

THE STATE COURTS SPEAK (2007)

by Richard P. Lentini
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A. Washington Law Against Discrimination

1. A New Definition of "Disability"

Last year we reported to you that the Washington State Supreme Court had redefined the definition of a "disability" under the Washington Law Against Discrimination in *McClarty v. Totem Electric Int'l*, 157 Wn.2d 188, 137 P.3d 844 (2006). In *McClarty*, our Supreme Court discarded the unworkable definition of disability as adopted by the Human Rights Commission in favor of the definition set forth in the Americans With Disabilities Act.

But the State Legislature was swift to react. On May 4, 2007, our Governor signed into law a new bill again redefining the definition of disability. Now, disability includes "the presence of a sensory, mental, or physical impairment that: (i) is medically cognizable or diagnosable; or (ii) exists as a record or history; or (iii) is perceived to exist whether or not it exists in fact." Further, "a disability exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or work at a particular job or whether or not it limits any other activity within the scope of this chapter." This is an extremely broad definition that arguably includes any sort of impairment whatsoever, even an impairment that is common.

For the purposes of reasonable accommodation, the impairment "must be known or shown through an interactive process to exist" and either has a substantially limiting effect on the employee's ability to perform his or her job, apply or be considered for a job, or access equal benefits, privileges or terms and conditions of employment; or it must put the employer on notice of the existence of an impairment. With respect to the last type of impairment, medical documentation must establish a reasonable likelihood that engaging in job functions without an accommodation would aggravate the impairment to the extent that it would substantially limit the individual.

2. Maternity/Disability Bias.

Hegwine v. Longview Fibre Co., 132 Wn. App. 546, 132 P.3d 789 (2006) (petition for review granted; review case). Plaintiff applied for a job in the customer service department of Longview Fibre. The advertisement for the job did not indicate any physical requirements, but one of the interviewers told the plaintiff there was a

25-pound lifting requirement. Plaintiff was offered the job contingent on a physical exam. The company physician learned during the exam that plaintiff was pregnant. During the orientation, plaintiff disclosed to the employer that she was pregnant. She was told to leave the premises while her medical clearance was resolved. She was later informed that her physician had released her to lift only 20 pounds. However, plaintiff's attending physician told the plaintiff that she could lift up to 40 pounds. Later, the plaintiff's physician told Longview Fibre that the plaintiff could lift 20 pounds frequently and 40 pounds occasionally. The company then determined that the plaintiff would have to lift boxes weighing up to 60 pounds up and down stairs. At trial, the attending physician stated he might have approved lifting up to 60 pounds, depending on the nature and frequency. Longview Fibre rescinded plaintiff's job offer, purportedly based on restrictions on her ability to lift. Although there was testimony that Longview Fibre could have accommodated Hegwine's lifting limitations, Longview Fibre did not consider the possibility of accommodation. Hegwine sued Longview Fibre, alleging discharge because of her gender and pregnancy. However, after trial the court concluded that Longview Fibre could not accommodate Hegwine's pregnancy-related temporary lifting restriction.

The Court of Appeals held that the trial court's disability discrimination analysis was inapplicable, because pregnancy and pregnancy-related conditions are not considered disabilities under Washington law. The court held that the facts must be analyzed under the standards applicable to a sex discrimination case. The court held that there was insufficient evidence to establish that the plaintiff was disabled, and that the employer therefore had not articulated a non-discriminatory reason for rescinding the job offer. As a result, the court held the plaintiff prevailed on her sex discrimination claim and remanded the case for a determination of her damages and reasonable attorneys' fees.

3. Damages Awards.

In *Pham v. Seattle City Light*, 159 Wn.2d 527, 151 P.3d 976 (2007), our Supreme Court held that the federal income tax gross-up authorized in *Blaney v. Machinists and Aerospace Workers*, 151 Wn.2d 203, 87 P.3d 757 (2004), is not available with respect to an award of general damages. Plaintiffs sued for racial and ethnic origin discrimination and were awarded \$550,000 in damages by a jury, including \$80,000 in noneconomic damages for one plaintiff and \$40,000 in noneconomic damages for the second plaintiff. In *Blaney*, the court had allowed an award for "additional income tax consequences" incurred by the plaintiff. Here however, the court distinguished between economic and noneconomic damages, holding that an award against the defendant for plaintiff's increased taxes for noneconomic damages was improper.

The court also stated that “only occasionally” will a “risk multiplier” be applied to the attorneys’ fees Lodestar calculation. However, the court remanded to the trial court for determination whether a fee multiplier was appropriate. The trial court had properly declined to award fees for plaintiff’s attorney time spent working on unsuccessful motions, an amended complaint and “development of media contacts.” The court noted that, “occasionally a risk multiplier will be warranted because the Lodestar figure does not adequately account for the high risk nature of a case.”

B. Minimum Wage Act

1. Carriers of Agricultural Products Are Exempt From the Minimum Wage Act.

RCW 49.46.130(2)(g) exempts certain agricultural workers from coverage under the Minimum Wage Act. This includes “any individual employed . . . (ii) in packing, packaging, grading, storing or delivering for storage, or to market or to a carrier for transportation to market, any agricultural or horticultural commodity . . .” In *Cerrillo v. Esparza Trucking Co.*, 158 Wn.2d 194, 142 P.3d 155 (2006), the Esparza Trucking Company hired plaintiff Cerrillo to pick up and deliver by truck agricultural products to processing plants in the Columbia Basin area of Central Washington. Plaintiff and other truckers in Esparza’s employ occasionally worked more the 40 hours per week, but no overtime was paid. The Court of Appeals found that the exemption described above did not apply, and the employer owed overtime wages. The Court of Appeals adopted the Department of Labor and Industries’ narrow interpretation of this exemption, reasoning that it “applied only to employees working for agricultural employers.” 126 Wn. App. at 728. The Supreme Court disagreed, finding that the statute was not ambiguous and the Department of Labor and Industries’ interpretation was erroneous. The statute defines the exception by the nature of the work being performed by the individual, not by whether or not the employer actually produces the agricultural product that is transported.

2. Employers Must Pay Employees for Overtime Work Performed Outside the State of Washington.

In *Bostain v. Food Express Inc.*, 159 Wn.2d 700, ___ P.3d ___ (March 1, 2007), our Supreme Court overruled the decision of the Court of Appeals on which we reported last year. That Court of Appeals decision had held that the Minimum Wage Act applied only to hours an employee worked within the State of Washington. Mr. Bostain worked for a trucking company with headquarters in California and a terminal in Vancouver, Washington, out of which Mr. Bostain was dispatched. Mr. Bostain worked an average of 48 hours per week, only 37% of which was in the State of Washington. While RCW 49.46.005 declares that the legislative purpose for the Minimum Wage Act

is to ensure “minimum standards of employment **within the State of Washington**,” the Supreme Court held that this declaration did not limit the application of the Act to merely those hours worked within the state. The court found that such a “restrictive reading of the declaration section and overtime provisions of the MWA would be inconsistent with protecting workers and specifically, would be inconsistent with the protections afforded Washington employees under the MWA.”

The case left unsettled exactly how it is to be determined whether an employee is a **Washington** employee. In a footnote, the court states that whether a worker is a “Washington based employee will depend on factors the courts routinely use for deciding choice of law issues.”

In an interesting comment on attorneys’ fees, the court held that the trial court improperly reduced the Lodestar attorneys’ fee calculation on the basis that the employer had a *bona fide* dispute as to whether overtime was owed. Then the court remanded for a determination of whether a multiplier would be appropriate. Double damages under RCW 49.52 were not appropriate because there was a *bona fide* dispute.

3. Administrative Exemption Under the Minimum Wage Act.

In *Mitchell v. PEMCO Mutual Insurance Co.*, 134 Wn. App. 723, 142 P.3d 623 (2006), Division I of the Court of Appeals addressed the administrative exemption supplied to claims adjusters. The court held that the burden was on the employer to establish by a preponderance of the evidence that the employees “plainly and unmistakably” are exempt. The administrative exemption required determination of:

- (a) whether the primary duty consists of performance of office or non-manual field work related to management or general business operations; and
- (b) whether the employees customarily and regularly exercise discretion.

The plaintiffs contended that the primary business of the employer was to sell insurance and that the work of the adjusters did not directly pertain to those business operations. However, the adjusters work in servicing policyholders, negotiating settlements, and carrying out numerous policies regarding handling claims was held to relate to general business operations. The court also held that the adjusters exercised discretion and judgment.

4. Wages Delayed Are Not Wages Denied.

In *Champagne v. Thurston County*, 134 Wn. App. 515, 141 P.3d 72 (2006), the plaintiff correction officers sued for delay in payment of wages. The county paid “specialty pay” (overtime, comp time and holiday pay) the month after they were earned and submitted on additional forms. However, Division II of the Court of Appeals held that the Minimum Wage Act did not provide a remedy “when an employer has in fact paid the employees their due wages, as the county did here.”

C. Union Issues

1. What Is Concerted Activity?

In *Briggs v. Nova Services*, 135 Wn. App. 955, 147 P.3d 616 (2006), six employees and managers of defendant Nova Services wrote to the employer’s board with their concerns about the executive director’s poor management style. The board began an investigation. Later, the executive director met with four of the six and fired the other two for insubordination. Within days, the remaining four employees/managers wrote to the board demanding immediate removal of the executive director and reinstatement of the two terminated employees, or they would “walk out.” The board did not respond, and the executive director treated the letter as a resignation. The terminated employees brought suit under RCW 49.32.020 (Little Norris-Laguardia Act). This statute protects an employee’s right to engage in “concerted activity” without employer interference.

The court held that the employees’ conduct did not constitute concerted activity. The court held that complaining about the executive director’s management style and skills amounted to “personal preferences and professional differences,” and therefore not concerted activities protected by the statute. The court noted that there was no attempt by the employees “to collectively bargain for terms and conditions of employment.”

D. Employment Security

1. Good Cause to Quit.

In *Batey v. Employment Security Dept.*, 137 Wn. App. 506, ___ P.3d ___ (2007), Division I of the Court of Appeals struck down as unconstitutional certain amendments to the Employment Security Act, RCW 50, establishing 10 exclusive “good causes” for voluntarily leaving employment. The 2003 amended statute violated Constitution Article II, Section 19, by failing to completely express the subject of the bill in its title. A 2006 amendment suffered from the same defect. As a result, the old law containing four

“good cause to quit” categories plus giving the Department discretion to specify other undue hardship or deterioration of work factors is back in effect.