

## Washington State Law Update (2010): What You Need to Know

Presented by Richard P. Lentini

### Supreme Court Cases

*Morgan v. Kingen*, 166 Wn.2d 526, 210 P.3d 995 (2009)

Personal liability for unpaid wages for an officer or agent of the employer with authority over the payment of wages who acts “willfully and with the intent to deprive the employee of any part of his wages . . . .” RCW 49.52.070.

The “willfully” element is only defeated by a clerical error or a *bona fide* dispute as to the amount or whether wages are owed at all. In ability to pay is not an excuse.

A mini-casino in SeaTac filed bankruptcy under Chapter 11, reorganization. The business continued to operate, but the defendant operators and owners would not inject new capital.

The bankruptcy was eventually converted to Chapter 7 liquidation, but not until unpaid wages of almost \$200,000 had accrued. The bankruptcy trustee had cash, but did not apply that to wages.

The two owner/officers were held individually liable for the unpaid wages (perhaps double, plus interest and attorneys’ fees). Prior to the conversion to Chapter 7, they had controlled which debts would be paid and refused to inject additional capital to pay the wages owing. Willfulness was established.

*Briggs v. Nova Services*, 166 Wn.2d 794, 213 P.3d 910 (2009)

Employers may not discriminate against employees for participating in “concerted activity.” RCW 49.32.020.

Six management and two subordinate employees did not like the management style of the Executive Director of a Spokane non-profit. Two managers wrote their complaints directly to the Board, in violation of company policy.

The Board hired an investigator and determined the Executive Director had not committed unlawful acts. The E.D. then fired the two complaining managers and another who stated she could be loyal to the company but not to the E.D.

Other employees wrote the Board demanding the E.D.’s termination and the reinstatement of the discharged employees. They threatened and did “walk out” on their jobs until their demands were met.

Plaintiff’s claims dismissed on summary judgment. RCW 49.32.020’s concerted activity theory was not raised until briefing before the Court of Appeals.

A split court: three justices found the employees who walked out were not terminated. Also, though “concerted activity” applies to attempts to improve the terms and conditions of employment, this does not include “managerial decisions which lie at the core of entrepreneurial control.” Employees may have been just trying to push out someone they considered a “bad boss.”



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### *Kitsap County Deputy Sheriff's Guild v. Kitsap County*, 167 Wn.2d 428, 219 P.3d 675 (2009)

An employer may not discharge an employee if such action jeopardizes a clearly stated public policy. But what about when retaining an employee jeopardizes a public policy?

A deputy sheriff assigned to the child pornography task force became obsessive about the cases and was removed from the task force and reassigned.

He failed to return equipment and case files and failed to secure a firearm. Ultimately he was discharged for 29 documented incidents. In arbitration, the arbitrator determined the county established the deputy had been untruthful. Nevertheless, the arbitrator ordered reinstatement.

The majority of the Court adopted the “public policy” exception to enforcement of an arbitration award, limiting this exception to public policies which are explicit and well defined, not just based upon general public interest.

The Court upheld the arbitration award, finding insufficient explicit expression of public policy requiring honest and truthful law enforcement officers.

The dissent would have found a public policy derived from “obvious ethical or moral standards” and RCW 41.14 (adopted by initiative), which provides deputy sheriffs have tenure “only during good behavior” and may be dismissed for “dishonesty” and other grounds.

### **Court of Appeals Cases**

#### *Corey v. Pierce County*, 154 Wn. App. 752, 225 P.3d 367 (2010)

A defamation claim deals with damage to reputation. The elements of proof are falsity; an unprivileged communication; fault (negligence or malice); and damages.

A false light claim provides compensation for mental suffering, rather than reputation. The elements are characterizing the person in a false light; which would be highly offensive to a reasonable person; and the publisher knew or recklessly disregarding the falsity and the false light in which the other would be placed (malice).

Pierce county deputy prosecutor was promoted out of the bargaining unit, losing protection of discharge only for just cause. She claimed she accepted the position only upon the promise she would be discharged only for just cause.

Plaintiff was fired for differences with the Prosecutor. In her desk was found money to be used as a donation for a colleague with an ill child. An investigation found no evidence of wrongdoing.

The prosecutor’s office leaked to a newspaper an internal investigation on missing funds involving plaintiff. The Prosecutor made a statement to the effect plaintiff was untrustworthy. An article stated the Prosecutor stated plaintiff was under criminal investigation. Plaintiff thus became unemployable.



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Plaintiff was awarded over \$2,000,000 on various claims. The award was mostly upheld on appeal, with plaintiff having proved defamation and false light.

However, the Court of Appeals determined there is no cause of action in Washington for the negligent dissemination of harmful or confidential information.

*Collins v. Clark County Fire District 5*, 155 Wn. App. 48, 231 P. 3d 1211 (2010)

Four women employed by the Fire District sued for gender discrimination and sexual harassment. The retired assistant chief who managed the training center regularly spoke of women in demeaning and provocative ways. At trial, he admitted to much of the alleged conduct, but claimed none of the plaintiffs complained about it. The women did complain to the Fire Chief and the Fire District Board Commissioners. A Commissioner responded to the complaints, "Well, that's just Marty."

The jury returned a six-figure verdict, and the trial judge awarded substantial attorneys' fees. The Court of Appeals affirmed, finding sufficient evidence of discrimination and harassment and finding no basis for reducing the jury's award or the fee award.

*Smith v. Employment Security Department*, 155 Wn. App. 24, 226 P.3d 263 (2010)

Smith, a public employee, feared retaliation from his employer for refusing to sign a declaration in opposition to another employee's sexual harassment claim. He then began secretly recording conversations in the workplace with coworkers, superiors, and members of the public in his office, cars, businesses, and homes. He was fired initially for violating his employer's directive to turn in his computer without deleting any files.

The Court upheld the Commissioner's finding that Smith was disqualified from receiving unemployment benefits because of misconduct. Smith violated a known company policy against recordings, adversely impacting the county's interest. He also deliberately engaged in illegal acts, and knowingly violated an employer directive.

*Roe v. Teletech Customer Care Management*, 152 Wn. App. 388, 216 P.3d 1055 (2009)

Plaintiff used marijuana prescribed by a doctor pursuant to the Medical Use of Marijuana Act, RCW 69.51A. The employer had a policy prohibiting misuse of drugs or alcohol. Plaintiff tested positive for marijuana and was fired. She sued for wrongful termination.

The Court of Appeals (Div. II) held that there is no civil cause of action for wrongful termination under the MUMA. Rather, the MUMA was enacted by the people (via initiative) to prevent the criminal prosecution of individuals using marijuana by prescription.

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