Recent Developments in Washington Employment Law

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OBSERVATIONS AND
RECENT WASHINGTON APPELLATE
DECISIONS IN EMPLOYMENT LAW

I. OBSERVATIONS

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

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

The Court in ***Drinkwitz v. Alliant Techsystems*** observed that this state enacted a requirement for an eight hour work day in 1899 and enacted a minimum wage statute in 1913, 25 years before the FLSA. 140 Wn.2d 291, 300, 996 P.2d 582 (2000). That led to the observation that this state has a "long and proud history of being a pioneer in the protection of employee rights."

The ***Drinkwitz*** imperative was re-affirmed most recently in ***Carranza v. Dovex Fruit Co.***, 190 Wn.2d 612, ¶ 27, 416 P.3d 1205 (2018), Part II.G, *infra* and ***Hill v. Xerox Business Services, LLC,*** — Wn.2d —,¶ 19, 2018 WL 4499755 (Sept. 20, 2018), part II.H*, infra.* It can't be ignored in advising either side in an employment dispute.

This imperative is manifest in the statutes found in Title 49, RCW. The state Minimum Wage Act, RCW 49.46, differs from the FLSA in many respects, chief among them the higher minimum wage.

The Washington Law Against Discrimination, RCW 49.60, includes this statement of policy at section .010:

> The legislature hereby finds and declares that practices of discrimination against any of its inhabitants . . . .are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state.

There is nothing similar in a federal anti-discrimination statute. And, unlike any federal law, the Washington anti-discrimination statute requires that, "this chapter shall be construed liberally for the accomplishment of the purposes thereof." RCW 49.60.020.

In its recent unanimous decision in ***Zhu v. North Central Educational Service District - ESD 171***, 189 Wn.2d 607, ¶ 14, 404 P.3d 504 (2017), Part II.A, *infra*, the Court again observed the "WLAD's provisions must be given 'liberal construction.'"

In his opinion for the Court in ***Grimwood v. University of Puget Sound***, 110 Wn.2d 355, 361-62, 753 P.2d 517 (1988), a discrimination case, Justice Brachtenbach wrote:

> While [ ]federal cases are a source of guidance, we bear in mind that they are not binding and that we are free to adopt those

> theories and rationale which best further the purposes and mandates of our state statute.

We see that carried out in ***Blackburn v. State***, 186 Wn.2d 250, 375 P.3d 1076 (2016), where the Washington court reached a result which likely would not occur under a federal claim.

Indeed, under the WLAD, independent contractors are covered due to ***Marquis v. City of Spokane***, 130 Wn.2d 97, 922 P.2d 43 (1996), cited with approval in ***Specialty Asphalt & Construction, LLC v. Lincoln County***, 191 Wn.2d 182, 421 P.2d 925 (2018), Part II.J, *infra.*

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

B. Willful Withholding: The Supreme Court At Odds With Itself.

A decision of the Supreme Court in August, 2018, ***Hill v. Garda CL Northwest, Inc.,*** — Wn.2d —, 424 P.3d 307 (2018), Part II.F, *infra*, is at odds with the February, 2017 decision in ***Allen v. Dameron,*** 187 Wn.2d 692, 389 P.3d 487 (2017), Part II.E, *infra*. Both decisions involve how liability is established for a claim for double damages due to willful withholding of wages under RCW 49.60.070. And they are inconsistent.

Hill fails to recognize the analysis in ***Allen***. What is truly interesting (and aggravating) is that the concurring opinion in ***Allen*** by Justice Gordon McCloud seemed crucial to resolution of the case, albeit grudgingly recognized by the majority: that RCW 49.52.050 is a criminal statute and that the civil action created under .070 for double damages requires proof of scienter - willfulness.

Footnotes to the majority opinion by Justice Wiggins in ***Allen*** observed that the criminal aspect of the statute was not briefed, and that the liberal construction of the statute may not be affected by the "mental element." 187 Wn.2d 692, at nn. 13, 15. However, rather than imposition of liability due to absence of a *bona fide* dispute and clerical error, both the majority and the concurring opinions discussed facts that "may" create liability. This leaves open evidence leading to a conclusion that intent to deprive the worker of wages earned is required.

Up until ***Allen***, liability was all but presumed under the statute unless an affirmative defense of clerical error or *bona fide* dispute could be established. See, e.g., ***Schilling v Radio Holdings, Inc.***, 136 Wn.2d 152, 961 P.2d 371 (1998). Due to ***Allen***, it seemed clear that a plaintiff has an increased burden. What once would be presumptive liability under ***Schilling*** might only tend to create liability under ***Allen***.

Obviously, ***Allen*** affects summary judgment practice.

Then, in ***Hill***, the majority opinion by Justice Gordon McCloud refers not to ***Allen*** but to ***Schilling***:

> The standard for proving willfulness is low—our cases hold that an employer's failure to pay will be deemed willful unless it was a result of " ' "carelessness or err[or]." ' " ***Wash. State Nurses Ass'n [v. Sacred Heart Med. Ctr.,*** 175 Wn.2d 822,] 834, 287 P.3d 516 [2012] (quoting ***Morgan [v. Kingen***, 166 Wn.2d 526,] 534, 210 P.3d 995 [2009] (quoting ***Schilling***, 136 Wn.2d at 160, 961 P.2d 371)); *see also* RCW 49.52.080 (presuming willfulness). But an employer defeats a showing of willful deprivation of wages if it shows there was a "bona fide" dispute about whether all or part of the wages were really due.

424 P.3d 207 at ¶ 14.

Is this seeming contradiction due to rejection by the Court of the "mental element"? Or, it an oversight? Regardless, it seems that the Court should have explained where ***Allen*** fits in, if at all.

This is confounding.

What are we, as practitioners, to make of this oddity? Some thoughts:

- It cannot be assumed the Court will be aware of its recent decisions;
- A party must brief decisional law on seemingly basic or "settled" points;
- Always check for decisions involving a given statute; don't follow a trail only from a court opinion.
- What to make of other parts of Title 49, RCW, which also provide for criminal liability?

II. WASHINGTON SUPREME COURT

A. *Zhu v. North Central Educational Service District - ESD 171*

189 Wn.2d 607, 404 P.3d 504 (2017)
RCW 49.60.210, retaliation by potential employer, opposition to employment practice by former employer.

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

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

Plaintiff, a US citizen but born abroad, was formerly employed by a school district. He was fired but reinstated in an arbitrator's decision. ¶ 3. He brought a claim of race discrimination

in US District Court. The case settled and he resigned from the district. ¶ 4. He then applied for a position with Defendant and was one of three finalists. Members of the hiring committee were aware of the earlier lawsuit against the former employer. Plaintiff was not hired and he claims the person who was hired was less qualified. ¶ 5.

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

The "plain language" of the statute dictated a result in Plaintiff's favor. ¶¶ 13-14. The anti-retaliation statute applies here if the Defendant is an "employer," the Plaintiff is a "person," the refusal to hire is discriminatory and the underlying activity is "opposition to practices forbidden by WLAD . . . " ¶¶14-15.

Defendant asserted that RCW 49.60.210 only applies to a current employer, not a prospective one. ¶ 22. But the definition of "employer" at RCW 49.60.040(11) is very broad - "any person acting in the interest of an employer . . . .." This "clearly includes prospective employers . . . ." ¶ 23.

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

"If prospective employers are allowed to engage in retaliatory refusals to hire, a reasonable employee might well be dissuaded from opposing discriminatory practices for fear of being unofficially "blacklisted" by prospective future employers." ¶ 31. [See also the Washington statute against blacklisting at RCW 49.44.010.]

Any doubts about the plain meaning of the statute are undercut by the legislative command to construe the WLAD liberally. RCW 49.60.020. ¶ 42, Part I.A *supra.*

B. ***Mikkelsen v. Public Utility District No. 1 of Kittitas County***
189 Wn.2d 516, 404 P.3d 464 (2017)
RCW 49.60, age/gender bias; *McDonnell-Douglas* burden shifting; replacement by person outside protected class not required; Employee handbooks, ambiguities of employer writings creating for-cause termination requirement.

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

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

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

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

Plaintiff conducted a survey, with a Board member's approval, of the employees to learn their views about the work environment. ¶ 12. The results were sent to the Board members and not to the general manager. When he learned of this, he accused Plaintiff of going behind his back and fired her because he felt the survey instrument was designed to make him look bad. ¶¶ 13-14.

Plaintiff was 57 when she was fired and was replaced by a woman aged 51. ¶ 16.

This unanimous decision by Chief Justice Fairhurst observed that "[s]ummary judgment for an employer is seldom appropriate in employment discrimination cases because of the difficulty of proving discriminatory motivation." ¶ 28.

In applying the ***McDonnell-Douglas*** burden shifting, it is not necessary to establish that a plaintiff was replaced by someone outside of his or her protected group. ¶ 36. What follows is a lengthy examination of federal and state appellate decisions. ¶¶ 25-32.

There was evidence, even from Plaintiff, that the relationship she had with the general manager was dysfunctional. ¶ 40 That would be a legitimate, non-discriminatory reason for a termination. Id. However, the evidence, taken as a whole, demonstrated that the breakdown in the relationship occurred because of Plaintiff's gender. ¶ 45. She was excluded from certain managerial meetings and the general manager "spoke over her during meetings" and denigrated her in front of subordinates. ¶ 43.

Summary judgment on the sex discrimination claim was improper.

Dismissal of the age discrimination claim was appropriate. Plaintiff asserted that the general manager once referred to some employees as "old and stale." ¶ 46. This ordinarily would be inadmissible as a "stray comment." However, ***Scrivener v. Clark College***, 181 Wn.2d 439, 334 P.3d 541 (2014), did away with that and allowed such evidence.

The Court does not mention why ***Scrivener*** was not followed. Here, the Court noted that the testimony about "old and stale" "suggests that [general manager] was simply marveling that some employees had worked for the same employer for so long" and that there was no evidence that older workers were treated differently. ¶ 46. That seems a premise in search of a foundation given the reluctance to grant summary judgment in discrimination cases and ***Scrivener's*** abandonment of stray comments which would seem to allow for a CR 56 reference in favor of Plaintiff as the non-moving party.

Plaintiff also claimed she was not an "at-will" employee due to the written corrective action policy. That policy granted discretion to impose various disciplinary actions but it emphasized that employees "should be treated fairly." ¶ 48. A stated goal of the policy is to "correct unsatisfactory behavior or performance." ¶ 50. A disclaimer referred to the policy as providing guidelines only and that they do not provide any guarantee of employment. ¶ 54.

The policy was lengthy and "contains many provisions suggesting the district has broad discretion . . . [b]ut these provisions are at odds with other parts . . . that seem to promise fair treatment and arguably establish a for-cause requirement . . . ."¶ 53.

The fact issue is whether an employee "has a reasonable expectation the employer will follow the discipline procedure based upon the language used in stating the procedure and the pattern of practice in the workplace." ¶ 52. Summary judgment for the employer on the claim that Plaintiff was at-will was improper.

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

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

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

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

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

D. ***Killian v. Seattle Schools***
189 Wn.2d 447, 403 P.3d 58 (Oct. 12, 2017)
Duty of Fair representation; limitation period

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

The majority opinion by Justice Madsen reasoned that the six month limitation period at RCW 41.56.160(1) and RCW 41.80.120(1) only applies with respect of complaints to PERC of unfair labor practices. ¶¶ 21-32. The majority determined there were "sound reasons" to depart from the six month limitation period for DFR civil actions under the NLRA set out in ***DelCostello v. International Brotherhood of Teamsters***, 462 U.S. 151, 165-71, 103 S. Ct. 2281, 76 L. Ed. 2d 476 (1983). ¶ 29. "Consistency with federal law is not a persuasive policy rationale . . . ." ¶ 30. This comports with what the Court said in ***Grimwood v. University of Puget Sound***, Part I.A, *supra*, about adherence to federal precedent with respect of anti-discrimination legislation.

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

Justice Gordon McCloud dissented in part.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Assuming that the statute now requires more of a plaintiff, is that consistent with the broad remedial purposes of Washington's employee-friendly employment statutes? See, Part I.A, *supra*. Or, as seems more likely, is that inherent with a statute which provides both civil and criminal liabilities?

F. ***Hill v. Garda CL Northwest, Inc.***
— Wn.2d —, 424 P.3d 307 (2018)
RCW 49.52 liability, how established; *bona fide* dispute; interest on lost wage claim.

A class of employees sought double damages arising from deprivation of meal breaks due to an employer policy of "constant vigilance." ¶ 1. Employer claimed a *bona fide* dispute existed, negating liability under RCW 49.52.050.

The Superior Court determination that employer did not provide the meal breaks required by WAC 296-126-092 was not on appeal. ¶ 12. Rather, the issue is whether the employer established an affirmative defense of a *bona fide* dispute, thereby negating liability for double damages under the statute. The majority opinion, by Justice Gordon McCloud, does not mention of ***Allen v. Dameron***, Part II. E, *supra* and see Part I.B, *supra*, and the scienter issue and instead focused on pre-***Allen*** case law. See ¶¶ 14-17. In essence, the "standard for proving willfulness is low . . . ." ¶ 14.

Here, employer claimed four distinct bases for a *bona fide* dispute. ¶ 18. Most notable was whether employees waived meal break claims by acknowledging they agreed to terms of collective bargaining agreements (CBAs) which allowed waiver of the meal breaks while on duty. However, an "on duty" meal break "is one during the which employee is relieved of all work duties." ¶ 22. Here, employees were required to be "vigilant" during the meal break. There was no *bona fide* dispute "because [employer] never actually argued there was waiver of the particular type of rights the Plaintiffs sought to enforce . . . ." ¶ 25.

The Court remands to Superior Court to determine whether a *bona fide* dispute existed as to knowing submission by employees to the meal break violation and whether the Federal Aviation Administration Authorization Act pre-empted the state claim. ¶ 39.

The majority determined that prejudgment interest at 12% under RCW 19.52.010 could be awarded on the compensatory portion of a double damage award together with double damages under RCW 49.52.070. ¶ ¶ 49-52.

G. ***Carranza v. Dovex Fruit Company***
190 Wn.2d 612, 416 P.3d 1205 (2018)
Minimum wage, piece work, agricultural workers, hourly rate for non-productive time.

This case is one of several from the Supreme Court dealing with agricultural piece work and the state Minimum Wage Act, RCW 49.46. Certified to the Court from the United States District Court for the Eastern District of Washington is the question of how employers are to compensate agricultural workers for "time spent performing activities outside of piece-rate picking work"? ¶ 1.

Agricultural workers are not within the scope of a Department of Labor and Industries regulation which allows employees to be paid on a piece work basis if the total wages paid results in no less than the minimum wage for the total hours actually worked. WAC 296-126—021, and exclusion at WAC 296-126-001(2)(c). This seems an instance where agricultural workers are treated in a more beneficial manner than non-agricultural workers.

That being so, non-productive time must be paid at least at the rate of the minimum wage, according to the majority. This is different, then, from what happens with non-agricultural workers. See, ***Hill v. Xerox Business Services LLC***, Part II.H, *infra*.

A good portion of Justice Yu's opinion for the majority is spent refuting the dissent of Justice Stephens, who was joined by Justices Owens and Johnson.

The agricultural employer here paid workers by the piece of fruit picked. This wage equals or exceeds the minimum wage inclusive of time that is non-productive in the sense that workers are not picking fruit. This non-productive time would be for travel between orchards, attending mandatory meetings or trainings, among other activities. ¶¶ 7-9.

A footnote to the majority opinion states "we do not opine on the legitimacy of a compensation structure similar to Dovex's when used outside the context of agricultural work." ¶ 9 at n.3, and ¶ 24. Agricultural workers, it is explained in another footnote, are "expressly excluded from the regulation governing minimum wage compensation for other workers paid on a commission or piece-rate basis. WAC 296-126-001(2)(c), .021" ¶ 10 at n.4. (This, it would seem, might be a problem under state equal protection jurisprudence. But that awaits another day.) However, this seeming distinction may be lost due to the analysis of the statute itself.

Here, an agricultural employer is required to pay piece work rates AND an hourly rate equal to or greater than the minimum wage for non-productive time. ¶ 14. This is based on the "plain language of the MWA . . . ." which requires employers to pay their workers not less than the applicable minimum wage "per hour." ¶ 15. This is in contrast to the like federal statute, the Fair Labor Standards Act, 29 USC § § 201-219, which requires employers to pay employees "in any *workweek* . . . wages at" not less than the minimum wage. ¶ 15.

A dissent by Justice Stephens is critical of the statutory and case law analyses of the majority. Most notably, this dissent contends that the majority focus on "per hour" at RCW 49.46.020(1) ignores another important word, "rate": Payment of wages is to be made "at a **rate** of not less than [the minimum wage] per hour." ¶¶ 41-43. (Emphasis supplied). Thus, "[v]iewing the 'per hour' language in context, the MWA's minimum wage provision measures the relative value, i.e., rate, of the wage on an hourly basis." ¶ 43.

If the majority is correct about the statutory command of the MWA, is piece work compensation allowable at all, and is the regulation, WAC 296-126-021, beyond the scope of the statute?

H. ***Hill v. Xerox Business Services***

— Wn.2d —, 2018 WL 4499755 (Sept. 20, 2018)

Minimum Wage; piece work; units of time as units of production

This is another wage and hour case involving piece work. And here, as in ***Carranza***, Part II.G, *supra*, Justice Stephens writes an emphatic dissent. This comes to the Washington Supreme Court on certification from the United States Court of Appeals for the Ninth Circuit.

The issue which divided the Court is whether a unit of time can be a unit of production allowing workweek averaging of hourly pay as allowed by a Department of Labor and Industries regulation for non-agricultural workers. The majority answers 'No'.

Here, employer operated a call center for its client, Verizon. ¶¶ 2, 41. Employer paid based on the number of 'production minutes' employees spent on inbound calls. Time spent waiting for a call, reviewing workplace announcements, recording time sheets, etc., was not counted. Employees were paid at least the minimum wage for the work week. Employer paid on an hourly basis for actual time spent in training, staff meetings, work shortages and breaks. Majority at ¶ 6, n.4; Dissent at ¶ 38 at n.3.

Employer did not pay the minimum wage for each hour employees worked. Instead, it used workweek averaging, a concept available for piece work outside of agriculture. In this manner, the compensation earned for the hours employees were at work equaled at least the minimum wage for the total of those hours. However, there could be fluctuations during the work week such that some production minutes would yield less than the minimum wage for a given hour. If the production minutes for the entire work week would yield less than the minimum wage for the hours worked during the week, the employee received a minimum wage subsidy. ¶ 7. Work week averaging is appropriate for piece work outside of agriculture but not

for hourly workers. ¶ 8, WAC 296-126-021. That regulation allows pay based upon "a fixed amount per unit of work" according to a Department of Labor and Industries Administrative policy. ¶ 23.

The issue here is whether Employer's units for pay method was piecework. The majority wrote that it is not. Liberal application of the Minimum Wage Act, RCW 49.46, is required for protection of workers. ¶ 26. An employer can't "classif[y] portions of the employees' work time as piece rate units." ¶ 25.

The dissent asserted that a production minutes could qualify as a "unit of work." Such a unit or "piece" "must be 'tied to the employee's output and production.'" ¶ 36. Here, the use of production minutes to determine productivity was an appropriate measure of work. ¶ 38. And, under this plan, "it is not possible for an employee to be paid less than minimum wage for all recorded hours worked, even if the employee never answers a single call." ¶ 39.

I. ***Martin v. Gonzaga University***
— Wn.2d —, 425 P.3d 837 (Sept. 13, 2018)
Wrongful termination, allocation of burdens; RCW 49.12.240-.250

Here, an employee with a history of performance problems alleged that he was fired due to whistleblowing about safety issues at a swimming pool owned and operated by the employer. The Court unanimously affirms summary judgment for the employer but does so in a manner substantially different from how the Court of Appeals did so at 200 Wn.App. 332 (2017).

The decision here is a follow-on to the trilogy of public policy wrongful termination claims in tort found in ***Becker v. Community Health Systems, Inc.***, 184 Wn.2d 252, 359 P.3d 746 (2015); ***Rose v. Anderson Hay & Grain Co.***, 184 Wn.2d 268, 358 P.3d 377 (2015); ***Rickman v. Premera Blue Cross***, 184 Wn.2d 300, 358 P.3d 1153 (2015). Those decisions rejected the so-called Perritt framework for analysis of most public policy wrongful termination torts. That analysis was found in ***Gardner v. Loomis Armored, Inc***., 128 Wn.2d 931, 936, 913 P.2d 372 (1989). ¶ 15. But Gardner was "highly unique case." ¶ 17 (quoting from ***Rose***, *supra*).

Generally, there are four species of public policy wrongful termination claims:

1. Employee refuses to commit an illegal act;

2. Employee is fired for performing a public duty or obligation;

3. Employee is fired for exercising a legal right or privilege;

4. Employee is fired in retaliation for reporting employer misconduct.

With these claims, the following burdens exist:

- Employee must show that discharge was motivated by reasons that violate a clear mandate of public policy. This is a question of law. ¶ 19.

- Employee must establish a prima facie case by producing evidence that this conduct "was a cause of the firing." ¶ 20.

- Employer may defeat the prima facie case by articulating (not proving) a legitimate non pretextual and nonretaliatory reason for the termination. ¶ 20.

- Employee then has the burden of proving either pretext or, if the employer reason is legitimate, that the employer's public policy linked conduct was "a substantial factor motivating" the discharge. ¶ 20.

The Perritt analysis is to be applied in cases that fall outside of the four general types of wrongful termination claims. It allows the employer to establish an "overriding justification" for the termination. ¶ 16. This analysis was applied here by the Court of Appeals. While that analysis was not applicable here, the Court does provide guidance.

The employer bears the burden of proving overriding justification. ¶ 26. After acquired evidence would not be part of that burden because that doctrine applies to limiting damages, not liability. ¶¶ 27-28.

Plaintiff in this case claimed that the employer did not fully comply with his request to disclose his personnel files as required by RCW 49.12.240-.250. This is part of the industrial welfare chapter of Title 49 RCW and the Department of Labor and Industries has enforcement authority. The employee must first make a claim with the Department before seeking a judicial remedy.

The decision is perplexing as it comes from a summary judgment for the employer. The decision observed the employer met its burden of establishing a legitimate reason for termination: insubordination by the employee. In discussion whether that was refuted by the plaintiff, the Court observed, "[t]here is a paucity of evidence linking [ ] termination with his voicing concerns about [safety]." ¶ 22. The only evidence of this was plaintiff's "own testimony." Id.

Aren't reasonable inferences to be drawn in favor of the non-moving party?

J. ***Specialty Asphalt & Construction, LLC v. Lincoln County***
191 Wn.2d 182, 421 P.3d 925 (2018)
RCW 49.60, gender discrimination of contractor; cumulative evidence; summary judgment

A woman-owned business sued a county after alleged contract bidding and award irregularities resulted in a male-owned business getting the contract. A number of claims were made including gender bias, RCW 49.60. The Supreme Court reversed a summary judgment in favor of the defendant county.

One must first know that contractors are subject to the anti-bias provisions of RCW 49.60. ***Marquis v. City of Spokane***, 130 Wn.2d 97, 922 P.2d 43 (1996).

Here, there was evidence of bias that should have defeated summary judgment: The country contracting authority called the woman business owner to discourage her from bidding on the project. This is evidence of "discriminatory intent, not benevolence"; the county agent treated the male owned business more favorably by scheduling a walk-through that departed from the terms of the bid proposal; the county tracked the plaintiff firm's status on the DL&I website after the bid award. ¶¶ 17-19.

Any one of these instances "standing alone, might not create a reasonable inference of discrimination . . . " However, taken *"together*, the inference of discrimination becomes quite strong." ¶ 21.

K. ***Sprague v. Spokane Valley Fire Department***
189 Wn.2d 858, 409 P.3d 160 (2018)
This case involves issues of religious expression by a public employee.

Employee is a fire department employee. Employer had a policy about use of its email system prohibiting personal use. ¶ 4. Personal use was acceptable if "linked" to fire department business. ¶ 4.

Employer provided an employee assistance program which dealt with various mental health issues, among other things. ¶ 6. Employee used the email system to post announcements to a group of firefighters about a religious fellowship and it dealt with religious teachings dealing with suicide, mental health and how best to deal with stressful matters. ¶ ¶ 8-11. Logos used in some of these messages had religious insignia and mottos. ¶ 9.

Employer warned Employee repeatedly not to send out messages regarding this fellowship and ultimately he was fired. ¶ 13. Employee appealed to a civil service commission and it affirmed the termination. ¶ 15. It determined the Employer prohibited expression of all religious views and applied the policy equally.

Employee filed suit alleging violation for First Amendment rights of free speech and exercise of religion. Employer sought and obtained summary judgment of dismissal, in part on the basis of collateral estoppel. ¶ 17. Division III affirmed, 2-1. 196 Wn. App. 21, 381 P.3d 1259 (2016).

Here, the Court reverses. The essence of the majority opinion is that Employer violated Employee's free speech rights when it restricted speech that discussed the same topics as the Employer's assistance program for its employees. ¶ 28. The policy, while reasonable, was applied to Employee in a manner that was not viewpoint neutral. ¶ 28.

The majority embarks on a lengthy, some might say exhausting, survey of First Amendment jurisprudence. ¶¶ 32-80. The Washington Constitution was not implicated because

that was not adequately briefed as required in ***State v. Gunwall***, 106 Wn.2d 54, 720 P.2d 808 (1986).

The majority took pains, albeit in a footnote, to state that its decision "does not prohibit government employers from taking appropriate action to prevent parties from using . . . .resources in an unconstitutional manner." ¶ 27 at n.5. Rather, when government permits speech of its employees, "it may not discriminate against only certain viewpoints - whether . . . religious or not." Id.

The discussion of collateral estoppel at ¶¶ 81-97 bears consideration in this era of ADR and administrative remedies. See, e.g., ***Scholz v. Wash. State Patrol,*** 3 Wn. App. 2d 584, 416 P.3d 1261 (2018), Part III.E, *infra.*

The issues in the judicial forum were not the same as those in the civil service forum: The latter did not make a determination about freedom of speech and it could only order reinstatement; it could not award general or punitive damages as a court could under 42 U.S.C § 1983. ¶¶ 91-92. And, public policy considerations - the free speech rights of 63,000 Washington public employees - were against applying an estoppel. ¶ 93

III. WASHINGTON COURT OF APPEALS

A. *Romney v. Franciscan Medical Group (Romney II)*

199 Wn. App. 589, 399 P.3d 1220, *review denied*, 189 Wn.2d 1026 (2017)
Arbitration, class actions, threshold disputes, waiver of individual arbitration in favor of class action by inconsistent conduct in litigation.

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

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

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

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

Consent to class actions cannot be inferred from the fact that the arbitration agreement is silent on the issue. ¶ 19. The employer successfully argued on appeal that the arbitration

agreements specifically refer only to the individual party to the agreement and thus negated the notion that class actions are permissible. ¶ 24.

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

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

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

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

Defeat snatched from the jaws of victory.

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

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

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

In a summary judgment context, however, rebuttal of pretext is part of the burden shifting mechanism long recognized by federal and state courts. At footnote 6 and paragraph 18, the Court observed that Washington courts construe RCW 49.60 using federal precedent under Title VII of the Civil Rights Act of 1964. This is a dangerous assertion in view of ***Martini v. Boeing Co***, 137 Wn.2d 357, 971 P.2d 45 (1999) and ***Grimwood v. University of Puget Sound,*** 110 Wn.2d 355, 361-62, 753 P.2d 517 (1988) ("[w]hile . . . .federal cases are a source of guidance, we bear in mind that they are not binding and that we are free to adopt those theories and rationale which best further the purposes and mandates of our state statute"). See Part 1.A, *supra.*

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

C. ***Floeting v. Group Health Cooperative***
200 Wn. App. 758, 403 P.3d 559 (2017)
RCW 49.60; public accommodation, employer liability for sexual harassment of patron by employee

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

RCW 49.60.215 provides in part that it is unlawful "for any person . . . .or employee to commit an act which . . . results in any . . . discrimination . . . in any place of public accommodation ...." [Why is it that this decision has to spend several paragraphs and citations to inform us that harassment is an unlawful form of discrimination? See ¶¶ 17-22.]

The analysis for a public accommodation claim was set out in ***State v. Arlene's Flowers, Inc.:***

1) Plaintiff's membership in a protected class;

2) defendant's operation of a public accommodation;

3) discrimination by defendant of plaintiff;

4) the discrimination occurred due to plaintiff's membership in a protected class.

187 Wn.2d 804, 389 P.3d 543 (2017), *cert. granted and judgment vacated,* 138 S. Ct. 2671 (2018) (remanded to the Supreme Court of Washington for further consideration in light of ***Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n***, 138 S. Ct. 1719 (2018)). ¶ 23.

A place where medical care or services are provided is one of public accommodation. RCW 49.60.040(2). ¶ 30.

An employee's act of harassment or discrimination of a patron imputes liability to the employer because of the plain language of RCW 49.60.215(1) *supra.* "[T]he legislature chose to fight discrimination in public accommodations by making employers directly responsible for their agents' and employees' conduct." ¶ 37. That the harassment or other discrimination will be a "solitary or fleeting event" is of no importance in this analysis. If the patron were simply to leave and not return to the business that would "undermine the legislature's goal of eliminating all such acts of discrimination." ¶ 41. Direct liability makes the employer liable "for all acts of sexual harassment occurring on its premises-including the first [act]." ¶ 42.

While the WLAD is not a civility code, ¶ 51, discriminatory conduct must be objectively so. ¶ 52. Such acts are foreseeable. ¶ 53. Plaintiff must also establish his or her subjective perception of being a victim of discrimination. ¶ 54. But the acts need not be severe and pervasive as might be true with harassment of an employee. ¶ 56. The decision specifically

rejected the employer's assertion that the analysis of ***Glasgow v. Georgia Pacific Corp.,*** 103 Wn.2d 401, 693 P.2d 708 (1985), should apply such that the harassment must be a term or condition of use of the accommodation. ¶¶ 59-66.

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

D. ***Raven Offshore Yacht, Shipping, LLP v F.T. Holdings, LLC***
199 Wn. App. 534, 400 P.3d 347 (2017)
Arbitration; threshold disputes, resolution by court, ability to contract otherwise

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

Superior Court denied a motion to compel arbitration.

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

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

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

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

E. ***Scholz v. Washington State Patrol***
3 Wn. App. 2d 584, 416 P.2d 1261 (2018)
RCW 49.60; application of collateral estoppel resulting from labor arbitration.

An arbitrator under a labor agreement determined that plaintiff was terminated for "cause" and that barred a later civil action claiming disability discrimination.

Employee worked for the state patrol. He was patrolling for trucks to assure they were installing chains before ascending Snoqualmie Pass. In doing so, he apparently stopped his vehicle in a lane of traffic. ¶ 9. This ultimately led to a huge pile up involving a number of trucks. ¶ 11. In a later investigation, employee claimed that he had pulled over to a shoulder area but this was disputed by other evidence and witnesses. ¶ 13, 15-17.

The pile-up incident traumatized the employee and he sought medical treatment. ¶ 14.

Employer fired employee for lying in the investigation. ¶ 17. Employee sought relief through the collective bargaining grievance process which ultimately led to an arbitration. The arbitrator determined that employee did, in fact, lie and that evidence of a mental disorder did not excuse his conduct. ¶¶ 19, 22.

Employee then sued based on a claim of disability discrimination. Superior Court granted the employer's motion for summary judgment dismissing that claim. ¶ 24.

The Court of Appeals applies collateral estoppel against Employee and affirmed Superior Court. That doctrine has these elements:

1. What is to be decided in a later tribunal was decided earlier;

2. That the earlier decision ended in a judgment on the merits;

3. That the party against whom preclusion is sought was a party to the earlier proceeding;

4. That injustice will not result against the party opposing application of the doctrine.

¶ 27. Here, the Court of Appeals determines that the labor arbitrator's determination that Employee "knowingly and intentionally lied to his superiors" defeats an element of proof required for a discrimination claim: That a plaintiff was "doing satisfactory work." ¶¶ 38-39.

In an unpublished portion of the decision, the Court also determined that application of issue preclusion would not work an injustice. Each side had a lawyer and could present witnesses. ¶ 45. The arbitrator could not award general damages and was limited by the labor contract to economic compensation that would restore him to his position absent termination. A civil action would allow broader relief in a successful discrimination claim. ¶ 54. This disparity in relief did not prevent application of collateral estoppel because the arbitrator could award "substantial remedies." ¶ 54; *see also*, ***Reninger v. Dep't of Corrections***, 134 Wn.2d 437, 951 P.2d 782 (1998).

F. ***Cox v. Kroger Co.***

2 Wn. App. 2d 395, 409 P.3d 1191 (2018)

Labor agreements, arbitration, preclusion of civil actions.

A class of employees claim that Employer manipulated a time rounding policy to favor "the house" and sought damages under RCW 49.52. ¶¶ 7, 16, 20. The applicable labor agreement

does not mention "rounding." It does contain a grievance process leading to arbitration. The arbitration provision applies to "[a]ny grievance or dispute concerning the application or interpretation of this Agreement." ¶ 25.

Employer moved Superior Court to compel arbitration and lost. Denial of that motion is reviewed *de novo* on appeal. ¶¶ 21-22.

"An arbitration agreement does not encompass statutory claims unless the waiver of an employee's right to judicial forum for such claims is 'clear and unmistakable.'" ¶ 24 (citation omitted). That clarity is missing here. ¶ 27.

G. ***Mikolajczak v. Mann***

1 Wn. App. 2d 493, 406 P.3d 670 (2017)
WAC 162-16-220; counting employees of related entities needed to trigger RCW 49.60

Employee alleges failure to accommodate a disability against a sole proprietor of a store which had fewer than eight employees. ¶¶ 3,6. Employer also owns a large majority of a limited liability corporation which operates a gas station.

Employer unsuccessfully moved Superior Court to dismiss the disability claim on the basis that it lacked the requisite eight employees to trigger application of RCW 49.60. This was apparently on the basis of Employer's interest in the LLC, although no transcript of the Superior Court proceedings was available. ¶ 7.

Regulations of the Washington Human Rights Commission at WAC 162-16-220 state that common ownership of corporations "and other artificial persons" may allow combining payrolls to determine whether the statute applies. ¶ 12. This will occur if management is centralized. But that regulation does not apply to a sole proprietorship. The regulation "does not allow combining the employees of a sole proprietorship with those of other entities." ¶ 18.

