MAP even existed when he signed the ERA." ¶ 28.

But a lack of meaningful choice is the hallmark of an adhesion contract. And, by itself, an adhesion contract is not unconscionable. But 'hiding the ball' in an adhesion contract scenario is unconscionable.

Think of what the UCC requires to waive a warranty of merchantability or fitness: A writing that is conspicuous. One can take that to mean **bold face**. UCC 2-316.Why does not that apply to waiver of a constitutional right to access to the courts and a jury trial? A ***Miranda*** warning buried in a 23-page document should not be a knowing waiver of a right against self-incrimination.

As for substantive unconscionability, the process for dispute resolution cannot apply to a former employee; there is no exception if one step of the process involves a manager who is the cause of the alleged dispute and the dispute resolution process including arbitration is only for claims by an employee and does not bind employer. ¶ 32, 37.

There is no severance provision in the employer writings. And severance only encourages overreaching by the drafter. ¶ 38.

F. *Floeting v. Group Health Cooperative,*

192 Wn. 2d 848 (2019)
RCW 49.60.215 Public Accommodations, strict liability of employer for employee harassment of patron/customer by employer.

Here, a majority determines that RCW 49.60.215 imposes strict liability on an employer whose employee harassed a patient of a healthcare provider.

The Court's decision acknowledged that this is different from workplace harassment. In that situation, the harassment must be imputed to the employer either through direct conduct by a manager or if the employer knew or should have known of the harassing conduct.

This decision requires employers to monitor employee treatment of patrons of its business—not that it would be a defense. Rather it is an ounce or more of prevention. But how can that occur with employees working off the employer's premises**?**

It is unlawful for "**any person** or the person's agent or employee **to commit any act [of] discrimination** in any place of public accommodation." RCW 49.60.215. The law against discrimination requires a liberal construction, RCW. 49.60.20, ¶6.

With respect of harassment or discrimination of an employee, the conduct must be by the "employer," RCW 49.60.180, ¶12. This invites a 'knew or should have known' standard.

The "any person…or employee" language in RCW 49.60.215 is substantially different and, plainly construed, imposes strict liability on the employers. ¶14. Thus, an employer cannot assert a lack of "fault," ¶20. Requiring imputation of knowledge to the employer "undermines the legislatures clear language,' ¶14.

The allegedly offensive conduct must be objectively discriminatory - a "reasonable person" test. ¶ 18. Subjectively offensive language or conduct will not cut it**.** ¶19.

How to defend? Justice Gonzalez's opinion for the majority gives these answers:

- The event didn't happen;
- The event was not objectively offensive;
- The person responsible for the offensive conduct was not an employee or agent.

Justice Madsen dissents. The majority's holding, she asserts, "makes business owners guarantors of their employee's behavior," ¶ 26. The dissent notes that RCW 49.60.215 imposes personal liability on the persons responsible for the offensive behavior. This, she claims "expand[s] who could be held accountable…" ¶ 32. But even in the situation of workplace discrimination, including harassment, there is personal liability for the offender.

More telling is the dissent's position and authorities cited, that strict liability only occurs when a statue explicitly requires it. ¶ 35.

G. *Karstetter v. King County Corrections Guild*

193 Wn.2d 672, (2019)

Wrongful termination, in house counsel, availability of tort.

The Supreme Court determined that an attorney employed by a union may maintain a claim for wrongful termination. RPC 1.16 and traditional notions of at-will employment of lawyers are not obstacles to the claim so long as the attorney/client privilege is not violated.

Plaintiff attorney was employed by a union. He had an employment contract which allowed for termination for "just cause." ¶¶4-5.

The union had a labor agreement with King County. A "whistleblower" complained about certain reimbursements—presumably from the county to union members. Plaintiff was told to cooperate in an investigation.

For an unexplained reason, the union sought advice from an outside law firm, and it advised Plaintiff's termination.

Plaintiff was fired without resort to the contractual processes. ¶ 6. Plaintiff sued claiming breach of contract and termination in violation of public policy due to his participation in the investigation. ¶23. Superior Court denied motions to dismiss, Division I of Court of Appeals reversed.

The union employer claims that RPC 1.16(a)(3) allowed it to terminate plaintiff at will. ¶ 9.

The majority opinion by Justice Wiggins observed that the in-house lawyer is in a "non-traditional relationship with his client." Therefore, he must not be treated the same as private practice lawyers. Fn. 3. This is due to "professional and financial dependence on a client" which can lead to "unusual pressures that are qualitatively different" from those faced by other private practitioners. ¶ 12.

The majority eschewed a "rigid application" of the RPC's because they were written when few lawyers worked outside of traditional law firm model. ¶ 13.

As for the wrongful termination claim, the majority clarified when the "Perritt test" was applicable. ¶ 23, fn 7. That analysis was put forward in ***Gardner v. Loomis Armored, Inc.,*** 128 Wn 2d 931 (1996). It led to a tangle of decisions where the Supreme Court grappled with whether use of that test foreclosed availability of the tort remedy if alternative remedies were available. The tangle was more or less undone by the trilogy of cases decided in 2015.

In ***Dicomes v. State,*** 113 Wn.2d 612 (1989) four types of wrongful discharge in violation of public policy were identified:

- Refusing to commit an illegal act;
- Performing a public duty or obligation;
- Exercising a legal right or privilege;
- Whistleblowing.

¶21. Only outside of these situations will the Perritt analysis be proper. ¶23, fn 7. This is due to the 2015 trilogy of cases clarifying the tort of wrongful termination in violation of public policy.

Justice Owens, for herself and Justices Johnson and Gordon McCloud, dissented. They do not buy into the notion that in-house counsel has a different relationship with a client. ¶¶27-28. At-will employment of lawyers is a "hallmark" of the legal profession. ¶26.

The RPCs adopted in 1985, cannot be out of touch with the modern legal profession. ¶30. If new considerations dictate new rights for some lawyers, "we should simply rewrite the rule." ¶31.

H. *Taylor v. Burlington Northern Railroad Holdings, Inc.*

193 Wn.2d 611 (2019)
RCW 49.60; disability; obesity.

It will come as no surprise to learn that a majority of the Supreme Court determined that "obesity is always an impairment under the plain language of RCW 49.60.040(7)(c)(i), It does not have to be caused by a separate physiological disorder…" ¶5.

Plaintiff was refused employment with employer because his body mass index (BMI) was above 35. ¶ 2. Employer offered to reconsider if plaintiff, at his own expense, had medical testing. Plaintiff couldn't afford that. *Id.* Plaintiff sued. U.S. District Court granted summary judgment to employer. Plaintiff appealed. The Ninth Circuit certified to the Supreme Court. The question is whether obesity may constitute as disability under the WLAD. ¶ 4.

The majority opinion gives a useful summary of Washington disability jurisprudence. ¶¶ 9 - 13. This shows how the legislature amended the WLAD disability definition to be broader than the Federal Americans with Disability Act. Anyone practicing in that area should read it.

The legislative amendments curing ***McClarty v. Totem Electric***, 157 Wn.2d. 214 (2006), defined "disability" as an "impairment" even if it did not limit life activities. ¶ 13. In turn, an "impairment" includes "any physiological disorder or condition…affecting one or more…body systems." *Id.* And, it includes perception of such a condition "whether or not it exists in fact." ¶ 16.

No doubt employer perceived plaintiff "to have obesity." ¶ 16, fn. 5.

The majority surveys texts and other authorities, including a resolution of the American Medical Association, that obesity is a disease. ¶¶ 19 - 22.

Some *amici* asserted that because obesity is so common in the United States and in Washington, that it can't be an "abnormality." But "statistical frequency" is not part of the statutory scheme; it states a disabling condition may be "common or uncommon." ¶ 28.

The majority concluded at ¶ 35:

> "[O]besity always qualifies as an impairment…because it is a "physiological disorder or condition" that effects many…body systems. Plaintiffs… need not show that they…actually were suffering from obesity…only that their actual or potential employers perceived them to have a statutory impairment."

Justice's Yu and Gordon McCloud dissented. They note that BMI may include muscle, not just fat. ¶ 40. An actual impairment—or perception of actual impairment—is required to establish a claim. ¶ 42.

Here, plaintiff's obesity was, in fact, diagnosed by employer's physician and he can establish a claim under WLAD. ¶ 44. But the majority's conclusion that obesity "always qualifies" as an impairment is overbroad. ¶ 45.

III. WASHINGTON COURT OF APPEALS

A. *Atwood v. Mission Support Alliance,*

13 Wn.App.2d 1126 (unpublished).
Disability discrimination, comparators, damages, future lost wages

These materials do not ordinarily deal with unpublished decisions. However, this is the only Washington decision this author is aware of which deals with comparators. There is also a discussion of economic damages which should be kept in mind when using WPI 330.82.

This decision reversed a jury verdict and judgment for plaintiff.

Because unpublished decisions now may be cited under GR 14.1, it can't hurt to be aware of what is out there. Unfortunately, the universe of these cases is so large it involves further work by lawyers, and therefore more expense to client, to learn if there are nuggets or mud. See, Part I.B, *supra*.

Plaintiff produced evidence at trial of four 'comparators' who were allegedly treated more favorably by the employer and, because of that, plaintiff's termination was unjustified and discriminatory.

One comparator was subject to a collective bargaining agreement; plaintiff was not. Another was disciplined years before plaintiff was fired and it was not obvious in which part of the company he was employed. Another involved off-site conduct by a manager not involved in plaintiff's chain of command.

The Court of Appeals stated evidence of these comparators was prejudicial to the defendant and warranted reversal.

As for economic loss, Superior Court instructed the jury that wage loss could be determined from the time "plaintiff may reasonably be expected to retire *or* fully recover from the continuing effect of the discrimination." (Emphasis in original). This was error. WPI 330.82 requires use of one or the other; it is not phrased in the disjunctive

B. *David Terry Investment, LLC v. Headwaters Development LLC*

13 Wn.App.2d 159 (2020)
Arbitration, scope of arbitration

This is a non-employment case, but it involves an arbitration agreement concerning "disputes over this agreement." ¶ 6.

The Court determined there is "little distinction between the three phrases, "arising out of," "relating to" and "over this."" ¶ 21. This meshes with the "strong policy" favoring arbitration on the state and federal level ¶¶ 15, 22 [One wonders whether the state policy is as strong as the federal policy. See ***Burnett v. Pagliacci Pizza***, Part II. E *supra*.] The phrases are equally broad. ¶ 26.

C. *Bengtsson v. Sunnyworld Int'l*

14 Wn.App.2d 91 (2020)
RCW 49.60, pregnancy discrimination; Hearsay, failure to produce declarant at trial

A jury verdict for plaintiff is affirmed.

A jury determined that employee was fired at a preschool due to her pregnancy. ¶ 10. Employer contended at trial that she was fired due to financial mismanagement. ¶¶ 9-10.

The school was owned by three persons. One of them resided out of the U.S. and allegedly made statements to the other two about the financial condition of the school. But this person would not be produced for deposition. At trial, the absent owner's statements about terminating employee due to poor finances were to be introduced through the other owners. Trial judge would not allow that. ¶¶ 8,13 and 16.

There was no error in prohibiting testimony of the statements made by the absent owner. Those statements were made by the person who decided to fire employee and that person was never presented for deposition and proof that he even existed was not established. ¶ 28.

D. ***Mackey v. Home Depot USA, Inc.,***
12 Wn.App.2d 557, *rvw denied* 195 Wn.2d 1031 (2020)
Disability discrimination

Summary judgment for employer is affirmed by Division II.

Employee had various mental and physical impairments. One day, she was berated by an assistant manager to the extent she was tearful. ¶ 8. The next day, employee reported the incident to the store manager. ¶ 9. A week or so later an investigation of employee started over her discounting practices. Employee allegedly admitted some discounts she gave to customers were improper. She was fired shortly after that – in under two weeks since her complaint to the store manager. ¶¶ 11-13.

After termination, employee disputed admitting to improper conduct but acknowledged accidental discounting. ¶¶ 15-16. She sued, alleging discriminatory discharge; retaliation for opposing an unlawful practice, wrongful termination, and failure to accommodate. ¶ 19.

In response to employer's motion for summary judgment, employee asserted that the brief time between her complaint to the store manager and the investigation was a fact issue precluding summary judgment. Superior Court granted the motion. ¶¶ 20-22. Employee's declaration also denied misconduct.

The opinion engages in a lengthy discussion of the *prima facie* case analysis as there was no direct evidence of discrimination. ¶¶ 30-33. Along the way, it notes that summary judgment is rarely appropriate in a discrimination case. ¶ 34.

Ultimately, the Court concluded that a *prima facie* case was established. ¶ 42. This is because of the short time between employee's complaint and termination. ¶ 55.

But the opinion observes that employee's burden of proving a *prima facie* case is to establish that retaliation "was a substantial factor in a termination based on the employers knowledge of the protected activity and the proximity in time between that activity and the termination." ¶ 54. This bears some careful examination by practitioners as it seems to place a greater burden on a plaintiff attempting to establish a *prima facie* case.

Employer established a legitimate nondiscriminatory reason for terminating employee due to the alleged unauthorized discounts. ¶ 66.

But then, amazingly, the opinion states employer "submitted strong evidence that the actual reason…was the investigation results." ¶ 69. [Emphasis added.] This is so although employee asserted that her declaration contradicted the investigation conclusion. ¶ 71. I

In the context of a summary judgment where inferences must be drawn in favor of the non-moving party and where courts are reluctant to grant summary judgment in a discrimination case, the result is troubling. At least as it is recounted by the opinion.

This decision deserves studied consideration by either side contemplating a dispositive motion. It is confounding and more so that review in the Supreme Court was denied.

E. *David Essig v. Michael Lei, et al.,*

9 Wn. App. 2d 587, (2019) dismissing review 194 Wn.2d 1016 (2020)
RCW 49.52, breach of contract, term for years, damages.

The court determined that a claim for unpaid wages and double damages under RCW 49.52 will exist when the employer breaches its contract with the employee for a specific term and employee leaves work.

"[P]ay under an employment contract constitute[s] wages for the purpose of [RCW 49.52]" ¶ 20. Thus, even future lost income under the contract – for a period when no 'work' is performed – is a 'wage.'

Employer tried to avoid double damages on the basis that it offered plaintiff alternative work at a contractor. Then, employer contended, created a *bona fide* dispute.

But the offered position was not equivalent to the salaried position. The employer's position was not "objectively reasonable" and the defense failed. ¶¶ 22, 25.

F. *Larose v. King County*

8 Wn App 2d 90, (2019)
RCW 49.60, harassment of employee by client; negligence, applicability of Industrial Insurance Act.

Plaintiff public defender was stalked and accosted by a client**.** She complained and sought to have the client assigned to another attorney. That did not happen. As a result, plaintiff sustained a disability. Thus, it is the reverse of the situation in ***Floeting v. Group Health Cooperative*** II.F, *supra*.

Superior Court granted summary judgment to employer. Division II reverses. Because King County was a party, venue was in Pierce County. This allowed appeal to Div. II.

A non-employee's harassment may be imputed to the employer if the employer authorized, knew or should have known of the harassing behavior and failed to take corrective action. ¶ 59. This creates liability for the employer through RCW 49.60.180(3).

Plaintiff also may maintain a negligence action against the employer. The immunity from negligence claims by employees against employers under the Industrial Insurance Act (IIA), ACW 51.04.010 does not apply when the injury is not compensable under the IIA. Generally, stress claims are not compensable. RCW 51.08.140, ¶¶ 69-70. But stress

arising from a single traumatic event such as actual or threatened assault, may be compensable. WAC 296-14-300(2)(a), (b). ¶ 71. Whether such a traumatic event occurred to a fact question.

In the workers comp process, plaintiff asserted she had an "occupational disease" to have the benefit of a longer limitation period than would be allowed for an industrial injury claim. ¶ 85. That claim remained in process. If it is allowed, it will bar her negligence claim.

As for employer's duty in a negligence claim, it was obligated to provide a safe place to work and to make reasonable provision against foreseeable criminal misconduct. ¶ 100. Plaintiff presented evidence that her former client stalked other lawyers, that employer knew that and assigned the client in a previous matter to a male lawyer from a female lawyer. ¶ 101.

After plaintiff was diagnosed with PTSD, employer appropriately accommodated her. But before that, it did not engage in an interactive process due to her workplace stress. But that was not an "impairment" as defined at former RCW 49.60.040(25)(c)(II) and there was no duty to engage in accommodation. Dismissal of the failure to accommodate claim was proper. ¶¶ 110-111.

That there are 132 numbered paragraphs in this decision reversing a summary judgment.

G. *Sornsin et al. v. Scout Media, Inc.*

10 Wn. App. 2d 739, (2019) *rvw denied* 195 Wn 2d 1003 (2020)
RCW. 49.48; 49.52; unpaid wages, accrued vacation, employer policies.

This is a refreshingly brief and concise opinion.

Plaintiffs claim they were owed accrued of PTO after they resigned without notice. They were paid all salary and wages due to the date of their resignations.

An employee manual stated that 70% accrued PTO will be paid provided the employee give two weeks' notice of resignation.

No statutory right exists for private sector employers to pay accrued PTO. ¶¶ 10-11. Guidance from the Department of Labor and Industries states that PTO is a "voluntary benefit." ¶ 13. The employer here established a condition required to receive PTO at the end of employment. Plaintiffs failed to meet that condition. They lose.

H. ***City of Everett v. Public Employees Relations Commission***
11 Wn. App. 2d 1, (2019) *rvw denied*, 195 Wn 2d 1005 (2020)
Public Employment, unfair labor practice, mandatory bargaining, staffing/workload surety.

Division I affirms a PERC decision that a union did not commit an unfair labor practice. In labor contract bargaining it insisted on a change in firefighter and paramedic staffing based on worker safety.

City contended this was not a mandatory subject of bargaining and made an unfair labor practice charge against the union. PERC found in favor of the union. ¶ 1.

Ordinarily, management has the right to determine staffing levels. ¶¶ 1, 34, 37. This is not subject to mandatory negotiation. However, safety issues do involve mandatory bargaining. ¶¶ 30 - 34.

Evidence at a PERC hearing established that staffing has a "direct relationship to firefighting workload and safety." ¶ 44. This, then, required mandatory negotiation of staffing.

One should consider this decision in re-allocation of resources to police departments: If officer safety is involved, a political decision may be usurped by PERC.

(The decision is notable for a magisterial opening paragraph of approximately 522 words. And that does not include a footnote of 132 words. Gabriel Garcia Marquez could do no better.)

I. ***Hernandez v. Edmonds Memory Care, LLC***
10 Wn. App. 2d 869 (2019)
Unpaid wages, prevailing party attorney fees, RCW 60.04.

Plaintiffs were laborers for a subcontractor on a commercial construction project. They were not paid. They filed a laborers lien. RCW 60.04. ¶¶ 2-5. The owner paid what was due soon after suit was filed to foreclose the lien. ¶ 5. Counsel for plaintiffs sought fees and costs as allowed by ROW 60.04.181, and the owner offered only partial payment.

On plaintiffs' motion for summary judgment regarding the fees and costs, Superior Court awarded $7000. ¶ 7. Division I affirms and orders fees on appeal. ¶ 34.

Plaintiffs prevailed because their lien and the lawsuit "produced the intended result, payment for their labor." ¶ 15.

The decision takes note, at ¶¶ 27-29, of the difficulty faced by workers trying to recover modest amounts in unpaid wages. But it did not mention the duty of the Department of Labor and Industries to investigate and collect unpaid wages.

