Washington Public Employment Relations
REVIEW

Winter 2002-03

Feature Article

High Court Reverses Itself?

COURT ALLOWS TORT CLAIMS FOR WORK-PLACE ABUSE AND HARASSMENT

Linda Robel's problems in the Fred Meyer deli began with falling out with a co-worker over the latter's relationship with Robel's son. It may have escalated with Robel's complaints over food handling procedures. Unfortunately, the deli assistant manager and others joined the fray, siding with the co-worker. About 14 months after she began working at Fred Meyer, Robel sustained a workplace injury and timely filed a workers' compensation claim. According to the trial record, the employer assigned her light duty offering food samples to customers.

Soon after, two workers started making fun of her by acting out a slip and fall and yelling, "Oh, I hurt my back, L&I, L&I!" Co-workers called her a "bitch," "snitch," "squealer," "liar" and "idiot;" sometimes these epitaphs were preceded with the adjective "f…-ing." They "told customers she had lied about her back and was being punished by Fred Meyer by 'demoing' pizzas.'"

Within a few weeks, the store director, after being contacted by Robel's union representative, warned employees that future harassment of this kind could result in termination. The warning apparently had no effect and deli workers continued their harassment. About a month after going on light duty, Robel obtained a two-week work release from her doctor and, upon leaving, overheard the assistant deli manager comment, "Can you believe it, Linda's gonna sit on her big ass and get paid." Her union representative again contacted the store director who, after an investigation, terminated Robel's primary nemesis.

Robel never returned to work at Fred Meyer. She filed suit and in a trial before a judge, recovered about $52,000 in damages along with attorney's fees. Division III of the appeals court reversed. (See the Winter 2000-01 *REVIEW*.)

The Supreme Court, in a 5-4 decision, reinstated the trial court's verdict, applying three equally applicable legal theories: the tort of outrage (intentional infliction of emotional distress), disability discrimination, and a tort that might be described as "wrongful retaliation." Particularly significant was the court's ruling that the employer was liable for the improper conduct of its employees even though it took prompt action when the employee complained. Complicating the analysis of this case was the employer's failure to assign error to the trial judge's findings of fact even though it challenged all of the trial court's legal conclusions. Justice Owens, writing for the majority, repeatedly emphasized this point (and improperly so, in the view of the dissent), making it less clear whether the majority was venturing far afield from its previous holdings (as the dissent charged) or whether the case should be considered an anomaly driven by a technicality of appellate pleading. In either case, the dissent took the majority's meandering seriously, noting that its ruling was irreconcilable with court precedent.

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Conflict Management Institute

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PERC Decisions

MINIMUM STAFFING MANDATORY SUBJECT IN SPOKANE DISPUTE

Minimum staffing was among five outstanding bargaining proposals at issue in a scope of bargaining dispute between Firefighters Local 1789 and the Spokane International Airport, one of two airports in the State with its own fire department. Those issues were:

- The continuation of prior contract language requiring a minimum staff of five to seven firefighters per shift;
- A union proposal that the employer join a Spokane-area dispatch system;
- A union proposal for certain contractual training provisions;
- Proposals for changes in work rules; and
- The continuation of a prior agreement concerning notice of inter-local agreements.

A preliminary issue concerned the employer's notice to the union of its challenge to the scope of bargaining. The employer asserted it gave notice through the PERC mediator, but WAC 391-08-810 makes all communications to PERC mediators confidential. Nevertheless, the union did not object when the employer elicited testimony from its negotiator that this communication took place. Accordingly, Examiner J. Martin Smith denied the union's motion for dismissal on those issues.

The REVIEW's Editorial Policy

The purpose of the REVIEW is to inform, educate and support the collective bargaining process. We maintain a neutral editorial policy on labor/management issues and endeavor to present a balanced approach to the issues. We hope the information presented is of practical use to labor and employment relations professionals.

Information we present should not be quoted as legal advice or an opinion of the Washington Public Employment Relations Commission or other state agencies, nor does it necessarily represent the opinion of persons associated with Conflict Management Institute.

Minimum Staffing Proposal Safety-Driven, Therefore Mandatory

Federal regulations require the Spokane Airport to have at least two fire trucks that can respond to an aircraft emergency within three to four minutes. The parties disagreed as to whether the fire department's scope of responsibility extended to structure fires at the airport, with the employer asserting its own personnel should withdraw once other fire departments arrived under mutual aid pacts. The examiner found that it was employer's prerogative to decide the scope of service. Therefore, the minimum staffing issue should relate only to aircraft emergencies to which the airport's bargaining unit members are uniquely certified to respond.

"Decisions about the mission and scope of the airport fire department are clearly a management prerogative."

Staffing proposals are mandatory subjects of bargaining if, after balancing the considerations on both sides of the equation, PERC determines that the proposal relates to firefighter safety and equipment staffing levels.

The question specifically concerned the staffing level of the two specialized trucks that must arrive on the runway within minutes of an emergency. The employer argued that FAA regulations make commercial aircraft crews responsible for evacuations and do not require airport fire fighters to enter a burning airplane. It also argued that there had never been a commercial airliner crash at Spokane airport and that although there had been a few general aviation emergencies, most came with advance warning. The vast majority of the calls taken by the bargaining unit are for emergency medical services within the airport. Examiner Smith observed that although the:

> facts tend to confirm that the airport fire fighters are out of their element in dealing with structure fires, they generally support a conclusion that the airport fire fighters are largely on their own when it comes to the aircraft emergencies.

The union presented evidence showing that the current staffing level of five to seven was the minimum necessary to ensure firefighter safety under scenarios involving the crash of a Boeing 737 passenger aircraft. It also presented evidence that the

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Airline Pilots Association and the International Civil Aviation Organization recommend a seven fire fighter minimum response. The employer did not present evidence rebutting the union's crash scenario.

Its argument that the mutual aid backup was sufficient begged the question, the examiner wrote, because FAA regulations require a three to four minute response time, while the response time for the closest neighboring fire unit was six minutes. Similarly, the fact that there never has been an airliner disaster in Spokane was irrelevant. The FAA has a minimum equipment requirement and response time, "regardless of whether an airport has ever had such an incident." After balancing these competing considerations, the examiner determined that the union presented "substantial evidence" of the issue's nexus to wages, hours and working conditions. As a mandatory subject of bargaining, it could proceed to interest arbitration.

The union's proposals for training pertained to fighting building fires, which management determined was outside its fire department's primary function. Therefore, the union's proposals were permissive subjects of bargaining, and it was an unfair labor practice for the union to pursue the topic to impasse in collective bargaining.

Dispatch Center Proposals Are "Wishful Thinking"

The examiner held that the union's proposal that the airport join the Spokane area dispatch center appeared "to flow from wishful thinking about the mission and scope of the airport fire fighting workforce." The examiner rejected the union's claim, as lacking in supporting evidence, that the dispatch center was unwilling to grant upgrades in fire suppression response to the airport fire department because it does not view it as a legitimate fire department, leaving it with insufficient personnel and equipment to deal with a major emergency. The examiner held the proposal was a permissive subject of bargaining.

Work Rule Proposals Lacked Supporting Evidence

The union proposed language requiring effects bargaining on rule changes and barring new illegal rules. The employer proposed the elimination of the following current language:

> Working conditions not specifically addressed in this Agreement shall remain unchanged or affected unless changed by mutual consent.

Examiner Smith expressed frustration that the parties had presented little supporting evidence on their proposals and required a ruling based on abstract hypotheses. He ruled that the union presented insufficient supporting evidence on its proposal; therefore it concerned a permissive subject of bargaining. He also determined that that the employer had not demonstrated why its proposal should not be a mandatory subject of bargaining.

Inter-Local Fire Agreement Proposal Deemed Permissive

The examiner found the record "bereft of any evidence establishing a relationship" between the union's proposal requiring 60 days' notice of the employer contracting for "an inter-local fire suppression agreement" and wages, hours, and working conditions. Again, the issue was not buttressed with supporting evidence, and the examiner held it to be a permissive subject of bargaining.

Spokane International Airport, PECB 7889-90 (2002)

KING COUNTY'S FUMBLING NOT ILLEGAL

Examiner J. Martin Smith dismissed claims brought by the International Federation of Professional and Technical Engineers, Local 17, that King County committed an unfair labor practice against a disabled employee/union activist by sending her purportedly threatening letters demanding that she complete and return medical leave forms in a shorter time than required by the federal Family Medical Leave Act (FMLA). While acknowledging that the employer did treat her and one other individual differently from other employees who had requested leave, the examiner concluded that it was because the employer was just then learning about the rules for reporting under the FMLA. He dismissed additional claims of interference and refusal to bargain.

After being injured in an automobile accident, Sherilyn McKee was unable to work and, unknown to the employer, unable to communicate via telephone or regular mail for part of that time. The employer sent her a letter requesting the completion of an FMLA form; when there was no response, it sent a second letter that set a deadline for the form's return.

The second letter warned that:

> failure to … return it in a timely fashion … will place you in violation of a lawful directive by a division manager. Your absence will be considered unauthorized at that point.

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Despite the tone of the letter, the employer did not hold her to the deadline but instead processed her FMLA form after receiving it late. It did not take or even contemplate disciplinary action, the employer maintained.

The employee somehow learned of the second letter and shortly before the deadline, contacted the employer, who promised to send a copy to the union. The employer then assured the union representative that it planned no discipline or adverse employment action. It sent a letter to the employee stating that it was "very appreciative of your willingness to engage in an interactive process in order that both your needs and the needs of the Department may be addressed," and then advised her it still needed documentation from her physician. The union argued that the employer's treatment was "abusive" and constituted "a pattern of misapplication" toward union activists. The employer acknowledged that only McKee and one other injured employee were subjected to the FMLA deadline. However, officials testified that the imposition of the deadline was on a "learn-as-you-go" basis, that the employer was only then becoming familiar with the FMLA rules.

The examiner agreed, holding that the employer's "fumbling" did not rise to the level of discrimination or abuse. He found that employer officials involved in the matter "seemed to have been unaware" of pertinent FMLA regulations at the time, and found no evidence that the employer officials were even aware of the other employees' union activities:

> The short time periods for [the plaintiffs] to respond to requests for medical information clearly resulted from a lack of familiarity by employer officials with the FMLA rules, rather than from a designed plan to harass or target union officials and shop stewards.

Regarding the somewhat threatening tone of the letters, the examiner agreed with the employer that the letters were meant to elicit a response from the employee, as she had been out of touch with the employer at the time. He emphasized that she was not disciplined or denied employment status as the result of her leave.

No Evidence of Interference

In a third letter, the employer wrote that it was concerned that:

> third parties are disseminating misinformation as it relates to our interaction with you. Such conduct is unproductive and does not serve to further the interactive process.

The union viewed that letter as unlawful interference, specifically the employer's negative comment toward the employee's use of third parties to disseminate information. The union considered that comment as discouraging her to communicate with her union about the FMLA deadline. However, the employer testified that the comment referred to the fact that she was using multiple fellow employees to convey messages between her and a supervisor *rather than* through the union. The examiner was convinced by the employer's interpretation and concluded that she could not have reasonably perceived a threat of reprisal for union activities based on this comment.

Refusal to Bargain Charge Dismissed

The union alleged that the employer refused to provide requested copies of the second letter in a timely manner and that the employer refused to communicate with the union. The examiner dismissed these claims, noting that the employer provided the union with a copy fairly quickly, within three days of its request. It was irrelevant that the union representative did not succeed in talking with managers of his own preference. The union representative attempted to engage officials other than the designated employer representatives who were actually authorized or qualified to negotiate. The employer fulfilled its obligation to provide information in a timely manner and, by the union's own admission, to foster the "spirit of communications" inherent in collective bargaining laws, concluded the examiner.
King County, PECB 6994-C (2002)

GUILD HEAD URGED TO THICKEN HIS EPIDERMAL LAYER

The Renton Police Officer's Guild accused the City of Renton of interfering with employee rights by reproaching its president after he distributed a memorandum criticizing the police chief. The union claimed that the chastisement both "interfered with an employee's right to organize" and "discriminated" against him because it created a perception that the president was being disciplined for insubordination merely for raising union-related issues.

While a guest at a supervisory retreat, the guild president asked the chief of police "where he saw the Renton PD personally in two or three years." The police chief thought he was being asked to formulate a mission statement, but both parties admitted there was some room for misinterpretation. In response, he drafted a "mission statement" that he delivered later at a regular staff meeting. The union president, present at the staff meeting, was upset by what he perceived as the police chief's lack of a substantive answer to the question he had put forth at the retreat. He subsequently e-mailed a memo to members criticizing the police chief's conduct.

After receiving some negative feedback and causing a "ruckus" among those in the office, the guild president voluntarily retracted the message approximately two hours after it went out. During the "ruckus" however, the police chief responded expressing disappointment and disagreement with the e-mailed memo. Later that afternoon the police chief and the president had a quick "chat" where the police chief articulated his concern that the guild president was "non-supportive" and "non-positive," but the chief did not hand down any discipline or imply that he would do so. It was the chief's reaction that created the substance of the union's complaint.

Union Alleges Interference

Examiner J. Martin Smith observed that to establish a case for "interference," the union must prove: 1) the exercise of a protected right, 2) a deprivation of any ascertainable right, status or benefit, and 3) a causal connection between the two.

The union president had a protected right because as union president, his employer was aware that he spoke for the union regarding labor-management issues. He was exercising his protected right when he sent the disputed memo to bargaining unit members. However, the union was unable to establish that its president was deprived of any ascertainable right. Although the police chief spoke to him, the union president was not disciplined, investigated, or asked to retract his e-mail. Instead, his retraction was voluntary. When testifying, he admitted that he did not feel threatened by the police chief's words.

In dismissing the union's charges, the examiner found that the union was unable to prove a discrimination violation:

> [U]nion officials should be accustomed to controversial situations, and can be expected to receive and interpret harsh words, criticism, and displeasure. … The longer a union official is involved in representing the interests of bargaining unit employees, the less reasonable are the claimed perceptions of threats and coercion. This acquisition of thicker skin has been recognized by the National Labor Relations Board.

City of Renton, PECB 7476-A (2002)

GRIEVANCE WAIVER REQUIREMENT IS UNFAIR

The Bremerton Police Officer's Guild filed an unfair labor practice complaint against the City of Bremerton when the police chief disciplined a police officer but later offered to reduce the punishment if the officer would agree not to grieve the reduced discipline. Examiner Walter Stuteville agreed with the union's claim, concluding that when an employer offers to reduce discipline in exchange for an employee's waiver of his right to file a grievance, it crosses the line and commits an "interference" violation under RCW 41.56.140(1).

Moonlighting Officer Disciplined

The employer allows its police officers to pursue off-duty work to supplement their income, but in order to maintain control, it issues yearly permits to moonlighting officers.

The employer decided to discipline a police officer for what it deemed to be "lapses in professional judgment" while working his second job at Kitsap Transit. At a disciplinary meeting attended by the officer and his union representative, the chief announced his intent to discipline the officer with a letter of reprimand and the suspension of his off-duty work permit for a year.

Two days later, the police chief met again the officer, this time without union representation. The police chief offered the officer two options. First, the officer could accept the discipline as meted and retain his right to challenge it through the collective bargaining agreement or the civil service procedure. Alternatively, the officer could sign a letter waiving his right to file a grievance. The discipline would be reduced to a reprimand, thereby allowing him to continue moonlighting.

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The officer considered the two options and feeling pressured to make a decision, signed the letter to accept the lesser discipline and waiving his right to grieve. The police chief testified at the PERC hearing that he would have considered giving the officer more time to examine the document or consult union representatives, but he did not recall ever telling the officer he could do so.

Waiver Requirement Constitutes Interference

An "interference" violation under RCW 41.56.140(1) occurs when an employer threatens reprisal or force or makes promises of benefit that are reasonably perceived by the employee as related to their exercise of rights under the collective bargaining agreement. The evidence in this case suggested that although there was no threat, there was definitely a benefit to be had for the officer if he signed the agreement waiving his right to follow the grievance process. The officer made nearly $10,000 a year working at his second job. If he signed the agreement, the employer would renew his permit and he could continue moonlighting. If he did not sign the agreement, the employer would not renew his permit, he would not be allowed continue his side-job, and as a result would suffer financially.

"Good intentions do not … change reality."

The compromise offer presented to the officer at the second disciplinary meeting was favorable to both parties: the employee would be allowed to continue working his second job, and the employer would not have to defend a formal grievance. Nevertheless, by promising the employee a substantial benefit to dissuade him from exercising his right to file a grievance under the collective bargaining agreement, the employer committed an unfair labor practice. Additionally, the examiner held that while an employer has a right to discuss grievances with an individual employee, the employer could not cut the union completely out of the negotiations, as the employer did in this case.

City of Bremerton, PECB 7873 (2002)

DISTRICT SNOOZES -- AND LOSES

The Public School Employees of Washington filed a petition seeking to represent the bus drivers in the Chehalis School District. After some procedural skirmishing, balloting ensued and the union won majority support.

The employer attempted to appeal the ballot tally, claiming that the ballot should have contained a choice for self-representation. The employer's appeal was filed outside of the seven-day period required by PERC rules, and it failed to serve a copy of its appeal on the union.

The Commission dismissed the employer's appeal as untimely and not properly served. However, it denied the union's request for attorney's fees. Although PERC has the power to award such fees, it has never done so outside of unfair labor practice disputes. It directed the certification of the union as the exclusive bargaining representative of the sought-after unit.

Chehalis School District, PECB 7878 (2002)

PRIORITY OF ACTION CLAIM REJECTED IN SEATTLE DISPUTE

In early 2002, the City of Seattle moved most of its police examination, hiring and promotion functions from its Public Safety Civil Service Commission to its personnel office. The Seattle Police's Officer's Guild filed a lawsuit seeking to enjoin the action, and several months later filed unfair labor practice charges with PERC contending that the employer had a duty to bargain the changes. At issue before Examiner Martha Nicoloff was the employer's motion to dismiss on "priority of action" grounds.

Priority of Action Rule Explained

The examiner explained that when a priority of action claim is made, the Commission must determine the appropriate forum for the unfair labor practice claim. Both the court and the commission have the authority to decide the case, but the Commission should defer to the prior court action under certain circumstances. The "priority of action" rule applies only if the two cases at issue are identical as to subject matter, parties and relief. If the cases are identical, the tribunal which first gains jurisdiction of a cause retains the exclusive authority to deal the action until the controversy is resolved. This rule prevents excessive expense as well as conflicts of jurisdiction and processes.

Subject Matter Not Identical

The examiner agreed with the union's argument that the subject matter of the court case and the unfair labor practices (ULP) claim with the Commission were quite different. The ULP claim alleged that employer violated RCW 41.56 when it unilaterally changed employee wages, hours or working conditions without giving the union notice and the opportunity to bargain. In contrast, the case filed in the superior court sought a declaration that the employer's enabling ordinance was void by reason of failing to accomplish the purposes of RCW 41.12, was against public policy, and was contrary to the Seattle City Charter. None of these theories state claims that are identical to those available through unfair labor practice proceedings with the Commission.

Parties to the Actions Differ

Second, the parties to the two proceedings differed, the examiner found. The parties in the unfair labor practices case are the union and the employer itself. While it is true that public employers act through their officials, the Commission has repeatedly held that public officials are not individual respondents in a case but only agents of the employer. The union is the only plaintiff in the suit filed with the court, but the defendants named in that lawsuit included individual city officials, as well as the City of Seattle as an entity.

Relief Sought Not Identical

Third, the relief sought in the complaint and the lawsuit were dissimilar. The relief sought in the unfair labor practices case was an order restoring the *status quo ante* and posting a notice to all employees. Additionally, the union asked for attorney's fees and a finding that the employer acted in willful disregard of the settled law regarding the duty to bargain. On the other hand, the union's lawsuit sought injunctive relief that the Commission has no authority to give.

After reviewing the subject matter, parties and relief sought, the examiner denied the city's motion to dismiss.

City of Seattle, PECB 7913 (2002)

UNION FEELS THE SQUEEZE AND CRIES FOUL

After being frustrated in its effort to dislodge the Teamsters as the exclusive bargaining representative, the Washington Public Employees Association (WPEA) filed unfair labor practice charges against the Department of Corrections, Teamsters Local 313 (the incumbent) and Teamsters Local 117 (the incumbent's sometime agent). The WPEA believed it was not being given fair access to employees and complained about: 1) the Teamsters' assignment of representation responsibilities; 2) the employer's overly-broad no-solicitation policies; and 3) the employer's discriminatory enforcement of no-solicitation policies.

Delegation of Representation Duties Okay

The WPEA alleged that Teamsters Local 117 acted on behalf of Teamsters Local 313 on several occasions and that the employer has dealt with Teamsters 117 as if it were the exclusive bargaining representative of the employees, in violation of RCW 41.56. Director of Administration Mark Downing dismissed this charge. He explained that the Commission has held that unions are entitled to select their own representatives for negotiations and contract administration. While unions commonly perform these tasks in-house, they sometimes hire attorneys or select others to act as their authorized agent in dealing with the employer. Past cases in Washington have allowed agents of one union to represent another union.

No-Solicitation Policy Proper As Written

The WPEA challenged the employer's policy barring solicitation during work times as being ambiguous and overly broad. That policy restricted the distribution of literature and authorization cards to "non-working hours in non-working locations at the institution, i.e. designated break rooms and staff eating areas." The WPEA pointed out that some employees do not receive unpaid lunch or rest breaks; instead, they take breaks "when and where they can." Employees may not have access to designated break rooms, depending on their post and duties. The WPEA interpreted the policy as "limiting the distribution of authorization cards to break rooms and lunch areas" and precluding its ability to solicit employees who lack ready access to those areas.

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The Director of Administration found no fault with the employer's policy and deemed the WPEA's interpretation to be too narrow. He noted that NLRB and Commission precedent require oral nonsolicitation rules to be restricted to nonworking time. Printed material is different; employers may restrict solicitation to nonworking time and nonworking areas including break rooms, clothes changing areas, parking lots, and entry and departure areas.

Order to Remove Union Material May Be Discriminatory

The WPEA also maintained that the employer applied its no-solicitation rules in a discriminatory manner. It alleged that an employee-supporter attempted to solicit an authorization card from another employee while on a break in a designated smoking area. That employee was later called into a meeting where she was told by a supervisor that she was not allowed to have the WPEA material, including authorization cards, on the prison grounds. She was then told to take her the WPEA materials off the premises and put them in her car. The supervisor also said that he didn't want her to hand out any union materials or start a shift-war that would increase tensions between the unions.

Director of Administration Downing agreed that these facts, if proven, could constitute a discriminatory enforcement of the employer's no-solicitation policy because it showed preference of one union over another and thereby violated RCW 41.56.140 (1) by interfering with employee rights.

Unequal Access Not Allowed

Finally, the WPEA asserted that the employer allowed Teamsters Local 117 special access to the employees and their work sites for purposes of organizing but denied the WPEA the same access. The WPEA also claimed that Teamsters Local 117 moved into an organizing mode when it announced its intention to take over for Teamsters Local 313 as the exclusive bargaining representative and that at that time, the WPEA should have been allowed equal access to employees. The Director of Administration determined that the WPEA articulated a valid claim for further adjudication. It was at least arguable that the employer was obligated to enforce identical restrictions on all unions and that it was possible that Teamsters Local 117 gained special advantage because of its presence on the employer's premises for legitimate purposes.

Washington State Department of Corrections, PSRA 7870-72 (2002)

Home Health Care Workers Win Contract With State

After voters gave State home health-care works collective bargaining rights in November 2001, Service Employees Local 6 sought representation rights and in August 2002 was certified as the exclusive bargaining representative of what has become the largest bargaining unit (26,000 employees) under PERC's jurisdiction.

After about six weeks of bargaining with the Governor's office, the union and the State reached a tentative agreement on the parties' first collective bargaining agreement, one with a duration of two years.

The two-year contract would raise the workers' current $7.68-an-hour wage by $1.02 the first year and an additional $1.05 the second year.

The parties also agreed to provide medical coverage to employees who had more than three months on the job and were working more than half-time. In addition, bargaining unit members will become covered by worker's compensation. However, workers were not given sick days or vacation days. The contract contained provisions on improved consumer services and training. Consumers still have the right to hire and fire workers and the contract specifies that consumers' eligibility for service should not be jeopardized in order to fund the contract.

In the Courts

Washington Supreme Court

I-272 REQUIRES STATE FUNDING OF COLAS FOR ALL SCHOOL EMPLOYEES

The Public School Employees of Washington, the Washington Education Association and other plaintiffs prevailed in their suit challenging the State's interpretation of Initiative 732, a measure requiring annual cost-of-living raises for school district employees.

The Washington Supreme Court's 8-1 decision penned by Justice Madsen answered two questions affirmatively: (1) does the initiative mandate cost-of-living increases for all school district employees, as opposed to "basic education" employees, and (2) if so, does it requires the State itself to fund the cost-of-living increases for all school employees?

I-732 states that "School district employees shall be provided an annual salary cost-of-living increase," and it includes a formula for calculating the increase. It further states:

> Each school district shall be provided a cost-of- living allocation sufficient to grant this cost-of-living increase for the salaries, including mandatory salary-related benefits, of all employees of the district.

It requires the State, starting with the 2001-02 school year, to "fully fund the cost of living increase" as part of its Constitutional basic education requirement.

Basic Education Versus Other Funding Sources At Issue

Public schools are funded by means of a complex formula designed to satisfy the Washington Constitution, as interpreted by the Supreme Court in the landmark 1978 *Seattle School District* decision to provide for and fund "basic education. The court explained:

> In general, state funding formulas are used to determine how much money, in total, based on certain student to staff ratios, must be appropriated for school districts to pay for basic education, and this money is then allocated to the individual districts. Each district is thus given flexibility to meet local needs within State prescribed staff ratios and salary requirements.

However, many school programs are not part of the basic education requirement and rely on other sources of funding. It is not uncommon for a school district employee's salary to be funded in part by the State's basic education appropriate and in part by other enrichment sources.

Interpreting its obligation under I-732, the State assumed its obligation in the 2001-03 biennium was only for a cost-of-living increase in basic education funding, and it appropriated approximately $318 million, as opposed to the more than $400 million needed to cover all school district employees. It also enacted legislation raising the lid for special levies, increased appropriations of federal funds, and reduced school district compensation rates for pensions, thus freeing up local funds to pay for cost-of-living increases on wages that were not part of the basic education fund.

High Court Applies Plain Language Rule

Section 2(1)(a) of the initiative contains the critical language, the court declared. It states that school districts will be given a funding allocation sufficient to cover the increases of "*all* employees of the district." The State's view "reads the word 'all' out of the sentence," the court opined.

The high court's conclusion that the State is required to fund these increases in their entirety was derived from Section 2(1)(d), which provides that "the state shall fully fund the cost-of-living increase." Thus, the plain language defeated the State's position, the court ruled.

The court rejected the State's contention that it satisfied its funding responsibility by providing for funding by increasing the lid for special levies, increasing appropriations of federal funds, and reducing school district compensation rates for pensions. First, I-732 did not provide for any such alternative funding mechanisms. Second, higher levy lids do not assure the availability of funding, nor does it constitute state funding of the mandated increases.

Attempt to Expand Constitution Invalid

The court invalidated a clause in Section (2)(1)(d) that purported to expand the State's Constitutional basic education mandate to include the annual cost-of-living increases. But because the clause was severable, it could be stricken while leaving intact the

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remaining requirements of I-272. Had the court not invalidated that clause, the Legislature would be faced with constitutional obstacles in attempting to amend or repeal I-272.

Legislature *NOT* Ordered to Make Appropriation

One important matter not decided by the court and discussed only in a footnote written in response to Justice Sander's dissent, had to do with whether the court was actually ordering the Legislature to appropriate adequate funds to meet the State's obligations under I-272. The high court previously has held that because of the separation of powers doctrine, it cannot order the Legislature to fund a legally mandated program. The majority denied that it was ordering the Legislature to make the required appropriation. Instead, it was merely interpreting a statutory mandate that the State had previously misinterpreted and would "not speculate on what future appropriations will be made in light of our decision construing I-732."

Finally, as the *Seattle Times* noted in response to the decision, the victory of those seeking to enforce the initiative may be a hollow one:

> Gov. Gary Locke has proposed the initiative be suspended as the state addresses a $2 billion budget deficit. The Legislature can make that change with a majority vote.

McGowan v. State of Washington, 71947-1, December 19, 2002)

Washington Court of Appeals

PARAMEDIC GIVEN GREEN LIGHT TO TRY HIS CLAIM TWICE

A significant ruling from Division III of the court of appeals allows an employee who lost his union discrimination claims before PERC to try those claims *de novo* under the guise of a wrongful discharge tort action in superior court.

A union activist/paramedic, fired by Grant County Hospital District No. 1 for sexual harassment, sought help from his union. The union filed an unfair labor practice complaint with PERC alleging that the paramedic was instead fired in retaliation for engaging in protected union activity.

The hearing officer concluded that the union failed to prove that the employer's action in firing the paramedic was substantially motivated by the exercise of rights protected by RCW 41.56 and that the employer hospital had articulated lawful reasons for termination. The union lost its appeal to the full Commission and decided to take no further action. Unhappy with the results obtained by his union, the employee sued, alleging he was wrongful discharged as punishment for his union affiliation and activity in violation of public policy.

Doctrine Precluding the Relitigation of the Same Fact Issue Explored

The employer sought dismissal of the suit because PERC had already determined that the plaintiff could not make a case that he was discharged in reprisal for union activity. Invoking the doctrine of collateral estoppel, a doctrine meant to protect against having to litigate the same factual issues more than once, it argued that because it had prevailed on the issue before PERC, it should not be required to relitigate the issue again. The employee had already had been provided a full and fair hearing, with adequate representation by the union; therefore, the courts should not step in.

In order for collateral estoppel to apply, four elements must be met: 1) the issues litigated in the first case must be identical to those in the second case; 2) there must have been a final judgment on the merits of the case; 3) the party against whom the plea is asserted must have been a party in the case decided earlier, and 4) application of the doctrine must not work an injustice upon the party at whom it is directed.

> *"PERC does not have the authority to adjudicate wrongful discharge tort actions."*

The employee conceded that the first three elements had been met. The issues regarding the termination were identical, a final decision was made on the merits of the PERC case, and he was a party to both cases. However, he argued that the final element was lacking here and maintained that precluding the relitigation of his claim would work an injustice. Among other things, he asserted that the remedies offered by the tort claim were different than those available to him in PERC proceedings. With a tort claim, he had a possibility of successfully proving emotional distress damages, while PERC was only able to provide back pay and reinstatement.

Bates Technical College Decision Controls

Relying on the Supreme Court's seminal decision in *Smith v. Bates Technical College*, the appeals court agreed with the employee. The Supreme Court had ruled that the tort of wrongful discharge in violation of public policy was of such great importance that the aggrieved employee did not have to exhaust all administrative remedies prior to seeking relief in the court system. (See the Spring 2000 *REVIEW.)* An employee who had exhausted his administrative remedies, therefore, should not be given lesser rights, the appellate court reasoned.

The court found that allowing an adverse agency decision on an employee's union discrimination claim to bar "a complete exploration" of the claim in trial court would permit a serious infringement upon the important public policy discouraging workplace union-activity discrimination. Accordingly, the court determined that the claim could proceed. Interestingly, it rejected his argument that his union representation was inadequate. The employee had sought advice from his own attorney before proceeding with the PERC filing, and an attorney employed by the union represented him. PERC procedures afforded him an adequate opportunity to present evidence, cross-examine witnesses, and submit rebuttal evidence. Moreover, there is nothing in the PERC rules that would have precluded him from employing his own attorney in the PERC proceedings.

Christensen v. Grant County Hospital, No. 21045-6-III (Wa. App., Dec. 17, 2002)

Editors' Note: While this decision enervates the Legislative scheme designed to remedy discrimination because of union activity claims through PERC's administrative process, it is the inevitable outcome of the Supreme Court's 2000 decision in *Smith v. Bates Technical College*. It also is the first reported post-*Bates Technical College* case to be decided by the appellate courts. For an academic article exploring the *Bates Technical College* decision, see 25 Seattle U. L. Rev. 677, 694-96 (2002). The author notes that the court's ruling "ultimately weakens the union's role in employment matters and undermines the labor-management relationship." The ability to forum-shop and relitigate claims diminishes the appeal of unions because they will have less to offer employees.

FIREFIGHTERS AWARDED ATTORNEY'S FEES IN DISCLOSURE CASE

The Public Disclosure Act (PDA) allows attorney fees to a prevailing plaintiff in a lawsuit "reasonably necessary to obtain the records requested." The Skyway Firefighters Association filed a lawsuit to obtain documents and attorney's fees against King County Fire District No. 20 after it requested budgetary documents on four separate occasions but received no response. The court regarded the lawsuit as reasonably necessary to cause the documents to be released; therefore, the union was a "prevailing party" and entitled to reimbursement for its attorney fees and costs.

Four Requests Produced Nothing

During contract negotiations, the union vice president informally requested the "2001 budget" from the fire district but received no response. After the request, the district responded, giving a time estimate as to when the documents would be produced, but it failed to meet that estimate. When asked for the 2001 budget a third time, the fire district provided merely a dollar figure with no accompanying documentation. Finally, the union made a formal fourth request, noting that the previously divulged dollar amount was "not responsive" and asked for specific expenditure information. Nevertheless, the employer would not produce the requested information, and the union sued to obtain the documents.

A Bargaining Relationship Not Exempt From PDA

In finding for the union, the court rejected the employer's argument that the court should defer to the parties' "ongoing and informal relationship" that has produced a history of prompt replies to prior document requests by the association. The employer failed to cite any authority suggesting that where an "informal and on-going relationship" exists between the requester and the agency, disclosure requests are handled differently.

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The court also rejected the employer's argument that the union had a duty under RCW 41.56 to "meet, confer and negotiate in good faith" the issue. It was not convinced that unions are somehow in a unique category that subjects them to different procedures or remedies. The court reasoned that the PDA sets up a formal process that is independent of ongoing relationships. It should not matter that the union could have obtained the documents in another matter (like reminding the chief). The statute does not permit agencies to avoid disclosure merely because the parties may have independent avenues for obtaining information. Finally, the court pointed out that there is nothing in RCW 41.56 requiring a union to forgo rights granted elsewhere.

The court agreed with the union that under the PDA, it should be permitted to recover all costs, including reasonable attorney's fees. The union was also entitled to a monetary penalty, set by the PDA at between \$5 and \$100 a day.

Violante v. King County Fire District No. 20, No. 49814-2-I (Wa. App., Dec. 16, 2002)

DOUBLE DAMAGES PERMITTED IF EMPLOYER WILLFULLY FAILS TO PAY BACK PAY AWARD

In 1991, the Town of Coulee Dam terminated a police officer for misconduct, but three years later, the court of appeals ordered his reinstatement. After being reinstated, the parties disputed the back pay due and, for reasons not explained by the appeals court, the officer commenced proceedings in both state and federal court. The town responded to the tangled web of proceedings by continuing to withhold back pay, but in 1998, after his federal claims were dismissed, it tendered paid nearly \$31,000. Nevertheless, the dispute continued over the exact amount owed.

Three more years had elapsed when the parties entered into a stipulation that the officer was entitled to prejudgment interest of 12% per annum on his back wages and to reasonable attorney fees. Although the parties finally agreed on the amount owed, the officer also sought a jury ruling that he was entitled to double damages upon showing that the employer willfully withheld wages. Additionally, he argued that the lower court improperly denied him prejudgment interest and attorney fees.

Back Pay Constitutes "Wages" Under Double Damages Statute

RCW 49.52 permits the award of double damages if an employer willfully withholds wages. The court of appeals agreed with the officer that the jury should have been allowed to consider the question of double damages and rejected the employer's argument that because back pay is not for work actually done, the double damage statute was inapplicable. The court pointed out that in past cases, the term "wages" has been construed to include back pay and that the employer was therefore within the ambit of the statute. Further, the plain language of the statute provides that the employer's obligation to pay must arise from "any statute, ordinance or contract." The officer's termination had been found to violate civil service laws; hence, the employer's obligation to pay back wages arose from statute.

The court noted that the willful intent element would be lacking if the employer had a bona fide dispute as to its obligation to pay. Here, however, the employer had already admitted that it had an obligation to pay the officer. The fact that the exact amount was debatable would entitle it to withhold the disputed amount only. Instead, for four years the employer withheld the amount it admitted that it owed. The court found that because there was a question of fact regarding willfulness, a jury instruction on double damages would have been proper.

Prejudgment Interest Previously Agreed Upon

The officer argued that he was entitled to prejudgment interest on back wages. The employer argued that it could not be held liable for prejudgment interest on tort judgments, that it did not enter into a contract to pay such interest, and that prejudgment interest was not available because the officer's claim was unliquidated.

The court found that although there was no statutory or common law basis for prejudgment interest, there was a contractual basis stemming from the parties' 2001 stipulation. That stipulation agreement, filed with the court, was signed and subscribed to by both parties and their attorneys and became a valid contract governed by contract law.

Statute Gives Right To Attorney's Fees

Finally, the officer argued that he was entitled attorney fees because RCW 49.48.030 awards attorney's fees to a successful plaintiff who recovers an amount equal to or more than the employer admits to owing. The employer disagreed on the grounds that the statute it violated when it discharged the officer does not authorize attorney's fees. The court found for the officer, noting that RCW 49.48.030 is a remedial statute requiring a court to award attorney's fees in any action, such as the one here, where an employee recovers more wages than the employer offered.

Allstot v. Edwards, No. 20415-4-III (Wa. App., Oct. 31, 2002)

CONTROVERSIAL WEBSITE OWNERS PLOW POLICE PRIVACY

The King County Sheriff's office was skeptical about a public records request for the names, ranks and pay scales of all of its law enforcement officers. What was more disturbing was that the request came from the owner of a web site known for criticizing and ridiculing police officers. Except for providing county wage scales, the county denied the request. After the web-site owner threatened to sue, King County filed a preemptory action, contending that the release of the names and ranks of its officers would threaten their privacy and safety as well as compromise undercover operations.

The sheriff's office provided evidence at trial that the web pages were highly critical of police and that one of the sites had, on occasion, published the names and home addresses of police officers. The record also contained testimony of an anonymous undercover agent stating that after a suspect was arrested as a result of an undercover operation, his or her car description and license plate number was posted on a web site for other suspects to read. This not only compromised the integrity of the undercover operation, but also put the officer's safety at risk.

Exemption for "Specific Intelligence Info" Only

In order to be exempt, public records must be investigative in nature or somehow threaten the privacy of the individual employees in a way that is highly offensive. As to the first criterion, RCW 42.17.310(d) states that in order to be exempt, the information must be "specific intelligence information," non-disclosure of which is essential to effective law enforcement.

Division I of the Court of Appeals found that the Public Disclosure Act was a tenet of representative government and that the free and open examination of public records was in the public's best interest even if it caused inconvenience or embarrassment to police officers. Further, the court found that since the names of the officer's themselves were not an "investigative record" and were available through other sources (such as a police report available upon an arrest), they were not protected under the this exemption to the Public Records Act. The court found that the county failed to show how lists of names, ranks and pay scales qualified as "intelligence information." As such they were public record and should be disclosed to the public upon request.

No Violation of Officer Privacy

RCW 42.17.310(1)(b) exempts from public disclosure any personal information of employees that would violate their right to privacy. Although addresses are exempt, Washington law does not subject the names of employees to the personal privacy exemption. In order for the privacy exemption to hold, the employees would have to prove that mere disclosure of their names is "highly offensive." The court was not persuaded by the county's argument on behalf of its employees.

Statutory Penalties for Failure to Disclose Records Okay

The web-site owners assert that they are entitled to statutory penalties of between $5 and $100 per day for the time that the records were withheld. The court agreed, adding that the penalties apply even though the county acted in good faith. Strict enforcement supports the underlying policies of the public disclosure act.

Identity of the Requester Irrelevant

The court noted that the Public Records Act requires that agencies ignore who is requesting the documents and their potential use and instead focus on the information itself. While it may offend some to know that public agencies must provide helpful information to those running anti-law enforcement web-sites, it is not up to the courts to act as censors of the public good.

King County v. Sheehan, No. 48161-4-I, (Wa. App., Nov. 12, 2002)

PUBLIC POLICY ASPECT OF LAST CHANCE AGREEMENT EXAMINED IN FERRY CASE

Brian Fosmo's union negotiated his reinstatement to the Washington State Ferries under a fairly typical "last chance" agreement. As a condition of reinstatement, he agreed to participate in an employee assistance program and comply with its recommendations. Subsequently, he violated the agreement by refusing to submit a urine sample and once again was terminated.

The employee claimed his termination was wrongful because it violated the public policy found in RCW 41.04.730. That statute, applicable to State employees, states that the refusal to participate in an employee assistance program "shall not be a factor in any decision affecting an employee's job security." The court noted that "Agreements against public policy are unenforceable."

Further, there are four elements to a wrongful discharge claim in violation of public policy:

> (1) a clear mandate of public policy; (2) discouraging the conduct the employee engaged in would jeopardize that public policy; (3) the public policy-linked conduct caused the termination; and (4) the employer is not able to offer an overriding justification for the termination.

Statutory Protection Not Available to Terminated Employee

In Division I's opinion, the employee's claim failed on all four points. The court agreed with the employee that RCW 41.04.730 contains a clear mandate of public policy. However, he was not terminated in violation of that statute. He was originally terminated for excessive absenteeism, not for refusing to participate in an employee assistance program. When he was conditionally reinstated, he agreed to participate in the assistance program and to abide by its terms as a condition of further employment. He violated the agreement and was properly terminated. Significantly, the court reasoned that the statute does not apply to terminated employees because they no longer enjoy the protection of being an employee:

> No clear mandate of public policy was implicated. The statute does not set forth any relevant public policy that terminated employees cannot agree to participate in the EAS program, nor that having violated the terms of their own agreement they cannot be dismissed.

However, the court's opinion was ambiguous as to whether an existing State employee could be given the option of agreeing to certain conditions, including using the employee assistance program as a conduit for a treatment, or termination. This is sometimes done, without first terminating the employee, when his or her misconduct is related to drug or alcohol abuse or other potentially treatable disorder.

Interestingly, the concurring judge opined that the kind of agreement that the employee made with the State was illegal because it violated public policy. With the agreement being void, the parties should be returned to the *status quo ante*, that being one where the plaintiff had been separated from from employment.

Fosmo v. State of Washington, Wn. App. No. 48242-4-I (December 16, 2002)

EDITORS' NOTE: It would be unfortunate indeed if giving employees this kind of assistance in lieu of termination were deemed to violate of public policy. The lesson to be learned from this case is for the State, as an employer, to tread carefully with these kinds of arrangements and to seek legal advice before setting off in this direction.

NO TEACHING CERTIFICATE, NO JOB; NO JOB, NO REMEDY

A Mt. Adams School District teacher was terminated because he had not renewed his teaching certificate by the first day of the school year. Although the teacher had completed all of the course work required for renewal, he had not yet received his new certificate. Both the trial and appellate courts found that where the teacher's certificate had expired, as a matter of law he had no valid contract with the district and no rights under the collective bargaining agreement. Therefore could not proceed with arbitration to contest his termination.

On May 15, 2000, the teacher signed a "Certificated Employee Contract" to teach for the 2000 – 2001 school year. The contract stated that it would not take effect until the employee submitted a valid teaching certificate.

The district's personnel office sent notices to the teacher on at least four occasions notifying him that his certificate would expire on June 30, 2000, and that he needed 15 credits to renew. The teacher proceeded to take classes to meet the credit requirements and kept the district personnel office up to date on his course work.

Paperwork Arrives Too Late

However, the Superintendent of Public Instruction refused to issue a permit that is a prerequisite to the certificate without being provided with transcripts showing successful completion of the required course work. The teacher did not receive his transcript for the last class he completed until three days after the start of the school year. Upon its receipt, he immediately proceeded to obtain his certification. However, the school district, finding that he had not met the certification requirement by the first day of employment, had already mailed him a termination notice.

District Processes Grievance, Then Balks

The teacher contacted his union, which filed a grievance on his behalf. The district processed the grievance through the third step, participated in the selection of an arbitrator, and a date was set for arbitration. Subsequently, however, it went to superior court to enjoin the arbitration.

At issue on appeal to Division III was the arbitrability of the teacher's grievance. Washington cases look to four governing principles to determine arbitrability, the appellate court observed: 1) the duty to submit a matter to arbitration arises from the contract itself; 2) the question of whether parties have agreed to arbitrate a dispute is a judicial one unless the parties clearly provide otherwise; 3) a court should not determine the underlying merits of a dispute in determining the arbitrability of an issue, and 4) arbitration of disputes is favored by the courts.

Contract Implicitly Excludes Teachers With Certificate Problems

The collective bargaining agreement between the union and the school district encompassed "regular … certificated personnel who hold valid contracts with the district." The teacher's contract did not become effective with the district until he had a valid teaching certificate. Without that certificate, he was not covered by that agreement, the court reasoned, and therefore his grievance was not arbitrable.

The court also rejected his assertions that he should not have been terminated because he had substantially complied with the certification requirements, that he had a substitute-teaching certificate, and that he justifiably relied on the school district's act of keeping him employed.

Mount Adams School District v. Cook, No. 20407-3-III, (Wa. App., Aug 15, 2002)

BOORISH BOSS BAD REASON TO SUE

A retail sales clerk working for a building supply company quit her job because of she was tired of being subjected to her manager's frequent temper tantrums. Her male supervisor on numerous occasions had sworn profusely at her and other employees, publicly humiliated her, hurled pencils across conference room tables nearly hitting her, and once even "shouldered" her away from her computer causing her to fall into an adjacent wall. After quitting, she filed suit against both the company and the manager under RCW 49.60.030, Washington's Law Against Discrimination. She alleged that her manager had subjected her to a demeaning and threatening pattern of behavior that affected the terms and conditions of her employment. She further alleged that this behavior was based on her gender and had forced her to resign.

Equal Opportunity Harassment

To establish the elements of an actionable hostile work environment, an employee must show 1) offensive and unwelcome conduct, 2) serious enough to affect the terms or conditions of employment, 3) that occurred because of sex, and 4) could be imputed to the employer.

The sales clerk was required to show that her supervisor created a hostile environment and that his conduct discriminated against her on the basis of her sex.

She submitted evidence that the manager was obnoxious, cantankerous and rude. Unfortunately, her evidence also suggested that the manager was that cranky with everyone, both male and female. She admitted for example, that he yelled at most employees about work related issues. Further, she agreed that he probably was not trying to hit her when he slammed a pencil on the table and it ricocheted, nearly missing her head.

As a result of her evidence, the employer contended that she had failed to show that: a) the conduct was sufficiently severe or threatening to affect the terms and conditions of her employment, or

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b) that it was motivated by animus towards women. To support its theory, the employer produced declarations from five employees of both sexes stating that the manager yelled only about job-related issues and yelled at both men and women equally. The employer also offered the manager's testimony that he yelled and swore at both sexes and denied ever making demeaning or gender specific derogatory comments.

The Civil Rights Law is not a Code of Civility

The lower court and the appeals court (Division III) agreed that while the sales clerk had produced enough evidence to suggest a question of fact as to whether her examples were sufficiently threatening, she had had failed to show that they were linked to her gender. Although the manager's conduct was inappropriate and outrageous, the appeals court held that the civil rights code is a not a code of general civility and that absent evidence that the manager's conduct was motivated by gender, there was no case for a jury. While the employee could prove that she had been yelled at, sworn at, had objects yanked from her hands, and as a result had spent time crying in the bathroom, she did not have a case for discrimination based on sex because her supervisor was equally rude to everyone.

Adams v. Able Building Supply, Inc., No. 20902-4-III (Wa. App., Nov. 5, 2002)

EMPLOYERS WHO DISCRIMINATE PAY BOTH THE PIPER AND THE IRS

The plaintiff in a gender discrimination suit against Machinist District No. 160 claimed that after years of applying for and being denied a position as a business representative, she was entitled to compensatory damages, including back and front pay. District 160 is the official bargaining representative for 14 local unions representing thousands of unionized machinists in Washington and Alaska. The plaintiff had served as a chief shop steward and several terms as both vice president and president of her local union. For four successive years, she sought a business representative's position in District 160. After District 160 removed her from her chief shop steward's position, she filed a complaint for sex discrimination under the Washington Law Against Discrimination (WLAD). A jury agreed with her claim and awarded her damages of $450,861, an amount derived from the pay of a business representative calculated to the year of her likely retirement.

On appeal, Division I of the Court of Appeals addressed two issues: the jury instructions on front pay damages, and the recoupment of the adverse tax consequences from a lump sum award.

Jury Determines Front Pay Damages

The trial court instructed the jury to calculate the plaintiff's front pay damages to the date she "may reasonably be expected to retire." District 160 argued that even if the plaintiff had been hired as a business representative, she might not have continued in that position until retirement. The court agreed and held that because the likely duration of future employment in a gender discrimination suit is a question of fact for the jury, the instruction was incorrect. Nevertheless, the instruction was not prejudicial because the defendant presented no reliable evidence suggesting that plaintiff's future employment would have terminated at any time other than the normal retirement age.

Adverse Tax Consequences Compensable under WLAD

The jury's lump sum award would have resulted in the plaintiff incurring a tax obligation of $244,753 due to recent amendments to the Internal Revenue Code. She argued that under WLAD, she should be compensated for her actual damages and that the federal government should not benefit from her misfortune.

The precise issue before the court concerned the meaning of "actual damages" required under RCW 49.60.030(2), a phrase that is undefined by WLAD. In determining the legislative intent, the court considered the statute's general purpose ("to deter and eradicate discrimination"), its embodiment of "a public policy of the highest priority," and its mandate for a liberal construction. It determined that the adverse federal income tax consequence is within the scope of the term "actual damages" and the expected tax payment should be added to the back pay and front pay awarded by the jury.

Blaney v. International Association of Machinists & Aerospace Workers, Dist. No. 160, No. 48444-3-I (Wa. App., Oct. 21, 2002)

In the Courts

OPTICIAN'S OUSTING AFTER FILING SEXUAL HARASSMENT CLAIM SUGGESTS RETALIATION

A licensed optician hired by the Spokane Eye Clinic was placed on its standard 90-day new-employee probation. Before that period expired, her male supervisor told her she was doing well and would become a full-time employee at the end of her probation. However, subsequently her supervisor made comments to her suggesting that she "eat his banana," which she interpreted as a sexual innuendo, but did not report. When nearing the conclusion of her probation, her supervisor told her that "everything was great" and that the clinic would be keeping her on. Accordingly, the optician received the employer's standard benefit package, including insurance benefits. The clinic also gave her a paid holiday on her birthday and July 4th, as it did for all regular full-time employees.

At about the same time, the employee began to experience further harassment from her supervisor. Her supervisor found her preparing for a date in a back room and asked her what she was doing. She told him she was "getting pretty" for her dinner date, to which he replied, "be sure to use protection." The optician, finding the comment disturbing, mentioned it to a long-time clinic employee who responded that she was not the first to endure such comments from the supervisor and suggested she complain about it to management. Immediately after this conversation, the supervisor appeared from behind some shelving; apparently he had heard the entire discussion. A few days after this exchange took place, the clinic advised the employee that her probationary period had been extended for 30 days.

Several days later, the optician was sent to a seminar and asked to write a report on it. The supervisor criticized the report and found it unsatisfactory. Shortly thereafter, while the optician was working with customers, she knelt down to get something from a cabinet. The supervisor approached and said "on your knees again? Didn't you spend most of your weekend that way?" Two customers overheard the comment. One laughed, but the other one seemed embarrassed. The employee reported the incident to the clinic's human resources manager who advised her to put the complaint in writing. She was hesitant but after being told the complaint would not affect her job, agreed to do so.

The HR manager immediately reported the complaint to her supervisor and told him to have no further contact with her. The following day, the supervisor sent her to two other clinics in Spokane for a one-week evaluation by other supervisors. Both of those supervisors submitted negative evaluations, and the optician was terminated Her termination notice stated that her probationary period had been extended for 30 days, a measure made necessary by the clinic's need to further evaluate her performance regarding customer service, listening skills and problem solving. It also declared that three supervisors independently determined that she had not made sufficient progress in these areas.

Optician's Retaliation Claim To Proceed

The optician filed suit against her supervisor and the clinic for: 1) discrimination and retaliatory discharge; 2) breach of contract; 3) breach of implied covenant of good faith and fair dealing; 4) wrongful discharge; 5) intentional infliction of emotional distress; and 6) sexual harassment. While the court agreed with the clinic that she had failed to provide sufficient evidence on the other claims, the court found that a case could be made for the claim of retaliatory discharge.

Legality of Supervisor's Comments Irrelevant

RCW 49.60.210(1) of the Washington Law Against Discrimination states that it is unfair practice for any employer to discriminate against any person for opposing any practice forbidden by that statute. Therefore, the employer committed a violation if it fired the optician because she complained of sexual harassment. The court found that the alleged facts regarding the comments made by her supervisor, if proven, showed sexual harassment. Upon making that case, the employer should be given the chance to rebut the presumption that it discriminated by providing legitimate, nondiscriminatory and non-retaliatory reasons for the discharge.

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The court found that the employer did offer some evidence that the employee was fired because of her poor performance. Should that evidence prove adequate, the burden would shift back to the employee to prove that the employer's stated reason for termination was pretextual and was motivated by a discriminatory or retaliatory purpose. In order to show pretext, the employee must show that 1) the employer's claim had no basis in fact; 2) the employer was not motivated by these reasons, or 3) that the reasons are insufficient. The employee had alleged sufficient facts to allow her case to go forward to trial.

The employer argued that even if the supervisor's conduct was inappropriate, it was not illegal. The court was quick to point out that the legality of the supervisor's comments was not the issue. The conduct complained of need not be unlawful. Rather, the question is whether:

> An employee who opposes employment practices reasonably believed to be discriminatory is protected by the "opposition clause" whether or not the practice is actually discriminatory.

Timing of Employer's Acts Raises Suspicion

The court suggested that while there was no "smoking gun" evidence, the cumulative, indirect, and circumstantial evidence was adequate to support a reasonable inference of pretext and that therefore the issue of retaliatory discharge should be presented to a jury. First, according the allegations, she passed the probationary period, was declared a full-time employee and given benefits. Shortly after she complained however, her probationary period was reinstated. Second, the short time period between the filing of her complaint and sudden requirement to attend seminars, write reports and undergo evaluations suggests retaliation. Third, she had received only favorable comments regarding her work up until the time she filed her sexual harassment claim. It was only after the claim that she began receiving negative feedback and criticism. Finally, the clinic failed to document any of her shortcomings until the day it fired her.

Renz v. Spokane Eye Clinic, No. 20679-3-III, (Wa. App., Dec. 19, 2002)

FIRE DISTRICT NOT LIABLE FOR POLITICALLY CORRUPT MANAGER

Plaintiff Crisman ran for Pierce County Fire District 21 commissioner against the incumbent. After he lost, he sued the fire district and its executive director, citing an internal review report that the director had intimidated and coerced employees into campaigning for the incumbent. He charged the employer with negligence in hiring the director, who had a troubled employment history that was only partially known to the commissioners, and alleged violations of the Public Disclosure Act (PDA) and the federal Civil Rights Act. Division II affirmed the dismissal of his lawsuit.

Hiring, If Negligent, Not Cause of Harm

Crisman argued that the employer hired the director without adequately investigating his background. Had it done so, it would have learned that he was not competent to manage district operations. The appeals court rejected the claim because he did not show how hiring an incompetent manager caused him harm. The director was responsible for the day-to-day fire district operations. Campaigning was not one of the director's duties, and the employer did not otherwise facilitate or enable the director's unlawful campaign activities.

Purely Private Action Under Disclosure Act Barred

The court rejected the plaintiff's argument that he has a private cause of action under the public disclosure law, even though that statute bars using a public agency's facilities to campaign for office. The PDA authorizes the attorney general or prosecuting attorney to enforce its terms. It also allows citizen suits, but only after the attorney general and prosecutor fail to act. Furthermore, the citizen's suit must be brought "in the name of the state." Given this remedial scheme designed by the Legislature that appeared to be wholly adequate to protect the public interest, the court decided that the statute does not allow a citizen's tort claim for damages.

No Constitutional Right Violated

The federal Civil Rights Act, 42 U.S.C. §1983, addresses violations of a person's constitutionally protected rights by "any person acting under color of state law." Crisman claimed that the fire district and its director violated his First Amendment free speech and association rights as well as his Fourteenth Amendment equal protection right. However, cited cases were not persuasive because each "turned on a possible denial of the fundamental right to vote, not the candidate's right to participate in an election free of irregularities," the court stated. The plaintiff failed to provide evidence that he was denied the opportunity to campaign and fully express his views or that any voter was denied the right to vote for him. The appellate court also noted the U.S. Supreme Court's caution "against enlarging the 'commodious' contours of section 1983 and the Fourteenth Amendment."

Crisman Pierce Co. Fire Protection Dist 21, No. 27830-8-II (Wa. App., December 31, 2002)

TARDINESS TANTAMOUNT TO TOSSED DISCRIMINATION SUIT

A former corrections officer for the King County Department of Adult Detention was terminated from her job after missing extended periods of work due to an on-the-job injury. She claimed that she was terminated due to her race and disability and filed suit. Unfortunately, she failed to timely respond to the court's order for discovery and to the employer's motion to dismiss. Those failures, along the lack of evidence suggesting a valid claim, resulted in the court's dismissal of her suit.

The corrections officer began working for the jail in February of 1993. Eight months later she fell down a ramp while on the job, injuring her right knee and wrist and her left arm. She quickly returned to work after the incident, but in the following three years had frequent health-related absences. The plaintiff's doctor advised the employer that she would be unlikely to perform some of the essential duties of a correction officer. The doctor was pessimistic about her ability to chase and restrain inmates, stating that the prognosis for her long-term function was not good.

The employer met with the plaintiff to discuss her medical issues and to determine the best course of action. At that time, she disagreed with her doctor's prognosis and said she would provide the employer with documentation showing that she was able to return to work and perform the necessary functions. Two weeks later, when the employer called another meeting because it had not received her response, she refused to answer questions and requested that a union representative be present. She again promised to deliver her medical information, but failed to follow through. As a result, the employer separated the corrections officer from her position. It informed her that she could still participate in a job accommodation/reassignment program to find a suitable position. She never took part in the program.

Plaintiff Misses Discovery, Motion Deadlines

Finally, the employer terminated the plaintiff, and she responded with a lawsuit. With a trial date set, the judge ordered the plaintiff to respond to the employer's discovery request. The plaintiff ignored the deadline and failed to provide King County with any of the material it demanded. When the employer moved to dismiss, she failed to submit a timely answer. The court rejected her late response and based its decision solely on the facts before it.

Race Discrimination Suit Years Too Late

The court first looked at the plaintiff's race discrimination claim and found that because the alleged occurrences happened in 1993, 1994 and 1995, the three-year statute of limitations had clearly run when she filed suit in 1999.

Restraint of Inmates Essential Job Function

In order to have enough evidence to proceed with a disability claim, a plaintiff must show that 1) she was disabled within the meaning of the Washington Law Against Discrimination; and 2) the employer failed to reasonably accommodate her disability. To prove the first prong, plaintiff needed to show that she had a sensory, mental or physical abnormality and that the abnormality substantially limited her ability to perform her job. Second, she had to produce evidence showing that there was a reasonable accommodation and that the accommodation was medically necessary. If she presented evidence on both prongs of the test, the burden would shift to the employer to prove that the accommodation was not reasonable.

Ruling for the employer, the court found that not only was the plaintiff untimely with critical deadlines, she had not provided a shred of evidence to suggest that she was capable of performing her job as a corrections officer even given an accommodation. Her doctor said she could not run or restrain inmates. She provided no evidence to contradict that claim or evidence that she could perform the essential functions of a correction officer's job.

Idahosa v. King County, No. 27242-3-II (Wa. App., Oct. 04, 2002)

In the Courts

The Ninth Circuit

CAP ON TITLE VII DAMAGES JUDGED CONSTITUTIONAL

A jury awarded the plaintiff Lansdale $100,000 for pain, suffering, mental anguish, shock and discomfort, and $1,000,000 in punitive damages in her gender discrimination suit against her former employer. She suffered no out-of-pocket damages. She appealed the trial court's reduction of her damages to $200,000 based on the limitation found in 42 U.S.C. §1981a, contending that the statutory limitation was unconstitutional. She argued that the damage cap violated the Separation of Powers Doctrine and invaded the province of the jury. She also argued that it violated the Equal Protection and Due Process clauses of the Constitution. A Ninth Circuit panel disagreed with her arguments.

In the Civil Rights Act of 1991, Congress expanded the remedies available under Title VII, but placed a cap on the amount of recovery. The court noted that in 1991:

> Congress determined that victims of employment discrimination were entitled to additional remedies. But, as legislative history makes clear, the 1991 Act would not have been passed by Congress *but for* the inclusion of a … damages cap.

For employers like the defendant in this case, damages were limited to $200,000 for each complaining party.

The court easily dealt with the plaintiff's separation of powers argument. The Supreme Court has stated that:

> when Congress creates a statutory right, it clearly has the discretion, in defining that right, to create presumptions, or assign burdens of proof, or prescribe remedies. … Such provisions do, in a sense, affect the exercise of judicial power, but they are also incidental to Congress's power to define the right that it has created.

Regarding the plaintiff's arguments on equal protection and due process, the court observed that "it goes without saying" that Congress must "act in a rational manner." But, it found nothing arbitrary or irrational about the limitation of damages in §1981a. A "statute must stand if it bears a rational relationship to any legitimate articulated government purpose." This statute was a political compromise, the court explained, where Congress chose to limit remedies believing that unlimited damages "would force employers to institute hiring quotas for their own economic safety." In addition, Congress believed a damage cap would deter frivolous lawsuits and would protect employers from financially crippling awards. The damage limitation, the court believed, was rationally related to a legitimate legislative purpose.

The plaintiff argued that equal protection was lacking because the damages for gender discrimination was limited, while race discrimination claims made under an older statute are not subject to a damage cap. Specifically, there is no limitation on the damages recoverable under 42 U.S.C. §1981 by plaintiffs proving they were denied rights "enjoyed by white citizens." The court found it proper that Congress would show special concern for persons subject to race discrimination:

> In fact, race discrimination has been one of the most disruptive elements in our national life since the founding of our republic, and attempts to overcome all vestiges of that evil have formed "the cornerstone of our entire body of civil rights law."

According to the court, the plaintiff mixed her categories when she contended that Congress discriminated when it did not give gender discrimination claimants the same rights as race discrimination claimants. Both genders are equally protected under both statutes, and that is all that is required. In any event, even a higher level of scrutiny would not change the result in this case, the court ruled.

Lansdale v. Hi-Health Supermarket, No. 01-16018
(9th Cir., December 19, 2002)

Arbitration Decisions

Grievance Arbitration

PORT'S REORGANIZATION OF WATERFRONT CRANE MAINTENANCE UPHELD

In a contract dispute between the Port of Seattle, represented by the National Electrical Contractors Association (NECA), and the IBEW Local 46, the union charged that the employer breached the Puget Sound NECA Agreement by unilaterally amending lease agreements for maintenance of the Port's electric and electronic container cranes on the Seattle waterfront. The lease changes displaced 17 IBEW Local 46 employees and resulted in the lay-off of seven employees. Arbitrator Michael H. Beck agreed with the Port that the 1965 Letter of Agreement, which allows it to subcontract or assign work to other non-union employers, is still in effect under the latest Puget Sound NECA Agreement, and dismissed the grievances.

Maintenance Operations Losing Millions a Year

The Port of Seattle owns the terminals and container cranes and in turn leases to terminal operators. Since 1990, the leases between the terminal operators and the Port have provided that the terminal operators make crane usage payments in addition to the lease payments for the terminal space. Under these lease agreements, Port employees performed the electric and electronic maintenance on the container cranes at the terminals. Over the last few years the Port's crane maintenance program operated at a significant loss.

In December 2000, the Port's Director of Labor Relations wrote to Local 46 as well as to the Seattle Building and Construction Trades Council and Operating Engineers Local 302 reiterating earlier discussions that the Port lost over a million dollars on crane maintenance operations in 1999 and that during 2000, losses were expected to grow to $1.4 million. He also pointed out that the losses were expected to grow annually, to approach two million dollars within five years.

The letter advised the unions and the Council that if the problems with the crane maintenance program could not be resolved over the next 60 days, the Port would consider a number of alternatives, including exiting from the crane maintenance program. The Port invited Local 46 to negotiate in a collective effort to retain the crane operation through contract efficiencies that would enable the Port to continue to employ union employees. After negotiations failed, the Port amended the agreements at four terminals and assigned electric and electronic container crane maintenance to two private companies.

Arbitration Focuses on 1965 Agreement

Local 46 filed an unfair labor practice complaint with PERC asserting that the Port's decision to "privatize" the crane maintenance came during the course of an existing contract, the Puget Sound NECA Agreement, to which the Port was a signatory. The union charged that the employer unilaterally repudiated the terms of that recently ratified agreement and thereby committed an unfair labor practice. PERC deferred the unfair labor practice complaint to arbitration.

In arbitration, the employer contended that the applicable language with respect to this dispute was contained in the 1965 Letter of Agreement executed by the Port, the Seattle Building and Construction Trades Council and its affiliated locals, including IBEW Local 46. The 1965 agreement stated that the employer retained the right to: 1) relieve employees of duties because of lack of work or other legitimate reasons; 2) subcontract or assign work to other employers; 3) maintain the efficiency of all Port operations, and 4) determine the methods, means, and personnel by which such operations are to be conducted.

The union contended that the latest Puget Sound NECA Agreement does not recognize the 1965 Letter of Agreement; therefore, the matter falls under Section 2.16(b) of the NECA Agreement. That section provides that the assigning or transfer of electrical work to any firm or corporation not recognizing the IBEW as the collective bargaining representative of their employees would be deemed a material breach of the agreement. The sub-contractors and terminal operators currently maintaining the cranes at the terminals do not recognize the IBEW Local 46 as the bargaining unit for their employees.

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Arbitration Decisions

Arbitrator Find 1965 Letter Still in Effect

The employer argued that it did not breach its contract with Local 46 when it amended the lease agreements. Arbitrator Beck agreed, rejecting the union's claim that the Letter was not an active side letter. Although the union and the employer discussed the issue of side letters, there was no agreement terminating them. Therefore, since no notice of termination or modification was made during the 1998 negotiations and those negotiations were concluded without any mention of the 1965 Letter, it was still in effect.

Although Arbitrator Beck agreed that was it significant that 17 unit employees were displaced, he also concluded that this fact alone could not override the clear language of the 1965 Letter giving the employer the right to subcontract or assign work to other employers. In dismissing the grievances, he also concluded that there is no indication that the employer acted in bad faith or with the intent to harm since it made an effort to negotiate an alternative to abandoning the crane maintenance program at the terminals before doing so.

Port of Seattle (IBEW Local 46, (unpublished op., Beck, 2002)

EMPLOYER'S NONCOMPLIANCE WITH FMLA REQUIREMENTS NULLIFIES DISCIPLINE

The grievance submitted by the Public School Employees of Morton/Washington alleged that the school district improperly issued the grievant a written warning and denied him pay for most of the family leave he took to care for his critically ill father. District policy allowed the use of paid sick leave for family leave and the collective bargaining agreement incorporated the provisions of the Family and Medical Leave Act (FMLA) by reference.

The grievant's supervisor gave him permission for a week's absence to care for his critically ill father in another state. At the start of the second week, the grievant telephoned his supervisor and indicated he needed more time off, perhaps a half week, and the supervisor concurred. The grievant took a second full week off to continue caring for his father.

At the start of the third week, some communication took place between the grievant's wife and the district to the effect that the grievant was still caring for his father. Witnesses disputed the nature of this communication; suffice it to say that the grievant did not keep the district very well informed as to when he expected to return. When he returned after three weeks' absence, the employer issued him a written reprimand and disallowed his use of paid sick leave for all but three days that he was absent.

The issues before Arbitrator Jane Wilkinson were whether there was just cause for the discipline and whether the withholding of accrued sick pay violated the labor agreement. She noted that the FMLA was relevant "to the extent necessary to interpret [the parties'] Agreement or to the extent its provisions are incorporated by reference." The parties did not dispute that the leave taken by the grievant was FMLA and sick-leave eligible.

Both Parties Had Obligation to Communicate; Neither Did

The arbitrator found that the both sides failed in their communication responsibilities. Department of Labor (DOL) regulations require that the employer give the employee written information on what it will require on notice and periodic reporting, among other things. She construed one DOL regulation as prohibiting an employer from penalizing an employee who does not comply with expectations that were not properly communicated. On the other hand, court decisions have not been "sympathetic to employees who fail to follow their employers' legitimate notice requirements."

The employer's brief family leave policy did not specify the employee's obligations with respect to notice and reporting and the employer gave no instructions to the grievant as to its expectations. The difficulty with the employer's case was "compounded by the ignorance of its managerial officials over its own obligations under the FMLA," the arbitrator noted. Its supervisor testified that he had never received training on the FMLA and that topic was not something that concerned him.

Although the employer maintained that it had a "common practice" that required employees to keep supervisors informed of their anticipated return to work, the arbitrator found the evidence supporting this contention "to be nonexistent."

The arbitrator observed that the "substantial failure of the district to fulfill its own communication obligations under the law obviates an award in its favor." However, she was troubled by the grievant's own behavior. She observed that a reasonable employee would promptly communicate changes in plans to his or her supervisor, as a matter of common sense. On the other hand, she was willing to give the grievant the benefit of the doubt because he and his sister were engaged in 24-hour care of a critically ill parent and no doubt he was "emotionally distraught and physically drained."

Thus, the arbitrator concluded that because the employer failed in its obligations to the grievant, the discipline issued was without just cause, and the employer improperly disallowed his sick pay during the period in contention.

Morton School District (PSE of Washington), unpublished op., (Wilkinson, 2002)

Mark Your Calendar!

The annual PERC/FMCS/IRRA Conference is scheduled for March 5 and 6, 2003. Arbitrators' day is March 4, 2003.

For more information, contact
PERC at (360) 570-7300 or
e-mail at info@perc.wa.gov
--OR--
FMCS at (206) 553-5800

Interest Arbitration

MODEST INCREASES AWARDED TO SEA-TAC FIREFIGHTERS DESPITE CITY INCOME UNCERTAINTY

Arbitrator Alan R. Krebs awarded Sea-Tac firefighters modest wage increases for the years 2001 through 2003 based on 90% of the Seattle CPI-W. He offset the wage increases for 2002 and 2003 by amounts of a new longevity pay benefit and an increase in the number of Kelly shifts. However, the arbitrator denied the employer's wishes to limit a shift to no more than 24 hours and to eliminate paid leave from total hours for the purposes of calculating overtime. He explained that he was sensitive to the employer's dependence on the travel industry for its income and the fact that the industry has seen major downturns recently.

Comparables Narrowed in Size, Geographic Proximity

In choosing comparable jurisdictions, Arbitrator Krebs chose a population band of 66% to 150% rather than the more common 50%-150% proposed by the employer or the 66%-167% proposed by the union, Firefighters Local 2919. The union's argument did not convince him that the employer's proposed population band improperly favored smaller departments.

The arbitrator explained that his chosen population band resulted in an ample number of comparable fire departments between one-third smaller and one-third larger than Sea-Tac's, all within the same or adjacent counties of King, Pierce and Snohomish. The comparables chosen were: Auburn, Bothell, East Pierce, King County Fire District 16, Lynnwood, Puyallup and Tukwila. Arbitrator Krebs saw no reason to draw from Kitsap County "inasmuch as it does not have a land border with King County" and the fact that it would add only one additional jurisdiction, an island, "which Sea-Tac is not."

Wage Increases Offset by Other Benefits

In awarding base wage increases, Arbitrator Krebs first noted that the bargaining unit compared favorably with the comparables in terms of wages, but that Sea-Tac firefighters typically worked more hours than their counterparts. For example, a Sea-Tac firefighter at the 10-year experience level earned an average total monthly compensation (including benefits) in 2001 of $5907, higher than the comparables' average of $5655 but worked an average of 21 hours more per month.

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The arbitrator awarded wage increases of 3.5% for 2001, 1.2% for 2002, and 0.25% for 2003, the three years covered in the most recent contract. However, in awarding the comparatively low amounts for 2002 and 2003, he subtracted from the CPI-W the effects of a new longevity pay benefit and an increase in the number of Kelly shifts available to employees.

The employer agreed to cover 100% of the increase of heath insurance for bargaining unit members and their families, which amounted to increases much greater than the cost of living. This led the arbitrator to base his wage award on 90% rather than 100% of the CPI-W.

Longevity pay had not been a part of the contract, but the arbitrator awarded this new benefit beginning in 2002. He assigned 1%, 2%, 3% and 4% longevity increases for completion of 5, 10, 15 and 20 years respectively. Longevity pay, he explained, is an important tool for retaining experienced firefighters that "are generally more valuable to the City than more recent hires."

The arbitrator was not convinced by the employer's contention that such a new benefit would cause problems for other city employees who do not have longevity pay. He pointed out that "the compensation package for this bargaining unit is [already] unique as compared with other City employee groups" and as explained above, the longevity benefit was offset by reductions in the wage increases.

Kelly Shifts Increased

Arbitrator Krebs increased the number of Kelly shifts received by employees by two each year to 6.33 beginning in 2003, resulting in a reduction in average scheduled weekly hours to 53.078. This increase "serves to decrease the gap between the City and the comparable departments with regard to scheduled work hours" and "represents a gradual move in the direction of prevailing practice," he explained. He awarded the increase despite the fact that the employer, "in the current difficult economic climate," might have trouble paying more overtime or hiring additional staff to cover the added Kelly shifts. However, he did use the added Kelly shifts along with longevity pay to offset base wage increases for 2003.

The length of shifts sometimes resulted in firefighters being paid for more than 24 hours in a single day. Worried about public perception of accounting practices, the employer proposed adding contract language to read: "An employee may not record more than twenty-four (24) hours in any one shift." The union objected to the proposed language on the ground that call-back at overtime rates would be eliminated in certain situations and pointed out that none of the comparable departments operated on this basis. Arbitrator Krebs saw no reason to add the proposed language because "there was no evidence that there has been any negative public perception of [the current practice]."

The contract currently specifies overtime as time worked in excess of 204 hours in a 27-day duty cycle; paid time off, such as vacation or holiday is counted toward the total. The employer proposed changing the language to eliminate paid time off in the calculation of overtime hours. It contended that the current practice is "fundamentally flawed." However, the arbitrator sided with the union, explaining that the current language "is part of the parties' negotiated scheme of providing higher pay to firefighters for working a relatively high number of hours." Though the increase in Kelly shifts will decrease the number of cycles with built-in contractual overtime, he wrote, bargaining unit members will still work more hours than their counterparts in comparable jurisdictions.

City of Sea-Tac (IAFF Local 2929), PERC No. 15951-I-01-370 (Krebs, 2002)

NO "FOUR-TENS" YET FOR WHATCOM COUNTY DEPUTIES

Interest Arbitrator Sandra Smith Gangle declined to award a schedule shift change of four-ten-hour days per week (a "4-10" schedule) to Whatcom County deputies as requested by the Whatcom County Deputy Sheriffs Guild. The union argued that the 4-10 schedule would reduce overtime and boost morale and service to the community, but the employer was concerned that such a change would actually increase overtime and lead to unbalanced squads under the parties' current seniority-based shift-bidding system. While the arbitrator mostly agreed with the employer's arguments on the merits, she based her decision partly on the fact that a change to the 4-10 schedule would not be meaningful.

In August of any given year, bargaining unit members begin their four-month-long seniority bidding process for the following year's shifts. At the time of the arbitrator's award, the bidding process for 2003 was nearly complete. She explained that were she to award a 4-10 schedule for 2003, as a practical matter there would not be time to re-do the bidding process in time to implement the new shift schedule. The earliest the 4-10 schedule could be realistically implemented would be 2004, she wrote.

More Negotiations Needed

The employer convinced the arbitrator that a 4-10 schedule, paired with the current seniority bidding system, would likely lead to inequitable and inefficient work teams. More senior officers would snap up the most desirable shifts. Personality problems could arise between deputies and their shift sergeants. The arbitrator agreed that a change to a 4-10 system should be paired with a change to a management-appointed "squad system" to assure balanced work teams. She advised the parties to "negotiate regarding the potential difficulties that a 4-10 schedule could generate, if it were implemented with seniority-based shift bidding still in place" and to "consider implementing a squad system commensurate with a 4-10 schedule."

The employer presented convincing evidence that jurisdictions with staffing difficulties, such as Whatcom County, are able to maintain minimum staffing levels and control overtime costs better under a 5-8 system than under a 4-10 system. However, the arbitrator noted that the employer was on its way to solving its staffing crisis such that "a 4-10 plan may be more reasonable to implement … in the future" and might actually save the employer in overtime costs. The arbitrator concurred with the union that a 4-10 schedule would undoubtedly improve deputy morale as they would have three days off per week instead of two. She advised the parties to follow the employer's suggestion to conduct a thorough workload study for 9-12 months before implementing such a change and to monitor the effects of the change before making it permanent.

Whatcom County, PERC No. 15395-I-00-347 (Gangle, 2002)

INTEREST ARBITRATION PANEL UNANIMOUS IN RICHLAND DISPUTE

After a hearing and briefing of the issues in a dispute between the City of Richland and Richland Firefighters, Arbitrator Michael Beck submitted a discussion memorandum to the panel members that triggered further discussion between the parties. A stipulated award included these significant items:

Appropriate Comparators: Bremerton, Kennewick, Longview, Lynnwood, Olympia, Pasco, Walla Walla and Wenatchee.

Wage Increase: 4.75% increase the first year of the contract (2001); 3.85% increase the second year of the contract.

Kelly Days: will remain unchanged at 17.

Retirement Medical Trust: Starting with the second year of the contract, the employer and each bargaining unit member will pay matched monthly contributions of $37.50 to the Washington State Council of Fire Fighters Post-Retirement Medical Trust.

City of Richland (IAFF Local 1052), PERC No. 16022-1-01-373 (Beck, 2002)

Feature article, continued from page 1

Outrageous, Abusive Conduct On Job Imputed to Employer

The tort claim of outrage requires the plaintiff to prove: (1) extreme and outrageous conduct that goes "go beyond all possible bounds of decency," is "atrocious" and "utterly intolerable in a civilized community," (2) intentional or reckless infliction of emotional distress, and (3) severe emotional distress on the part of the plaintiff. The court accepted the trial judge's findings that these criteria were satisfied. More significantly, it held the employer liable for the workers' conduct because an "employer will be held vicariously liable" for "intentional or criminal" conduct "within the scope" of the wrongdoer's employment. Just about any misconduct on the job, (except sexual or road rage), is within the scope of employment, the majority intimated:

> the Fred Meyer deli workers tormented Robel on company property during working hours, as they interacted with co- workers and customers and performed the duties they were hired to perform.

The court noted that the employees were able to abuse Robel without leaving their job station or neglecting their duties.

2001 Decision Overruled?

The problem with the majority's determination, the dissent stated with Justice Bridge authoring, was that it was directly contrary to its 2001 ruling in *Snyder v. Medical Services Corp*. In that case, the plaintiff claimed outrage based on nearly constant verbal abuse and threats from her supervisor on matters pertaining to work, abuse so serious that three other employees had already quit. The employer, aware of the behavior, did nothing at all to stop it. The Supreme Court found that because the supervisor's behavior was not in the scope of his employment, the employer was not vicariously liable. The abuse by Robel's co-workers was not only less severe, but unlike the *Snyder* facts, much of it was unrelated to the workplace, the dissent opined. The dissent strongly disagreed that being "on duty" means the conduct is within the scope of employment. The dissent warned that:

> Under the majority's reasoning, an employer would essentially be strictly liable for all intentionally tortious actions committed by an employee who was 'on duty' regardless of whether the actions were in furtherance of the employer's business. This position is clearly not supported by Washington law.

Retaliation By Harassment Deemed Actionable

Washington's Industrial Insurance Act has an anti-retaliation provision that contains administrative remedies but does not grant a private right of action in superior court. Thus, Robel's allegation that although the employer did not discharge her for filing a workers' compensation claim, it discriminated against her for filing that claim, was a charge sounding in tort. Even though the employer did not contest her worker's compensation claim and gave her a light duty assignment as soon as she was ready, she alleged it retaliated via the deli workers who poked fun at her claim. The trial court's unchallenged "finding" was that the "harassment of Robel … constituted an unlawful and adverse employment action against her."

The Supreme Court held that Robel was only "required to prove that she had filed a claim, that Fred Meyer thereafter discriminated against her in some way, and that the claim and the discrimination were causally connected." The trial court made unchallenged findings favorable to her on each element, the high court stated; therefore its judgment in her favor should stand.

Tort Claim No Longer Confined to Discharge Cases

The dissent pointed out that what was truly astounding was that the majority expanded the tort of wrongful discharge in violation of public policy to any "adverse employment action," including harassment. (Bear in mind that Robel never alleged a constructive discharge.) It did so without so much as mentioning its prior holdings refusing to expand the wrongful discharge tort to other job actions, something other jurisdictions have declined to do as well. The dissent charged that:

> Without justification, the majority extends the tort of wrongful discharge … to encompass an act by an employer short of actual or constructive discharge. The majority merely substitutes the word 'discrimination' for 'discharge.' However, the majority fails to define any limitation to the tort or to provide any justification expanding the tort beyond acts of discharge.

Moreover, the dissent wrote, even if a cause of action should exist, the employer did not discriminate against Robel because she filed a workers' compensation claim:

Feature article, continued from previous page

> There is no indication that Fred Meyer attempted to prevent her from filing this claim or that she was in any way denied benefits. The record also clearly shows that Fred Meyer accommodated her injury by giving her a light duty shift.

To the contrary, the dissent noted, "the record shows a pattern of negative treatment by Robel's co-workers that began nearly six months before she filed her claim and involved many statements completely unrelated to her claim."

Hostile Work Environment Disability Discrimination

The least controversial claim that Robel submitted was a hostile work environment disability discrimination claim. The majority and the dissent agreed that a hostile work environment kind of disability discrimination claim was actionable, citing several parallel federal decisions under the Americans with Disabilities Act. To succeed on the claim, a plaintiff must prove:

> (1) that he or she was disabled within the meaning of the antidiscrimination statute, (2) that the harassment was unwelcome, (3) that it was because of the disability, (4) that it affected the terms or conditions of employment, and (5) that it was imputable to the employer.

There was no dispute that Robel was disabled and that the harassment was unwelcome. As to whether the harassment was "because of the disability," the majority interpreted an ambiguous pronouncement of the trial judge as a finding for Robel. The fourth element, the majority explained, requires a showing that the harassment is "sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment." Because the trial court found that Robel's work environment was abusive, the reviewing court was satisfied.

Warning, Terminating Offender Not Enough

Finally, to hold the employer responsible, Robel must show that it:

> (a) authorized, knew, or should have known of the harassment and (b) failed to take reasonably prompt and adequate corrective action.

The trial court found that "Fred Meyer, through the acts of its managers, participated, authorized, knew and/or should have known of the verbal and non-verbal harassment of Robel." The trial judged clarified that the deli manager and assistant manager were "management personnel for purposes of employer liability," but the judge did not define the term "manager" and, in all likelihood, these individuals did not possess full supervisory authority. (The Supreme Court noted that "[m]anagers are those [with] the authority and power to affect the hours, wages, and working conditions of the employer's workers.") The trial court also found that "Fred Meyer's remedial action … was not of such a nature to have been reasonably calculated to end the harassment' and that '[i]ts investigations and termination of [one co-worker] without further management corrections were inadequate." The court deemed itself bound by this unchallenged pronouncement of the trial court. Therefore, Robel must prevail.

The dissent's problem with the majority had to do with the causal element:

> In the context of disability harassment, the question the court must ask is whether 'the employee would have been singled out and caused to suffer the harassment if the employee had' not been disabled? … In Robel's case, the answer is clearly yes.

The record showed that the "harassment suffered by Robel began long before she became disabled" and only one post-injury incident referenced her disability. "These facts clearly indicate that Robel would have been harassed even if she had remained able-bodied," the dissent stated, adding:

> Given the ongoing pattern of harassment and its genesis in significant personality differences, had Robel not suffered her back injury, it is unfortunate but likely that the adverse treatment would have endured in another form.

The dissent noted that several federal circuit courts of appeals have held that "isolated incidents of harassment were not motivated by plaintiffs' disabilities even though at least some of the harassing conduct may have been related to the plaintiffs' disabilities."

The employer prevailed on one claim. The Supreme Court found that none of the vituperative names Robel's tormenters called her were defamatory because they were merely matters of opinion, and not fact.

Robel v. Roundup Corp., d/b/a/ Fred Meyer Inc., No. 70561-5 (Wa. S.Ct. December 12, 2002)

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