

WASHINGTON STATE BAR ASSOCIATION
Labor and Employment Law Section
Fourteenth Annual Labor & Employment Law Conference
Friday, November 21, 2014

**OBSERVATIONS AND RECENT APPELLATE DEVELOPMENTS
IN WASHINGTON STATE EMPLOYMENT LAW©**

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Thanks to Sarah Armon and Mort Brinchman at Stokes Lawrence for their invaluable assistance in the preparation of these materials. Any errors of fact or judgment are those of the author.

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I. OBSERVATIONS

Whither *Cudney*?

After the Supreme Court decision in *Cudney v. ALSCO, Inc.*, 172 Wn.2d 524, 259 P.3d 244 (2011), one could safely say that the tort of wrongful termination in violation of public policy was on life support. More recent developments, however, seem to indicate that it may be that the *Cudney* approach to the tort is in need of intensive care. These developments include a later decision of the Supreme Court; decisions of the Court to accept or deny review in cases involving this tort; a remand of a case to the Court of Appeals; a decision out of Division III with a concurring opinion advocating a wholly new analysis in these cases; and change in Court personnel. The careful practitioner will be careful to consider the role that *pro tem* Justices play.

The issue decided in *Cudney* was whether an employee had a tort remedy. The plaintiff was fired after making a complaint to management that a company employee was driving a company car while under the influence. This jeopardized the public interest in a safe work place and safety in general.

In a 5-4 decision, a majority held that the worker had an adequate remedy to protect his, and the public's, interests by making a complaint to the Department of Labor and Industries in order to protect his right to a safe work place. That was *Cudney* Part A.

Part B was that the employee could have protected the public interest in preventing drunks driving cars by reporting the incident to law enforcement. That, of course, would leave the employee without any adequate remedy. The majority decision did observe that had the employee been fired after making either complaint there could be a different story.

Justice Owens wrote for the majority in *Cudney* and was joined by Chief Justice Madsen, Justices Alexander, Fairhurst, and James Johnson. Justice Stephens wrote the dissent and was joined by Justices Charles Johnson, Chambers, and Sanders (sitting *pro tem* because he heard oral argument and was later defeated for re-election by Justice Wiggins who did not participate in the decision).

In 2013, a five justice majority of the Court decided that a public employee who has rights with the Public Employment Relations Commission to grieve a termination also had a tort claim for public policy wrongful termination. *Piel v. City of Federal Way*. Part II.E. This seemed to undercut *Cudney*.

The Court stayed consideration of review in *Piel* pending its decision in *Cudney*. After *Cudney* was decided, the Court kept the case for argument. *Piel* at ¶ 9.

Justice Tom Chambers was a *pro tem* in *Piel* and joined the majority opinion written by Justice Stephens, the author of the *Cudney* dissent. Justice Wiggins did not participate in *Piel*. He had not participated in *Cudney* either. Judge Karen Seinfeld of Division II was a *pro tem* in

his place and was in the *Piel* majority along with Justices Charles Johnson, a member of the *Cudney* dissent and González, who replaced retired Justice Alexander, part of the *Cudney* majority. Justice Gordon-McCloud did not participate in *Piel* as she succeeded Justice Chambers. Thus, the *Piel* majority was composed of two *pro tems* and a justice new to the Court.

Weiss v. Lonquist, Part III.I, was in the Supreme Court on a petition for review at the time *Piel* was decided. There, Division I reversed a trial court judgment for plaintiff where an attorney claimed wrongful termination in retaliation for not committing an unethical act. The trial court judge was Justice González. The reversal was based on *Cudney*: There was a remedy available through the WSBA discipline process to protect the public interest in maintaining the integrity of the legal profession. The WSBA discipline process does not provide a remedy for the complaining party. This, then, is a pure *Cudney* Part B case.

Justice González, of course, recused on the petition for review in *Weiss*. Judge Lisa Worswick was appointed in the Supreme Court as *pro tem*.

Ordinarily, one of two departments of the Supreme Court decides whether to accept or reject a petition for review. In *Weiss*, Department Two of the Court was unable to decide whether to grant review in July, 2013 (days after *Piel* was decided on June 27, 2013), and the *en banc* Court with Judge Worswick made the decision not to grant it in November, 2013. We don't know the vote count.

What occurred next was consideration of a petition for review in *Rose v. Anderson Hay & Grain Co.*, 168 Wn. App 474, 276 P.3d 382 (2012), *review granted and remanded*, 180 Wn.2d 1001 (2014). There, Division III affirmed a trial court dismissal of a wrongful termination claim by a truck driver due to availability of an administrative remedy. However, when the lawsuit was filed the time for filing an administrative claim had lapsed. No matter: *Cudney* Part A required dismissal of the common law tort claim. On April, 1, 2014 Department 2 of the Supreme Court “remanded to the Court of Appeals in light of *Piel* . . .”

After *Rose* was remanded to Division III, that court decided *Becker v. Community Health Systems, Inc.*, Part III.J, on August 14, 2014. *Becker* affirmed a trial court denial of the employer's CR 12(b)(6) motion to dismiss a wrongful discharge tort case. The plaintiff, a CFO, alleged he was constructively discharged when he refused to cook the employer's books. Despite whistleblower protections in federal and state legislation, the Court of Appeals, in an opinion by Chief Judge Brown, decided that a tort action was available. In a concurring opinion, Judge Fearing, joined by Judge Lawrence-Berry, advocated scrapping the four part analysis long-used in wrongful discharge cases since *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 913 P.2d 377 (1996) in favor of “requir[ing] the employee to prove a clear mandate of public policy and [that] her conduct directly relates to the policy” *Id.* at ¶ 62.

A petition for review was filed in *Becker* on October 29 under Supreme Court docket no. 90946-6.

A month after **Becker** was decided, Division III issued its opinion on remand in **Rose**. Part III.K. In an opinion by Chief Judge Brown, the Court again found in favor of the employer on the basis that a federal trucking industry regulatory statute provided adequate remedies to protect the public and the employee. The employee, a truck driver, claimed that the employer required him to work more hours than the statute allowed.

Chief Judge Brown distinguished his earlier decision in **Becker** on the basis that Becker would be personally liable under state and federal law if he cooked the books, as requested by the employer. *Id.* at ¶ 16. The plaintiff in **Rose** filed a petition for review in the Supreme Court on October 24, 2014. The Supreme Court docket number was not available when these materials were written.

Court personnel have changed. Justices James Johnson and Alexander, part of the **Cudney** majority, each retired as did Justice Chambers, part of the dissent in that case. New to the Court since **Cudney**, besides Justice González, are Justices Wiggins, Gordon-McCloud, and Yu.

Thus, we are left in this place: A decision, **Cudney**, severely limiting the scope of wrongful termination in violation of public policy is adhered to in Divisions I and III in **Weiss** and **Rose**. The Court then decided **Piel** and denied review in **Weiss** but remanded **Rose** in light of **Piel**.

Rose on remand was affirmed in Division III on the basis of **Cudney**. But in another decision from Division III, **Becker**, two judges rejected the analysis used in **Cudney** and wrongful discharge cases since **Gardner**.

And, since **Cudney** was decided, two of its five justice majority have retired.

Is **Cudney** limited by **Piel**? Do we have to take into account that the majority in **Piel** was composed of two *pro tems*? What are we to make of the denial of review, with a *pro tem* involved, in **Weiss**? Does it matter that the Court decided **Cudney** while **Piel** was pending on its docket yet kept **Piel** for decision even after its decision in **Cudney**? And then we have **Rose** - apparently remanded by sitting Justices with no *pro tems* involved. What are we to make of the two judge concurring opinion in **Becker** from Division III?

All very interesting to ponder and suggestive that **Cudney** may not be the death of common law wrongful discharge claims.

A lawyer on either side of a wrongful termination tort claim should take all these moving parts into consideration in terms of advising a client regarding settlement and in advocacy in trial and appellate courts. It may be telling how the Supreme Court deals with the petitions for review in **Becker** and **Rose**. If one is accepted but the other rejected, what does that mean? What if both are accepted?

What is clear since **Cudney** is that judges are having a difficult time with the analysis of wrongful discharge cases in use since **Gardner** was decided. Indeed, there is difficulty in deciding whether a tort action should exist at all. There has been a marked split on the Supreme Court as to whether the focus should be on the interests of the employee on a co-equal basis with protecting a public interest or merely a focus on the public interest.

The certainty in the law which seemed assured in **Cudney** has been substantially eroded.

II. WASHINGTON SUPREME COURT

A. **Chaney v. Providence Health Care** 176 Wn.2d 727, 295 P.3d 728 (2013) Wrongful termination, FMLA.

A jury verdict in favor of the employer was reversed in a split decision involving FMLA regulations.

The employee was fired because the employer found that he had not been released for work by a physician by the time FMLA and borrowed leave time ended. ¶ 3. The majority determined that as a matter of law the trial court should have granted a directed verdict in favor of the plaintiff employee.

The dispute centers on whether the employee's physician appropriately determined in a timely way that the employee was fit to return to work. ¶¶ 4, 6. The case is fact intense dealing with what the physician wrote and when it was written and whether that related to the time the employee desired to return to work or some other time. The majority treated the regulatory and statutory interpretation matters *de novo*. ¶¶ 7-8.

Relying on former 29 C.F.R. § 825.310(c), the majority, in an opinion by Justice Chambers, determined the physician statement "is ok to work as soon as Employer allows" satisfied the FMLA and therefore, the employer was required to allow the employee to return to work. If there was any ambiguity, the employer was required to seek clarification from the physician. ¶ 15.

The dissent for four justices was by Justice Charles Johnson. They took issue with the standard of review applied by the majority. The dissenters believed that all inferences in a motion for a directed verdict are to be made in favor of the non-moving party - the employer in this case. It was for the jury to decide the importance of the physician's note and what it meant in terms of time when the employee could return to work. ¶¶ 21-22.

B. *Gandee v. LDL Freedom Enterprises, Inc.*
176 Wn.2d 598, 293 P.3d 1197 (2013)
Arbitration, contractual unconscionability.

This is a non-employment case involving an arbitration provision. The trial court refused to compel arbitration. Justice Charles Johnson wrote the opinion for the Court.

This is one of a series of decisions involving challenges to arbitration provisions on the basis of unconscionability.

Review of a decision denying a motion to compel arbitration is *de novo*. ¶ 4. The party seeking to avoid arbitration has the burden of establishing that arbitration is inappropriate. ¶ 4.

Compare that with the burden placed on the employer in Washington always to prove that a post-employment restraint is unenforceable. See *Sheppard v. Blackstock Lumber Co., Inc.*, 85 Wn.2d 929, 540 P.2d 1373 (1975).

Substantive *or* procedural unconscionability may void a contract in Washington. ¶ 5. While severance of an offending provision is the usual remedy, the unconscionable terms may so pervade a contract as to make the entire writing void. ¶ 5.

Here, the contract required arbitration out of state. The costs of doing that were burdensome and posed a hardship on the consumer. ¶ 9. The contract also provided for prevailing party attorneys' fees. Under the Consumer Protection Act, RCW 19.86, only the consumer would be entitled to fees if it prevailed. The contractual fee shifting would benefit only the business and not the consumer. This would chill a consumer's "ability to bring suit under the CPA" and is contrary to the legislature's intent. ¶ 9.

Think about this in light of one way fee shifting in actions under RCW 49.48, 49.52 and 49.46! This is consistent with *LaCoursiere v. Camwest Development, Inc.*, and *Brown v. MHN Government Services, Inc.*, Part II.C and G, *infra*.

The contract also required that an arbitration had to be started by a consumer within 30 days. ¶ 11. While a contractual limitation period shorter than that otherwise available under law may be valid, this doesn't cut it. ¶ 12.

While the business offered to 'waive' offending provisions of the contract, the entire contract was void. To hold otherwise would invite contracts to be loaded "full of unconscionable terms and then, when challenged in court, offer a blanket waiver." ¶ 16. This would invite even more litigation.

C. *LaCoursiere v. Camwest Development, et al.*,

____Wn.2d____, 2014 WL 5393866 (October 23, 2014)

Wage rebate, RCW 49.52; prevailing party fee shifting disallowed.

A 5-4 majority determined that a bonus plan allowing for forfeiture of an unvested portion of a bonus paid to a related entity did not amount to an unlawful rebate of wages under RCW 49.52.050. All nine justices agreed that while the employer prevailed in the litigation, the bonus plan contract allowing for prevailing party attorneys' fees was unconscionable "where the legislature authorizes only prevailing employees to collect attorney fees." ¶ 32. This, of course, is consistent with recent decisions of the Court in employment and other cases. See, e.g., Parts II.B and G.

An employment contract provided for a discretionary bonus based on net profits of the employing entity. ¶ 4. A portion was paid directly to the employee and the majority was distributed to a related LLC which was apparently managed by the owner of the employing entity. ¶ 6. The employee was also party to the LLC agreement. ¶ 3. The contract provided for prevailing party attorneys' fees.

The money paid into the LLC was deemed a capital contribution. ¶ 5. The money in the related LLC could, in turn, be loaned to the employing entity. *Id.* The employee would vest in ownership of the contribution at the rate of 20%/yr on a rolling basis for contributions to the LLC made by the employing entity each year.

If the employee was fired for "cause," his interest in the LLC would be sold. The president of the employing entity had first right to purchase the unvested units. ¶ 6. Ultimately, the employee was fired for 'cause' - persistent tardiness - and his 40% unvested and forfeited interest was lost.

The employee sued under RCW 49.52.050 claiming this was an unlawful rebate. The employer prevailed on summary judgment in Superior Court and in the Court of Appeals. ¶ 10.

First, the Court determined that the bonus payments were "wages." ¶ 14. RCW 49.52 does not define 'wage' but the Minimum Wage Act, RCW 49.46 does. ¶ 15. Here, the payments were due by virtue of employment and work performed. ¶¶ 17-18.

While the bonuses were wages, there was no rebate because the entity which collected and received the money was not the employer. ¶ 20. In order to establish a claim under RCW 49.52 the party receiving or collecting a rebated wage must be both an agent and have control over the payment of wages. ¶ 22. "[W]ages are rebated only when they are returned to an entity that controlled and originated payment." *Id.*

Here, the employing entity and the LLC were "separate legal entities engaged in mutually beneficial transactions." ¶ 24. Because of the LLC agreement, it was impossible to predict at the outset who would end up owning the forfeited money - the employing entity, the owner of that entity or other LLC members. ¶ 25. Therefore, it could not be said that the

employer was the recipient of the forfeiture in all events. This negated the notion that an unlawful rebate to the employer would occur.

While the employer prevailed it was not entitled to fee shifting. The statute provides only for fees to be awarded to the successful plaintiff. Here, the action was not brought under the contract but through the statutory remedy at RCW 49.52.070. The legislative policy of that statute could not be waived by contract under these circumstances.

Justice González, along with Justices Stephens, Charles Johnson, and James Johnson dissented on the rebate issue. They could not separate the LLC from the employing entity because the president of the latter was the manager of the former. ¶ 38. Further, the amount of the bonus paid to the LLC is decided by that same person. *Id.* The dissent seems to offer the better analysis given the remedial nature of the statute.

D. *International Union of Operating Engineers, Local 286 v. Port of Seattle*

176 Wn.2d 712, 295 P.3d 736 (2013)

Arbitration remedy following vacation of award.

The trial judge, now a justice on the Supreme Court (González) and not participating in this decision, found that an arbitration award violated a fundamental public policy: elimination of discrimination in the work place. The trial judge vacated the award and instead of the arbitrator's 20 day suspension imposed a six month suspension on the offending employee.

The union employee did several things in the workplace which indicated an overt racial animus. ¶¶ 4-5. The public employer fired the employee. ¶¶ 6-7. The union sought arbitration and the arbitrator found the acts occurred but determined that in light of the employee's previous service that termination was too harsh.

The employer went to Superior Court under *certiorari*. There, Judge González vacated the award and imposed the stiffer punishment. ¶ 11. The Court of Appeals affirmed. 164 Wn. App. 307, 264 P.3d 268 (2011).

The Supreme Court reversed.

Vacation of an arbitration award is appropriate when the award violates a fundamental public policy. ¶ 16. Anti-discrimination statutes embody such a policy. ¶ 18. However, a court cannot substitute its judgment for that of the arbitrator. Here, the arbitrator made findings about the level of consciousness the employee had regarding his "ignorant and unacceptable" behaviors. ¶¶ 24-25. The Court will not speculate what amount of discipline "would have been insufficient to prevent a similar incident in the future." ¶ 26.

If a court vacates an arbitration award, it must remand to the arbitrator for further proceedings. A court cannot "impose its own remedy." ¶ 28.

E. ***Piel v. City of Federal Way***

177 Wn.2d 604, 306 P.3d 879 (2013)

Wrongful termination, public policy, public employee, PERC remedy not a bar to tort action.

(The author of these materials is chair of a committee which provided an *amicus* brief in support of plaintiff in this case.)

Whether an anomaly, see Part I above, or a post-***Cudney*** change in public policy wrongful termination analysis, this 5-4 decision deserves attention. The line-up of justices in this case also requires attention to be paid, as also noted in Part I.

A uniformed officer was fired. He had available to him remedies under a labor agreement and because of an allegation of retaliation for union activity, through the Public Employment Relation Commission (PERC). ¶¶ 4-8. The majority determined that the jeopardy prong of the wrongful termination analysis used by the court in all cases, save one, since ***Gardner v Loomis Armored, Inc.***, 128 Wn.2d 931, 913 P.2d 377 (1996) allows the common law wrongful termination claim to proceed.

It was that one decision, ***Smith v. Bates Technical College***, 139 Wn.2d 793, 991 P.2d 1135 (2000) that drew attention here from the majority and the dissent. ***Smith*** also involved a public employee. An issue decided by the Court in ***Smith*** was that the employee did not forfeit a tort remedy due to failure to pursue a statutory administrative remedy. ¶ 16. This was because of the collateral estoppel effect of the administrative process, ***Reninger v. Department of Corrections***, 134 Wn.2d 437, 951 P.2d 782 (1998). ¶ 23.

Superior Court dismissed ***Piel*** on the Employer's motion for summary judgment, relying on ***Korslund v. Dyncorp Tri-Cities Services, Inc.***, 156 Wn.2d 168, 125 P.3d 119 (2005).

Smith did not use the four step analysis adopted in ***Gardner***. The majority found that the issues here and in ***Smith*** were similar. ¶ 16. According to the majority, the discussion of the remedy available through PERC in ***Smith*** echoed the jeopardy analysis in ***Korslund*** and ***Cudney***.

Where the real fun begins is the majority's discussion of ***Smith*** and the notion that it "highlight[ed] the importance of having a tort remedy apart from the PERC remedy in order to advance public policy, not the plaintiff's personal compensation." ¶ 18. This duality arose from the employer's alleged breach of a labor agreement and the public policy ostensibly vindicated by a tort remedy. *Id.*

The majority was dissuaded from an "overbroad reading of ***Korslund*** and ***Cudney***" because to do so "would fail to [take into account] this long line of precedent allowing wrongful discharge tort claims to exist alongside sometimes comprehensive administrative remedies." ¶ 22.

Supposed tension between **Smith** and **Cudney** and **Korslund** tends to evaporate when it is recognized that the administrative remedy in **Smith** was determined to be inadequate to address the public interest arising in a wrongful termination context while the Court determined that the remedies in the latter two cases were determined to be adequate. ¶ 25.

Finally, the majority opinion discussed an issue raised by *amicus*: That the PERC statutory scheme specifically states at RCW 41.56.905 that its remedies “are intended to be additional to other remedies.” ¶ 26.

Justice Jim Johnson dissented with two colleagues and a special concurrence by Chief Justice Madsen.

The dissent takes issue with the majority’s reading of **Smith**. This opinion reminds the reader of the procedural posture of that case; summary judgment was granted to the employer on the basis of the employee’s failure to exhaust administrative remedies. ¶ 52. Upon remand, “the [Supreme] court expected the trial court to walk through the [**Gardner**] analysis . . .” *Id.*

The dissent urges that if **Smith** is taken for a decision impliedly using the **Gardner** analysis, it went off the tracks as a tort remedy would always exist regardless of the availability of administrative remedies. ¶ 55. From there, the dissent examines the remedies available through PERC and contrasts them with those available in the administrative schemes at issue in **Korslund** and **Cudney** and finds what PERC can offer to be comparable. According to the dissenting justices, RCW 41.56.905 is not a legislative determination that the remedies available through PERC are inadequate to provide redress. ¶ 68.

The Chief’s concurrence observed that the majority “attempts to bind this court to a theoretical holding purportedly implicit in **Smith**.” ¶ 29. “**Smith** should not be followed as if it is controlling.” ¶ 40. In essence, “[w]hen there are adequate means to protect the public policy regardless of whether an employer is exposed to the . . . tort claim, then a tort action should not be recognized . . .” ¶ 42. This starkly states the real distinction between the majority and the dissent. The majority would offer a tort remedy to the employee if there is a mechanism outside of tort which protects the public and the employee (**Cudney** Part A) or only acts to protect the public interest to the exclusion of the employee’s interests. (**Cudney** Part B).

These opinions in **Piel**, like a good book, should be read, and re-read. Every reading will reveal a nuance missed in an earlier reading.

F. Hill v. Garda CL Northwest, Inc.
179 Wn.2d. 47, 308 P.3d 635 (2013).
Arbitration, substantive unconscionability.

This unanimous decision reversed a Court of Appeals decision at 169 Wn.App. 685, 281 P.3d 334 (2012) and holds that an arbitration agreement is substantively unconscionable.

The Employees brought an action under RCW 49.46, the Minimum Wage Act, because of alleged failure to provide meal and rest breaks as required by RCW 49.12. ¶¶ 1, 4. The Employer negotiated an agreement with an ‘association’ which represents the Employees. The association is a ‘kinda/sorta’ union but does not collect dues, has no resources and does not file grievances. ¶¶ 2-3.

Employees moved for class certification and Employer moved to compel arbitration. ¶ 5. Superior Court certified a class but compelled arbitration by the class. ¶ 6. Division I determined that arbitration would occur but on an individual basis and did not address the issue of whether arbitration was unconscionable. ¶ 6.

Judicial officers should determine the validity of a contract requiring arbitration unless the contract specifically provides for that to be decided by an arbitrator. ¶ 9. Unconscionability is a ‘gateway dispute’ which courts are to resolve. ¶ 12. Otherwise, a costly proceeding on the merits will occur and perhaps for naught. *Id.*

Here, the arbitration provision required initiation of a claim within 14 days as opposed to a statutory three year limitation period otherwise applicable. ¶ 15. The limitation period was coupled with a several month period for which the employees would be able to recover back wages under the labor agreement’s arbitration provision. ¶ 16. This was unconscionable.

The agreement required each side to pay half of the fee of the arbitrator. ¶ 18. The evidence put forward by the employees showed the hardship they would endure to proceed in this manner. ¶ 19.

Severability of offending portions of the arbitration agreement is not practicable because the offending “terms pervade this . . . agreement.” ¶ 20.

G. *Brown v. MHN Government Services, Inc.*

178 Wn.2d 258, 306 P.3d 948 (2013)

Arbitration, forum selection, procedural and substantive unconscionability.

This is a unanimous decision rejecting an employer’s motion to compel arbitration. California law was applied as required by the arbitration contract.

Plaintiffs are medical professionals hired to perform services in Washington under a contract which provided for arbitration.

Superior Court refused to compel arbitration and determined that the contract was procedurally and substantively unconscionable because of arbitrator selection, fee-shifting, forum selection, limitation period, and punitive damages provisions. ¶ 4.

Application of California law did not offend Washington public policy interests. ¶ 6. Using California law, the court reviewed arbitrability *de novo*. ¶ 8. Because this was not specifically delegated to the arbitrator, it was proper for judicial officers to determine whether

unconscionability voided arbitration. ¶ 9 (See, for Washington law, *Hill v. Garda N.W.*, Part II.F).

The decision noted that *AT&T Mobility, LLC v. Concepcion*, 131 S.Ct. 1740 (2011) would prohibit application of unconscionability principles peculiar to arbitration but would not prohibit analysis of unconscionability under general contract principles. ¶¶ 10-12. Here, California's common law regarding unconscionability is of the latter stripe. ¶ 12. However, both procedural and substantive unconscionability needs to exist, although not necessarily to the same degree. ¶ 13 (This is at odds with Washington common law. See, *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 347, 103 P.3d 773 (2004) and Part II.B, *supra* - either procedural or substantive unconscionability will void a contract in Washington).

The decision determined that procedural unconscionability existed because of ambiguity as to which AAA rules governed any arbitration. ¶ 16. And, the employer changed its position during the litigation as to which rules applied. ¶ 17.

The forum selection (San Francisco) was not a financial hardship on these plaintiffs - although it might be for others not so well-off, presumably. ¶ 20.

A provision prohibiting an arbitrator from awarding punitive damages also was not unconscionable although that could arguably limit recovery of double damages under RCW 49.52.070, a claim they pleaded but was premature at this point. ¶¶ 21, 25. This required an interesting discussion as to whether double damages under that statute are punitive or remedial or something in between. ¶¶ 23-25.

AND THIS REQUIRES ATTENTION OF INSURANCE COVERAGE COUNSEL DEALING WITH EPLI AND OTHER POLICIES WHICH MAY ARGUABLY COVER WAGE CLAIMS OR DEFENSE OF THEM.

A limitation period of six months was bothersome and indicative of substantive unconscionability. ¶¶ 26-28. However, it is interesting that the decision touted this when a majority found a ninety day period within which to file complaints with the Department of Labor and Industries was sufficient in *Cudney* not to be a factor acting to preclude a common law tort action for wrongful discharge in violation of public policy. So it goes.

Allowing the employer to have a heavy hand in selecting an arbitrator was suspect and unconscionable. ¶¶ 29-30

Fee-shifting to the prevailing party was also a ground alleged by the employees to be inconsistent with Washington wage statutes and therefore unconscionable. The Court agreed. ¶¶ 31-33. *See, also*, Part II B & C.

The employer contended that the court could sever unconscionable provisions. Superior Court refused to do so and under California law that was reviewed only for abuse of discretion. Although the Supreme Court did not determine as many provisions to be suspect as

did the Superior Court, the agreement could not be cured through severing the offending provisions. ¶ 37.

Justice González concurred and addressed head-on the issue of whether RCW 49.52.070 allows for recovery of punitive damages. He determined that doubling amounts to punitive damage and provides a very nice review of Washington cases equating ‘exemplary’ with ‘punitive’ damages. ¶¶ 39-44.

H. *Scrivener v. Clark College*

____ Wn.2d____, 334 P.3d 541 (September 18, 2014)

RCW 49.60, age discrimination, proof of pretext, stray comments.

This unanimous decision may impair any defense based on inadmissibility of supposed ‘stray comments’ by a decision maker. And it clarifies what a plaintiff needs to do in order to establish that the employer’s stated non-discriminatory reason for an adverse employment decision was a pretext for discriminatory motivation.

Plaintiff was an adjunct instructor at the college and 55 years old when she sought a tenure track teaching position. ¶ 4. She made it through the initial screening process and was one of four finalists referred to the college president and a vice president for interviews. ¶ 5-6. After she was interviewed, she was informed she was not selected. ¶ 6. Two of the final four were chosen and they were each under the age of 40. Among other things, the college stated, in defense, that plaintiff’s exuberance and passion for teaching could have been “off-putting by some passive students because of such an up-front style.” ¶ 10.

The college’s president gave a speech in which he said there was a “glaring need” for younger talent. ¶ 8, 28. He also stated publicly that there was no need for teaching experience for the positions sought by Plaintiff. ¶ 8.

The decision, by Justice Wiggins, reversed a summary judgment in favor of the college and a decision of the Court of Appeals affirming the summary judgment.

First, the decision notes that a plaintiff in an action under WLAD for employment discrimination need not prove that unlawful motivation was the ‘determining’ factor. Rather, the standard under the statute is whether discriminatory motives were a ‘substantial’ factor in the employment decision. ¶¶ 13-14 and WPI 330.01.01. The opinion also observed that “summary judgment to an employer is seldom appropriate in the WLAD cases because of the difficulty of proving a discriminatory motivation.” ¶ 15.

The decision next travels the familiar ground of the ***McDonnell Douglas*** shifting burden framework. ¶ 20. Here, the court notes that it is not necessary to disprove the employer’s stated non-discriminatory reason for the adverse employment decision. ¶ 21.

The employer may be motivated by multiple reasons, some legitimate and some not. *Id.* The plaintiff’s burden is to establish by a preponderance that discriminatory motivation was a

substantial factor in the decision, “not the only motivating factor.” *Id.* The Court took to task the decision of the Court of Appeals in this case which omitted in its analysis of pretext that discriminatory motive might be a substantial factor in the decision along with legitimate reasons. ¶ 22. In doing so, the decision noted that other Court of Appeals decisions made this same error. ¶ 23.

In the Court of Appeals, the college president’s statement about the need for ‘younger talent’ was dismissed as a stray remark and did not give rise to an inference of discriminatory motivation. ¶ 29. Here, that was deemed to be circumstantial evidence of discriminatory intent. *Id.* In support of that, the decision cited to ***Reid v. Google, Inc.***, 50 Cal.4th 512, 538-46 (2010) where the California Supreme Court rejected the notion that supposedly stray remarks are irrelevant. ¶ 29 and fn.3.

I. *Ockletree v. Franciscan Health System*

179 Wn.2d 769, 317 P.3d 1009 (2014)

RCW 49.60, definition of “Employer,” religious exemptions, constitutionality.

In this 4-4-1 case, a majority determined that the religious exemption to the definition of “employer” at RCW 49.60.040(11) is constitutionally overbroad as applied to the facts of this case.

Plaintiff was a security guard at a hospital operated by a non-profit religious organization. He brought suit in federal court claiming race and disability discrimination under RCW 49.60. ¶¶ 2-3. The employer moved to dismiss because the definition of “employer” at RCW 49.60.040(11) excludes “any religious or sectarian organization not organized for private profit.”

The federal court certified to the Supreme Court whether the religious exemption violated either art. I section 11 (freedom of religion) or art. I section 12 (privileges and immunities) of the Washington Constitution.

The state constitutional prohibition against privileges and immunities prevents favoritism in legislation while its federal analog prohibits discrimination against disfavored groups. ¶ 10. Washington’s recent cases require determination whether; (a) a privilege or immunity is involved and, if so, (b) whether there is a reasonable ground for it. ¶ 11.

The lead opinion, by Justice Charles Johnson, joined by three justices, asserts that a “privilege” is “limited to those fundamental rights of citizenship” and that freedom from discrimination in private employment is not a fundamental right. ¶¶ 15-16. Rather, this is only an “important” right. ¶ 17. Who knew?

That a non-profit religious based institution is exempt from a duty imposed on a non-profit, non-religious based institution does not amount to a privilege to the former for these four justices. ¶ 19.

While determining there is no “privilege” involved, the lead opinion goes to the next step in article 1, section 12 analysis, whether there is a “reasonable ground” for the broad religious exemption of RCW 49.60.040(11). ¶¶ 21-25. Here, these four justices concluded that “there are real and substantial differences between religious non-profits and secular non-profits” that allow for different treatment by the legislature. ¶ 22. Chief among these is “a right to religious liberty guaranteed by . . . article 1, section 11.” *Id.* This, then, avoids “potential entanglements between the state and religion . . .” ¶ 25. However, the broad exclusion in the definition of “employer” for religious institutions is not required by article 1, section 11. *Id.* at fn. 11.

Next, the lead opinion determined that the exemption did not amount to an establishment of religion in violation of article I section 11.

An indirect financial benefit to a religion-based entity is not improper. ¶ 2. Public funding is not involved and there is, therefore, no conflict with article I, section 11. ¶ 29.

This opinion did not consider whether the exemption “as applied” to this Plaintiff was unconstitutional.

Justice Stephens with three other justices dissented. In its footnote 1, this opinion noted that the lead opinion did not address the Plaintiff’s “as applied” arguments.

Three justices explored recent state privileges and immunities jurisprudence. ¶¶ 34-40. It is an excursion well worth exploring. Not surprisingly, this opinion concludes that freedom from discrimination is a right worthy of protection under article I, section 12. It is, after all, declared to be a “civil right” at RCW 49.60.030(1), and matter of “state concern.” RCW 49.60.010. ¶ 45.

The distinction between secular and religious non-profits is unreasonable, these justices concluded. ¶ 51. “[W]hat makes non-profits vulnerable to discrimination claims is their structure and financing, not their particular mission.” *Id.*

Here, the over-broad religious exemption grants a special benefit to religious institutions which violates the First Amendment. ¶¶ 54-61.

In short, the privilege found at RCW 49.60.040(11) is invalid “and only as applied to plaintiffs whose dismissal was unrelated to their employer’s religious practices of beliefs.” ¶ 64, fn. 6.

Justice Wiggins wrote separately. He agreed with the lead opinion that the definition of “employer” is not facially suspect. However, as applied in this case, it was. ¶ 67. “[T]he constitutionality of the exemption depends entirely on whether the employee’s job responsibilities relate to the organization’s religious practices.” ¶ 7.

J. *Kumar v. Gate Gourmet*

180 Wn.2d 481, 395 P.3d 193 (2014)

RCW 49.60, religious discrimination, implied action for religious accommodation.

(The author of these materials is chair on a committee which filed an *amicus* brief in support of Plaintiff)

In this 5-4 decision a majority of the Supreme Court determined that an employer must reasonably accommodate an employee's religious beliefs. What was not specifically decided is the extent of "reasonableness."

Plaintiffs are employees of a company which prepares meals for airlines. For security reasons, employees cannot bring their own food to work nor can they leave their worksite for meals. ¶ 2. The employer provided vegetarian and meat-based meals. However, it was alleged that animal by-products were in the vegetarian meal and that pork was on the meat-based meal. Eating these was contrary to various unspecified religious beliefs and practices.

A class action was brought alleging; failure to accommodate these religious beliefs and practices, that the meal policy had a disparate impact due to religion, battery, and negligent infliction of emotional distress. ¶ 3. Superior Court, Judge Mary Yu, dismissed on a motion brought under CR 12(b)(6), due to its conclusion that RCW 49.60 provided no claim for accommodation relying on *Short v. Battle Ground School Dist.*, 169 Wn. App. 188, 279 P.3d 902 (2012). The dismissal did not mention the other claims. ¶ 4.

Justice Gordon-McCloud's opinion for the majority observed that with the exception of gender discrimination, RCW 49.60 predates federal analogs. ¶ 8. That said, federal case law is instructive – but not controlling – in applying the state statute. ¶ 9. Application of the state statute departs from federal case law only to "provide[] greater employee protections. . ." ¶ 9.

Unlike the amendment to Title VII in 1972 requiring reasonable accommodation of an employee's religious preference, RCW 49.60 is silent on religious accommodation. ¶ 11. However, that omission "is not persuasive." ¶ 13. Nor was it persuasive that the Human Rights Commission (HRC) had not promulgated rule-making about religious accommodation. ¶ 15. Here, the majority noted the *amicus* brief of the HRC and observed that it never doubted that RCW 49.60 includes a religious accommodation requirement. ¶ 15. And the failure of the agency to act cannot diminish statutory protections. ¶ 16. That rules were promulgated by HRC accommodations of disabilities "merely implemented a requirement already inherent" in the statute. *Id.*

The employer placed emphasis on its arguments that Title VII was specifically amended in 1972 to require religious accommodation. ¶ 18. From that, it concluded that Title VII was more protective of religious practices in the workplace than RCW 49.60.

The majority countered with EEOC rules requiring religious accommodation from shortly after enactment of Title VII in 1964. These rules were amended in 1967 to require

accommodation which did not impose “undue hardship” on the employer. 29 CFR §1605.1(b). ¶ 21. The 1972 amendment expressly affirmed the EEOC’s rule-making a religious accommodation. ¶ 22. This cured some Federal decisions holding the EEOC had exceeded its authority. ¶ 23. Other decisions, including one from the 9th Circuit, treated the 1972 amendment as only clarifying Title VII as originally enacted. ¶ 24.

The majority then delved into disparate impact analysis and concluded that it and religious accommodations bar facially neutral employment practices that disproportionately affect a protected class. ¶ 27. According to the majority, there is “no logical reason” to recognize a disparate impact claim and not recognize a reasonable accommodation claim with regard to religious bias. ¶ 28.

Failure to accommodate a religious practice requires: 1) a *bona fide* religious belief, 2) notice to the employer of the belief(s) and the conflict(s), and 3) a response by the employer subjecting the employee to actual or threatened discriminatory treatment. ¶ 31.

An employer defense is that accommodations would be an “undue hardship.” ¶ 32. This is an undefined term in Title VII but federal precedent limits it to no more than a *de minimis* cost. ¶ 32. And, concerns other than money – legal obligations, interests of customers or interests of other employees – may also be considered. ¶ 32.

By requiring employees to eat food which violated their religious beliefs and practices, they established a *prima facie* case of failure to accommodate. ¶ 33. Likewise, a claim for disparate impact was made out. ¶¶ 34-35.

A claim for battery was established for purposes of CR 12(b)(6) motion because of the offensive contact with food which violates religious practice. ¶ 38. Here, the employer knew that its actions would result in the harmful touching when it deceived its employees about the content of its food.

While the employees did not establish objective symptomology of emotional distress, their claims for its negligent infliction survived a CR 12(b)(6) motion.

Chief Justice Madsen wrote the dissent. She chided the majority for creating a cause of action. ¶¶ 44-45. The legislature directed the HRC to promulgate rules to implement RCW 49.60 and at the same time “chose to entirely exempt non-profit religious institutions from prosecution” under the statute. ¶ 45. A footnote explains that the court “recently rejected a facial challenge to the constitutionality of this exemption” citing to *Ockletree*. Part II.I. However, a majority in that case found the exemption as applied to be constitutionally infirm.

According to the dissent, only the HRC, not the judiciary, has the authority “to create specific rules to effect [RCW 49.60’s] general intent.” ¶ 46.

This is an interesting statement. Most of these dissenters were with the majority in *Cudney*, where they chose to ignore

procedures of, and an amicus brief by, the Department of Labor and Industries in support of Plaintiff pointing out the inadequacies of its administrative remedies with regard to workplace safety complaints.

The dissent also took issue with the majority's equation of reasonable accommodation with disparate impact analysis. ¶ 50. These justices claimed that disparate impact is not a cause of action "but is merely an alternate method of proving discrimination under RCW 49.60.18(1)." ¶ 50.

Assuming existence of a claim for failure to accommodate, the dissent fails to see how it can exist in this case because there is no "cognizable employment harm. . . ." ¶ 52. None of the employees suffered punishment, reprimand, or discharge. ¶ 53 [They were merely faced with either eating prohibited food or going hungry].

The dissent does not discuss the common law claims.

K. *Campbell v. Employment Security Dept.*

180 Wn.2d 566, 326 P.3d 713 (2014)

Unemployment benefits, "quit to follow," disqualification.

A unanimous Supreme Court determined that a school teacher quit his job unreasonably far in advance of the start of this wife's fellowship. Thus, he was not entitled to unemployment compensation benefits through RCW 50.20.050(2)(b)(iii). This ruling was consistent with what the Department did, and what Superior Court and the Court of Appeals ruled.

Claimant's wife was awarded a foreign study grant for four months of research starting in February of 2011. Claimant resigned in June 2010. The Department determined that the quit was premature and that the "quit to follow" statute would not allow benefits. Here, Claimant was under an obligation to remain employed "as long as reasonable prior to the move."

Claimant would also be ineligible for benefits because he would not be available to seek work in the foreign country. RCW 50.20.010(1)(c). ¶ 12 n. 3.

L. *Failla v. Fixtureone Corporation*

___ Wn.2d ___, 2014 WL 4925671 (Oct. 2, 2014)

RCW 49.52, long arm jurisdiction over personal defendant, transacting business within the state, RCW 4.28.185(1)(a).

This is the first employment decision by newly appointed justice Mary Yu and she writes for an eight justice majority reversing a Court of Appeals decision. The Court held that an out-of-state executive for a company with no physical presence in Washington was personally liable to a Washington resident for unpaid wages and that Washington courts had personal jurisdiction over him.

Plaintiff sought a job with the defendant employer, an entity with no physical presence in Washington. She negotiated by email with the defendant CEO and founder, a non-resident. ¶ 2. Ultimately, Plaintiff travelled to Pennsylvania to interview with the CEO with the understanding that if employed, she would live and work in Washington state. *Id.*

Eighteen months after being hired and working out of Washington state, Plaintiff was told that the company was closing down. ¶ 6. Plaintiff was owed commissions and was told by the CEO that he signed her check and later that he disputed whether she was owed anything. *Id.*

In the inevitable lawsuit under RCW 49.52.050 and .070 for unpaid wages, the employing entity could not be served. The CEO was served in Pennsylvania. ¶ 7. On cross motions for summary judgment the Superior Court entered judgment in favor of Plaintiff for unpaid wages and determined that it had personal jurisdiction. The Court of Appeals reversed. 177 Wn.App. 813, 312 P.3d 1005 (2013). That court held that personal jurisdiction over the CEO could not occur because Plaintiff only resided in the state and worked from her home and that the company did not target Washington consumers. ¶ 18.

The CEO was the person who interviewed and hired Plaintiff and set the terms and conditions of her employment. ¶ 17. Plaintiff generated \$700,000 of revenue for the employing entity while working in Washington. *Id.* An out-of-state employer “that employs a Washington resident, and though that employee, conducts business from Washington for over two years forms a sufficient connection to the state such that it should reasonably anticipate defending a wage dispute here.” ¶ 21. Therefore, hiring a Washington resident to perform work in the state constitutes the transaction of business within the state under the long-arm statute, RCW 4.28.185(1)(a). This tie to Washington is especially strong where the personal defendant hired, promoted, paid, and fired Plaintiff. He was “not just any corporate officer.” ¶ 24.

The summary judgment of liability of the CEO is affirmed. While willfulness, as that term is used at RCW 49.52.050 and .070, is usually a fact question, summary judgment may be appropriate. ¶ 26. Here, the CEO controlled the employing entity’s finances and had the ability to pay Plaintiff. ¶ 28. That he produced e-mails faulting other company employees for not paying commissions to Plaintiff did not negate willfulness as they were prepared only after he terminated her. ¶ 27,28. And he admitted to Plaintiff in an email that he signed a check for her commissions. ¶ 29. There was no evidence, in any event, to dispute her accounting of what was owed. ¶ 29.

Justice Owens dissented on the jurisdictional issue. She was bothered by the fact that it was the Plaintiff’s contacts with Washington which seemed to drive the majority’s analysis - not the contacts of the defendants with Washington. ¶ 32-35. Here, Plaintiff chose to reside in Washington. ¶ 36. But this seems to ignore the reality of modern commerce. As the majority noted, “many employers no longer do business in physical buildings or rely upon hands-on or face-to-face presence for there to be actual presence in a geographical location.” ¶ 23.

M. *Becerra v. Expert Janitorial, LLC*

___Wn.2d___, 332 P.3d 415 (2014).

Minimum Wage Act, RCW 49.46, joint employers.

In a unanimous decision by Justice Gonzalez, the Court reversed a Superior Court summary judgment in favor of employers and held that the joint employer doctrine applies under the Washington Minimum Wage Act, RCW 49.46 (MWA).

Until 2004 Fred Meyer stores used mostly unionized janitors to clean stores. In 2004 it outsourced that work. ¶ 2. Fred Meyer had a contract with Defendant Expert Janitorial, and Expert would contract with independent companies to do the work. The contract between Fred Meyer and Expert was for a fixed fee per store. ¶ 5. Plaintiffs were employed by the second tier service providers. ¶¶ 3-4. Apparently none of the people who actually did the work in the stores were fluent in English. ¶ 4.

It will come as no surprise that the folks who did the actual work, supposed independent contractors themselves, were paid less than the minimum wage in effect at the time they provided service in the stores. ¶ 5. And, it will not be a surprise to learn that the second tier contractors would take the risk of misclassifying and underpaying their people as they would simply go out of business. ¶ 6.

This lawsuit was against Fred Meyer, the first tier contractor, Expert and the second tier contractors. Given the proclivity of the second tier contractors to go out of business, the claim was that Fred Meyer and Expert were joint employers with the second tier contractors. Fred Meyer and Expert escaped this predicament on summary judgment in Superior Court. ¶¶ 7-8. The Court of Appeals reversed at 176 Wn. App. 694, 309 P.3d 711 (2013).

Under the MWA, an employee includes “any individual permitted to work by an employer. This is a broad definition.” ¶ 12, quoting from *Anfinson v. FedEx Ground Package System*, 174 Wn.2d 851, 867, 281 P.3d 289 (2012).

The Joint Employer doctrine enjoys currency under the FLSA. ¶ 14. There seems no reason for it not to exist in Washington. The economic reality test articulated by the Ninth Circuit in *Torrez-Lopes v. May*, 111 F.3d 633 (9th Cir. 1997) is “most helpful” in determining whether a joint employer relationship exists. ¶ 15. The matter was remanded to the trial court to apply the *Torres-Lopez* analysis.

The Joint Employer doctrine for purposes of liability for the minimum wage is alive and well in Washington.

N. *Storti v. University of Washington*

181 Wn.2d 28, 330 P.3d 159 (2014).

Public university faculty, promise of merit pay, cancellation of merit pay, unilateral contract, breach, estoppel.

For the 2009-2010 academic year the University suspended annual 2% pay raises for faculty based on merit. A merit pay program allowed for re-evaluation in response to changing financial conditions. ¶ 2. Chief Justice Madsen, writing for a majority of eight, determined that the suspension was appropriate for the 2009-2010 year. Justice Gordon-McCloud dissented.

This case follows a similar case a decade earlier when the University administration unilaterally excluded merit raises from its budget when the Legislature failed to appropriate money for the raises. ¶ 3. This time, administration and faculty consulted and only after these consultations did the University President suspend the merit increase but did so retroactively - "after faculty had substantially performed." ¶ 6. That is, they provided service in the 2008-2009 academic year which, absent the suspension, would have entitled them to the merit raise in the 2009-2010 academic year. ¶ 14.

The University prevailed on summary judgment. The Court of Appeals affirmed. This Court likewise affirmed.

That a contract was offered by the merit pay plan was conceded by the Court. ¶ 12

The Plaintiffs, a class of faculty at the University, contend that they substantially performed and thereby accepted the offer, forming a unilateral contract. ¶ 15. That, too, was conceded by the Court. ¶ 16. The parties to this dispute agreed that the merit pay policy allowed for re-evaluation based upon financial considerations. ¶ 18. But the Plaintiffs contend this only allows for prospective action - elimination of the merit pay increase in the 2010-2011 academic year. ¶ 19.

The University's faculty handbook specifies the procedures to be followed regarding orders of its President. Because the University followed these procedures, and because the class was on notice of the potential for re-evaluation, the suspension of the merit pay for the 2009-2010 year did not breach the contract with faculty. ¶ 20.

What is missing in this discussion is analysis and not what seems to be only a conclusion.

Justice Gordon-McCloud's dissent argues that the re-evaluation mentioned in the merit pay policy allows for prospective changes and "not cancellation of raises already earned." ¶ 29

Her discussion of the issues seems superior to that of the majority.

O. *Washington Education Ass’n v. Washington Department of Retirement Systems*
___Wn.2d___, 332 P.3d 428 (August 1, 2014).

Public employment, pensions, reservation of right to repeal benefit, estoppel, unilateral contract.

In 2007 the Legislature repealed a pension benefit enacted in 1998 for certain public employees known as “gain sharing.” This allowed extraordinary pension fund investment gains to be distributed to certain retirees. ¶¶ 2-3. The 1998 legislation reserved to the Legislature the “right to amend or repeal this chapter in the future and no member or beneficiary has a contractual right to receive this . . . adjustment . . .” ¶ 4.

Plaintiffs challenged the repeal of the 1998 legislation claiming impairment of contract, denial of due process, estoppel due to writings distributed to employees and beneficiaries and unilateral contract. The Superior Court granted summary judgment to the Defendants and the Supreme Court took the case on direct review. ¶ 8.

Here, the gain sharing was entirely advantageous to employees and formed part of their employment contract with the state. When enacted, the program did not detract from pre-existing pension rights. ¶ 17. There was implied consent by the employees to this program and the possibility of its repeal. If the program was repealed, pension benefits pre-dating the 1998 legislation would survive. Therefore, the repeal proviso did not impair a contract. Rather, it became part of the contract.

The Defendants were not promissory or equitably estopped by their descriptions in employee handbooks of the 1998 legislation which did not mention the repeal proviso. The handbooks distributed by Defendants did advise employees to consult the statute for description of their rights. ¶ 21. Therefore, there was no promise that the gain sharing program would last indefinitely.

The claim for existence of a unilateral contract based on the handbooks also failed. Promises contained in handbooks may be enforceable as employer-specific policies. Statutory rights described in a publication prepared by a bureaucracy not directly employing the workers are apparently another matter. ¶ 25.

Justice Gonzalez concurred specially. He would not find implied consent to the repeal proviso or that the gain sharing program was a gratuitous enhancement of benefits. He referred to Washington appellate authorities stating that public sector pension benefits represent payments for work performed and are not gratuities. ¶ 28. And he also referred to Washington authority for the proposition that employees do not impliedly consent to reductions in benefits by continuing to provide labor after the reductions are announced. ¶ 29. (This, of course, contrasts with private sector changes in terms or conditions of employment. See, *Gaglidari v. Denny’s Inc.*, 117 Wn.2d 246, 815 P.2d 1362 (1991).) Instead, this Justice would find no substantial impairment of contract because “[f]rom its inception, the right was

subject to the . . . reserved power to repeal or revoke it in the future.” ¶ 33. Because of this, later action to repeal did not modify any right.

III. WASHINGTON COURT OF APPEALS

A. **Woodbury v. City of Seattle**

172 Wn. App. 747, 292 P.3d 134, *rvw. denied*, 177 Wn.2d 1018 (2013)

Public employment, local government, whistleblower, administrative remedy only.

There are distinct statutory remedies for whistleblowing applicable to public employees. One statute, RCW 42.41.040, applies to local government employees. Another statute, RCW 42.40.050, applies to state employees. The latter statute, in turn, incorporates remedies found in the Washington Law Against Discrimination, RCW 49.60.030, including a right to bring a civil action. The statute applicable to local government employees does not include such a provision and instead provides only for an administrative remedy subject to review under the Administrative Procedure Act. ¶¶ 12-13.

The remedy available for state employees includes capped emotional distress damages while the remedy available for other public employees is limited to reinstatement “with or without back pay, [and] injunctive relief” ¶ 16.

B. **East Valley School District No. 90 v. Taylor**

174 Wn. App. 52, 295 P.3d 1224 (2013)

Public employment, school teacher reinstatement, constitutional *certiorari* not available in Court of Appeals.

The holding here is that constitutional *certiorari* was not conferred on the Court of Appeals. Therefore, its powers are more circumscribed than Superior Court and the Supreme Court. This is an interesting lesson in the division of powers between the various state courts.

Teacher was criminally accused. Employer put Teacher on paid administrative leave. Teacher was acquitted in the criminal matter. Employer started the process to fire Teacher based on the same allegations in the criminal matter. ¶¶ 2-3. A hearing resulted and the hearing officer required Employer to reinstate Teacher. ¶ 4.

Employer sought review in Superior Court under RCW 28A.405.320. While that was going on, the Supreme Court decided that public school districts do not have a statutory right to review a reinstatement order under that statute. **Fed. Way School Dist. No. 210 v. Vinson**, 172 Wn.2d 756, 261 P.3d 145 (2011). Employer then sought constitutional *certiorari* in the Court of Appeals. This remedy is not available in that Court. The Constitution specifically gives the Court of Appeals the jurisdiction “provided by statute or by rules authorized by statute.” ¶ 9. This is unlike the Superior Court and Supreme Court which are each authorized under the Constitution to grant “all other writs necessary and proper” *Id.*

There is no statutory grant of jurisdiction to the Court of Appeals similar to the Constitutional grant to the other courts. The remedy here was to remand to Superior Court to determine whether to permit amended pleadings to include Constitutional *certiorari*. ¶ 13.

C. Schlosser v. Bethel School District

____ Wn. App.____, 333 P.3d 475 (August 26, 2014)

petition for review filed September 30, 2014 (90818-4)

Public school teacher; non-renewal of contract v. tenure; property interest; due process.

In this 2-1 decision we learn that a Washington public school teacher does not have tenure and that she had no property interest requiring due process in the employer's decision not to renew her contract. A dissent argues there is a property interest involved.

Plaintiff taught in the public schools beginning in the 1980s. She started teaching in the Bethel School District in 1998. For ten years, all of her evaluations for teaching were 'satisfactory.' Starting in 2009 the evaluations started declining to the point in 2012 where the Superintendent placed her on a 60 day probation. ¶ ¶ 2-4. During that period, there was not much improvement. In May, the Superintendent notified her that there was probable cause not to renew her employment contract at the end of the school year. ¶ 5.

Plaintiff appealed the non-renewal determination to a hearing officer as provided by law. ¶ 6. That procedure was unsatisfactory and she sought review in Superior Court which affirmed.

In the courts, Plaintiff claimed that due process was violated because she received a hearing only after the decision not to renew her contract was made and not in advance of that determination. ¶ 12. For this, she cited out of state authority regarding terminations of tenured public school teachers. ¶ 13. However, Washington's statutes provide for automatic renewal of one year contracts unless notice of non-renewal is given as opposed to a permanent status of tenure. ¶ 15. Therefore according to the majority, she did not have tenure rights and did not have a property interest in renewal of her contract.

Assuming there was a property interest, the post-deprivation hearing process afforded by RCW 28A comported with due process. The pre-termination hearing required in **Cleveland Bd. of Educ. v. Loudermill**, 470 U.S. 532 (1985) involved discharge of a public employee, not non-renewal of a contract. ¶ 19.

The dissent argued that RCW 28A.405.310(8) places substantive procedural restrictions on a decision maker's discretion and therefore gives a teacher a property interest in renewal of her contract. This opinion asserted that **Loudermill** applies, and requires a pre-termination hearing, because of the teacher's interest in retaining employment. ¶ 48

D. *Teamsters Local 117 v. Dep't of Corrections*

179 Wn. App. 110, 317 P.3d 511 (2014)

Public employees, RCW 41.80, omission of "Concerted Activities" in statute.

In this decision, Division II concluded that the public sector organizing and collective bargaining statute, RCW 41.80, does not protect concerted activities of covered employees.

A union affiliated public employee filed an unfair labor practice (ULP) charge with the Public Employment Relations Commission (PERC) after a reprimand issued concerning emails about workplace issues. PERC dismissed the ULP. ¶¶ 4-8.

The decision notes that private sector employees in Washington have statutorily based protection for concerted activities not protected by §7 of NLRA through RCW 49.32.020. ¶ 10, fn. 6. But the legislature "has not expressly extended protections for such 'concerted activities' to public employees." *Id.*

RCW 41.80, enacted long after the NLRA, plainly incorporated many of the NLRA's protections. But RCW 41.80 plainly excluded the right to engage in protected concerted action. ¶ 16. The conduct which is protected at RCW 41.80.050 relates to organizing, forming, joining and assisting a labor organization. Here, the offending emails were not so related. ¶¶ 18-24.

E. *International Union of Police Ass'n, Local 748 v. Kitsap County*

___ Wn. App. ___, 333 P.3d 524 (September 2, 2014).

Public Employment, ULP, 'action' under RCW 49.48.

The parties disputed whether and to what extent the employer and its employees were to contribute to health insurance premiums in the year following lapse of a collective bargaining agreement. The Union filed an unfair labor practice (ULP) complaint with the Public Employment Relations Commission (PERC) when the employer withheld from employees' pay the amount of a premium increase. The PERC hearing examiner ordered partial refund of the premiums but declined to award attorney's fees to the Union. ¶ 5.

In Superior Court, the Union successfully contended on summary judgment that the award of fees was mandatory under RCW 49.48.030. The Court of Appeals reversed.

The Court reasoned that a ULP proceeding before PERC was not an 'action' as that term is used in the statute. Unlike the arbitration underlying *IAFF, Local 46 v. City of Everett*, 146 Wn.2d 29, 42 P.3d 1265 (2002) PERC was "strictly limited to the issues, procedures, and remedies prescribed in its governing statutes and regulations." ¶ 13. And, the ULP was not an action for wages. ¶¶ 15-17.

F. *City of Vancouver v. Public Employment Relations Commission*

180 Wn. App. 333, 325 P.3d 913 (2014)

Municipal employment, “Cat’s Paw” liability.

This is a fact-intense decision which is the first reported appellate decision in Washington to approve “cat’s paw” liability – *i.e.*, imputing improper motivation of a lower level manager to an ultimate decision maker arguably free of improper animus. (The term “cat’s paw” derives from a fable where a monkey persuades a cat to pull chestnuts out of a fire. The cat’s paw got burned and the monkey ran off with the chestnuts.) This form of liability was approved by the U.S. Supreme Court in *Staub v. Proctor Hospital*, ___ U.S. ___, 131 S.Ct. 1186 (2011). The decision deals with municipal employment under RCW 41.56, but the analysis of “subordinate” (“cat’s paw”) liability should be equally transferable to other employment contexts, especially RCW 49.60, where general rules of proximate causation seem wholly consistent. *See, e.g., Martini v. The Boeing Co.*, 137 Wn.2d 357, 971 P.2d 45 (1999).

Here, a chief of police relied on certain employment decisions by a managerial subordinate. ¶¶ 3-17. The subordinate manager was determined by a hearing examiner to have anti-union animus. ¶ 16. However, the police chief, who had ultimate authority to make the employment decision, “possessed no animus of his own.” ¶ 17. The chief, however, relied on the “tainted recommendation” of the subordinate. ¶ 19.

Subordinate or “cat’s paw” liability occurs when the “subordinate’s animus sets in motion the events that culminates in the adverse employment action.” ¶ 33. Thus, the discriminatory act is imputed to the agent’s principal. ¶ 33. This seems the same as proximate causation. *See, e.g.,* WPI 15.01.

In order to invoke this form of liability, a claimant must establish the subordinate’s animus “was a substantial factor in the decision resulting in the unfair labor practice.” ¶ 3.

If the ultimate decision maker exercises independent judgment “substantially free of the subordinate’s animus,” this then becomes a supervening cause and negates the subordinate’s animus. ¶ 49. Otherwise, the employer is charged “with constructive knowledge of the wrongful conduct . . .” ¶ 51.

G. *Fey v. State*

174 Wn. App. 435, 300 P.3d 435 (2013), *rvw. denied*, 179 Wn.2d 1029 (2014)

RCW 49.60, disability; failure to accommodate, essential function.

A jury verdict in favor of an employee is reversed because the employee could not perform an essential function of the job - holding a Commercial Driver License (CDL). The decision is fact intense but there is an excellent discussion of accommodation and determination of how to determine what constitutes an essential function of the job.

The employer has a maintenance crew. One of the job functions is to clear snow. ¶ 3. This was clearly stated to be an essential duty of the job. ¶ 7. Some of the snow removal

machinery consists of large trucks. For a time, the employer believed that a CDL was not required for vehicles used on its property. Employer and its union agreed ultimately that the CDL was, in fact, required in order to operate the large trucks even on employer property alone. ¶ 6. Over time, half of the maintenance crew was CDL qualified. ¶ 9.

Employee had a genetic vision condition which prevented him from obtaining a CDL. ¶ 1. However, Employee applied for two job positions which required the CDL and was not interviewed. When he did not get the jobs, he sued for failure to promote due to his impairment and the failure to accommodate. Ultimately, only the failure to accommodate claim went to trial. ¶ 15. At trial, he was awarded about \$7,000. The trial court granted additur of \$50,000 together with fees and costs. ¶ 20.

The Court examined what constitutes reasonable accommodation and referred to various federal regulations regarding determination of when a job function is “essential.” ¶ 30-32. The employer’s determination of this is to be given deference. ¶ 31. Here, the necessity for a CDL was grounded in fact. ¶ 39-40. That being so, accommodation to eliminate that function was out of the question. ¶ 10.

H. *Currier v. Northland Services, Inc.*

___ Wn. App. ___, 333 P.3d 1006 (August 4, 2014).

petition for review filed October 7, 2014 (90858-3)

RCW 49.60.210; acts by independent contractors, reasonable belief of legitimate opposition conduct; temporal proximity of adverse action and protected conduct; after acquired evidence.

Judgment in favor of Plaintiff was affirmed in this retaliation case.

Plaintiff was a true independent contractor for the Defendant trucking company. Their contract allowed either side to terminate on 30 days’ notice. ¶ 2. Plaintiff heard another contract driver make racially derogatory remarks another contract driver. ¶ 6. He reported this to one of Defendant’s dispatchers. Two days later, Plaintiff was fired because of supposed customer service issues. ¶ ¶ 7-8. After Plaintiff was fired, Defendant learned that the tread on his truck tires was deficient.

Plaintiff sued, successfully claiming unlawful retaliation under the WLAD, RCW 49.60.210, in a bench trial. On appeal, the Defendant claimed its motion for summary judgment should have been granted.

Since *Marquis v. City of Spokane*, 130 Wn.2d 97, 922 P.2d 43 (1996), it has been clear that the WLAD applies to discrimination against contractors. ¶ 19. Defendant argued that the racially tinged comment by one contractor could not be imputed to it because Plaintiff was not opposing, for purposes of RCW 49.60.210, its employment practices but rather the conduct of an individual.

However, to gain protection of the WLAD's anti-retaliation provision, it is only necessary for the Plaintiff to show that he had a reasonable belief that the employment practice was prohibited. Here, under an objective standard, Plaintiff could reasonably believe that the racially offensive language of a contractor was a discriminatory practice of the employer. Denial of the summary judgment was appropriate.

The trial judge's determination that the short time between report of the racial comment and Plaintiff's termination allowed a finding of retaliation was also appropriate. ¶ 25. Here, the Defendant had no documentation of complaints about Plaintiff's performance or lack of it. ¶ 27.

The Court was careful to observe that Defendant was not being held liable for the offensive comments by one of its contractors. Rather, it was liable for its retaliatory acts towards Plaintiff. ¶ 31

As for the evidence of the defective tires, the trial court found that this would not have been an issue had Defendant not terminated its contract with Plaintiff as it did not perform regular truck inspections. ¶ 33. And, even Defendant's own expert could not testify as to the extent of the tire defect and whether the alleged defect would require that the truck be taken out of service. ¶ 34.

The burden on a defendant with after acquired evidence is to prove that it would have terminated the worker on that basis alone had it known of it before taking the unlawful action. ¶ 32. If that is established, Plaintiff's front pay would be reduced to the time period between the adverse action and the discovery of the evidence of misconduct. ¶ 32.

I. *Weiss v. Lonquist*

173 Wn. App. 344, 293 P.3d 1264, *rvw. denied*, 178 Wn.2d 1025 (2013)
Wrongful termination, public policy, adequate alternative remedy.

This decision reversed, in light of ***Cudney v. ALSCO, Inc.***, 172 Wn.2d 524, a jury verdict in favor of the Employee/Lawyer. The trial judge is now Justice González.

Lawyer believed that she was being asked by the Employer to prepare a declaration for a client which would suborn perjury. ¶ 7. Lawyer refused to do this because of professional ethics. ¶ 8. Shortly after that, Employer provided Lawyer with a 30 day notice of termination. ¶ 9.

Lawyer did not file a bar complaint against Employer. She testified that she wanted to pursue a civil action and that a bar complaint would be 'on hold' during the pendency of a lawsuit. ¶ 10.

A jury found in favor of Lawyer and awarded damages. ¶ 13. Employer appealed and during the appeal process, ***Cudney*** was decided. The Court of Appeals entertained supplemental briefing. ¶ 20.

The Court determined that Lawyer had a remedy to protect the public policy of requiring adherence to professional ethics and that was through the WSBA complaint process. ¶ 33. While that process does not provide a remedy for the complaining employee, **Cudney** makes clear that it is only the public policy to be vindicated, not employment rights. ¶¶ 34, 39.

The situation would have been different if the employee had made the complaint to WSBA and was then adversely affected on the job. ¶ 39.

Does this make it imperative for employees to act in concert in order to obtain the protections of § 7 of the NLRA or RCW 49.32.020?

Review was denied after **Piel** was decided. See Part I.

J. *Becker v. Community Health Systems*

___ Wn. App. ___ 332 P.3d 1085 (Aug. 14, 2014).

petition for review filed October 29, 2014 (90858-3)

Wrongful termination, public policy, adequate alternative remedy, availability of tort remedy.

This case must be read by all employment law practitioners in Washington! In a lead and concurring opinion, judges of Division III demonstrate their clear displeasure with the state of the law in wrongful discharge tort cases.

The Court of Appeals affirmed a Superior Court denial of the employer's CR12(b)(6) motion and allowed a tort action for wrongful discharge to proceed despite myriad state and federal administrative remedies available to the employee. The case arrives in the Court of Appeals through certification from the trial judge for review. ¶ 5.

A truly fascinating two judge concurrence advocated scrapping the analysis long-used by the Supreme Court in wrongful discharge cases and points out the complications that Supreme Court jurisprudence has brought to the tort.

Plaintiff was hired as the CFO of the Defendant. He projected a \$12 million loss and that would have to be reported to the Securities and Exchange Commission (SEC). ¶ 2. Others in the company wanted him to report the loss at \$4 million. ¶ 3. Plaintiff told the CEO and an internal auditor that he believed a false number was used in order to obtain investment and credit. Ultimately, he learned that a subordinate in his department was going to submit the lower number. He apparently wrote to higher-ups (the lead opinion does not tell us their identity) that he would have to resign unless the misconduct stopped. The next day he received an email (again, we don't know from whom) accepting his resignation. ¶ 3.

The employer claimed in its CR 12(b)(6) motion that a variety of federal and state laws protected the public policy of honesty in corporate financial reporting. ¶ 6. The Court's opinion, by Chief Judge Brown, recites the four part analysis set out in **Gardner v. Loomis Armored, Inc.**, 128 Wn.2d 931, 913 P.3d 377 (1996) and adapted from a treatise by Henry

Perritt, Jr. ¶ 9. One of those elements has to do with the jeopardy element, the focus of Supreme Court decisions in many wrongful discharge cases.

In order to establish that employer action would discourage the conduct in which an employee engaged thereby jeopardizing the public interest, the employee must establish either: That the employee engaged in conduct directly relating to the public policy or that the conduct was necessary for effective enforcement of the public policy. **Gardner**, 128 Wn.2d at 945. ¶ 10. And as a later Supreme Court decision put it, the plaintiff must demonstrate that the actions taken were the only available adequate means to promote the public policy. ¶ 10.

The opinion then stated “our jeopardy analysis overemphasized the abstract adequacy of statutes and regulations while forgetting the concrete public policy impact of chilling protected employee conduct.” ¶ 18. In this case, the jeopardy element is easier to satisfy in favor of the employee because the employee “has special responsibilities or expertise connected with the public policy and other enforcement mechanisms are less likely to succeed because they depend on the employee’s . . . pro-compliance efforts.” ¶ 33. This is a clear departure from the teaching of **Cudney** because it puts on equal footing the tort interests of the employee with preserving and protecting the public policy interest at issue.

How does the foregoing analysis differ from the situation faced by the lawyer-Plaintiff in the **Weiss** case, *supra*?

The statutes cited by the employer provide non-exclusive remedies, as in **Piel**. ¶¶ 21, 28. Here, the employer forced the Plaintiff to choose between committing a criminal act - cooking the books - or disobeying the employer. ¶ 30.

Judge Fearing concurred in the result along with Judge Lawrence-Berrey. He finds **Cudney** and **Piel** irreconcilable. ¶ 37. Along with other Supreme Court wrongful discharge cases they “offer puzzlement, not direction.” *Id.* The opinion notes that other wrongful discharge cases cannot be squared with each other. ¶¶ 46-52.

The concurrence dissected a key passage of **Gardner** sentence by sentence and determined that much of its jeopardy analysis strays from what Perritt treatise set out. ¶¶ 39-42. He notes that virtually all public policies are amenable to alternative means of enforcement. ¶ 45. And, he questions the validity of using the Perritt treatise as a means of analysis at all. ¶ 58 (“The treatise is more a collection of decisions than it is a reasoned discussion of the tort . . .”). The concurring judges urge re-examination of the tort. A plaintiff should only be required to show termination implicated a clear mandate of public policy and that the plaintiff’s conduct “directly relates to the policy.” ¶ 61

K. *Rose v. Anderson Hay and Grain Co.*

___ Wn. App. ___, 335 P.3d 440 (Sept. 25, 2014)

Petition for review filed October 24, 2014

Wrongful termination, public policy, adequate alternative remedy.

This was remanded to Division III by the Supreme Court in light of its decision in ***Piel v. City of Federal Way***, 177 Wn.2d 604, 306 P.3d 879 (2013). See Part I, *supra*. The earlier decision of Division III is found at 168 Wn. App. 474. The Court of Appeals again determined that a tort remedy for Plaintiff is barred by adequate remedies available to him through federal legislation and an administrative process.

Plaintiff alleged that he was fired as a truck driver because he would not complete his shift due to his belief that doing so would put him beyond the number of driving hours allowed by federal law, the Commercial Motor Vehicle Safety Act (CMVSA), 49 U.S.C. ch. 311. ¶¶ 2-3. That Act provides an administrative mechanism for complaints of retaliation which include special remedies for an employee. ¶ 10. Here, Plaintiff did not timely file an administrative complaint. ¶ 3.

The Superior Court dismissed the tort case on the employer's motion for summary judgment.

Because remand was to take into consideration ***Piel***, the Court took note, in an opinion by Chief Judge Brown, that the statutory administrative remedy in ***Piel*** specifically provided that it was non-exclusive and that the administrative remedies were inadequate compared to the full range of damages relief available in a tort remedy. ¶ 14. "Accordingly, if a statutory scheme has language and remedies analogous to those at issue in ***Korslund [v. DynCorp Tri Cities Services]***, 156 Wn.2d 168, 125 P.3d 119 (2005)] and ***Cudney [v. ALSCO, Inc.]***, 172 Wn.2d 524 (2011)] the scheme is distinguished from ***Piel*** and has comprehensive remedies to protect the public interest." ¶ 15.

The CMVSA, like the statute in ***Piel***, also specifically provides that it does not preempt "any other safeguards against . . . retaliation . . . provided by Federal or State law." 49 U.S.C. § 31105(f). ¶ 17. However, the CMVSA is ambiguous in terms of relief and whether it allows for recovery of general damages. 49 U.S.C. § 31105(b)(3)(A). Division III takes the position that the remedies available to Plaintiff in this case are similar to those available in ***Korslund***. And, the decision plainly observes that the goal is to protect the public interest, "not protecting the employee's individual interests." ¶ 9.

This decision distinguished Division III's decision a month earlier in ***Becker***, Part III.J, *supra*, also written by Chief Judge Brown. In ***Becker***, the former employee was allowed to pursue a tort remedy despite comprehensive administrative processes to protect the public and himself. The plaintiff in that case was himself put in great jeopardy by the employer's demand that he cook its books. ¶ 16. One wonders, however, if a truck driver required to drive excessive hours is not also put in jeopardy for her physical safety and well-being.

This is the great divide: Whether availability of a tort remedy should consider employee interests as well as promoting the public interest or only focus on the public interest, as was true in **Cudney** part B and **Weiss v. Lonnquist**, Pt III.I.

L. *Worley v. Providence Physician Services, Co.*

175 Wn. App. 566, 307 P.3d 759 (2013)

Wrongful termination, public policy, adequate alternative remedy.

A Superior Court summary judgment in favor of the employer in a case involving claims of wrongful discharge is affirmed in Division I.

Plaintiff is an ARNP. A physician instructed her how to read and interpret certain X-rays used in his practice. She thought that some patients had conditions too complex for her to understand. ¶ 5. Over time, she was counseled about performance issues including not returning patient phone calls and tardiness. ¶¶ 7-8. Employee reported concerns to the hospital COO about billing and the necessity for her to read complex X-rays. ¶ 8. These issues were never taken to any regulatory officials. ¶ 11.

The Employee removed several pages of patient files and showed them to a friend, an attorney. ¶ 10. That caused her to be fired. Her lawsuit claimed she was acting to protect the public policies of workplace safety, preventing fraudulent billing and protecting against retaliation. ¶ 18.

Based on **Cudney**, the summary judgment was inevitable because the Washington Health Care Act, RCW 43.70, provided to her comprehensive remedies including an administrative process that protects whistleblowers. ¶ 20-22.

How are the processes in that statute similar to, if at all, those available to the Employee in *Smith*? In *Piel*?

Likewise, a claim based on an employee manual promise that there would be no retaliation for reporting a possible regulatory violation failed. ¶¶ 23-25. The confidential information she purloined was the reason for her firing. The employee manual also stated that employees would not be protected from their own misconduct for any act harmful to the employer. Sort of an employee manual promise that in a mixed motive case, the employer wins. ¶ 24.

M. *Arzola v. Name Intelligence, Inc.*

172 Wn. App. 51, 288 P.3d 1154 (2012), *rvw. denied*, 178 Wn.2d 1011 (2013)

Wages, withholding, stock in employer, redemption.

Employees obtained stock in a non-public company for every year of above average performance. ¶ 2. Employer engaged in a sale of the company and provided 'stock right cancellation agreements' (SRCAs) with cash payments due at the same time payments were made by the purchaser.

Employer (by then the former Employer) and Purchaser get into a tiff before full payments were made by Purchaser. Purchaser did not make a required payment and therefore former Employer did not make a payment on the SRCAs. Employees sued for breach of contract. Former Employer paid the judgment. ¶ 6.

The final payment from Purchaser to former Employer was reduced by 2.5% from the original deal. Former Employer reduced the payments to Employees in a proportionate amount, \$7,382. ¶¶ 8, 9. The Superior Court determined this was a willful withholding under RCW 49.52.050 and .070 and awarded double damages, fees and costs to the Employees. ¶ 9.

The Court of Appeals reversed. The amounts due under the SRCAs were not ‘wages’ and were therefore not subject to RCW 49.52 remedies. ¶ 52. Here, the stock was, in essence, a gift to Employees for their hard work. ¶ 16. And, under the SRCAs, the Employees surrendered their proprietary interest in the company. ¶ 17.

Does this seem reasonable? The stock would not have been awarded absent the services provided by the Employees to the former Employer. The conversion of the stock into the SRCAs should have no bearing on whether a “wage” was involved. Wages, after all, are anything paid “by reason of employment.” *Hayes v. Trulock*, 51 Wn. App. 795, 755 P.2d 830, *rvw. denied*, 111 Wn.2d 1015 (1988).

N. *Jumamil v. Lakeside Casino*

179 Wn. App. 665, 319 P.3d 868 (2014)

RCW 49.52, rebates, willful withholding, personal liability.

Division II reversed a summary judgment dismissing individual defendants. A jury found the employing entity liable for willful withholding and unlawful rebating of wages in violation of RCW 49.52.050 and .070. The entity then entered bankruptcy. ¶¶ 1, 16.

Defendant Coon became the sole manager and 51% owner of an LLC which owned a casino. ¶ 5. However, he lived outside of Washington and disclaimed responsibility for terms and conditions of employment. ¶ 6.

Plaintiff was a poker dealer. After her employment began the casino required dealers to gamble six hours per week in order to retain “seniority.” ¶ 7. Defendant West was involved in developing and implementing this policy and was a CR 30(b)(6) designee. ¶ 8, in fn. 3.

Plaintiff argued casino deducted money from its dealers’ wages while they gambled since the casino retains a percentage of forced bets required of all poker players. ¶ 9. After about a month, Plaintiff told West she could not play the extra six hours/week because she had a child at home. She was threatened with loss of her job and her seniority and therefore compensable hours dropped. ¶ 10. Ultimately, she was fired. ¶ 11.

Generally, a corporate officer is personally liable under RCW 49.52 only “where he knowingly participate[s] in the wrongful withholding.” ¶ 36. Here Coon, the 51% owner of the

LLC, “became a knowing participant” once he became aware of the dealer support policy in 2010. ¶ 40. His dismissal from the case was improper. *Id.*

While plaintiff had already received compensation for what was wrongfully withheld from another manager in a separate lawsuit, ¶ 17, Coon was liable for her costs and attorneys’ fees. ¶ 42.

Both individual defendants asserted that the dealer support policy of the casino was not an unlawful rebate. Here, because of the coercive nature of the policy, Plaintiff was not voluntarily gaming. ¶ 47. And it was clear that a small portion of the dealer’s wages went to the employer for various “fees.” ¶¶ 48, 52. There is a factual issue as to whether Coon and West collected a rebate of plaintiff’s wages. ¶ 54.

O. *Alonso v. Qwest Communications Co., LLC*

178 Wn. App 734, 315 P.3d 610 (2013)

RCW 49.60, disability, national origin, military service discrimination.

The trial court dismissed on summary judgment claims of disparate treatment, hostile environment, and retaliation. Here, Division II affirmed on his retaliation claim and otherwise reversed.

Plaintiff is a Gulf War veteran and Mexican American. He is disabled due to injuries from military service and also has a congenital speech impediment. ¶ 2.

Plaintiff enjoyed success at work until Martinez became his manager in 2008. ¶ 4. Thereafter, Plaintiff claimed he was harassed and tormented due to his military status, Mexican heritage and disabilities. ¶ 5. Plaintiff reported his concerns to a corporate ethics hotline but did not specifically claim discrimination due to a protected status. ¶ 7. Shortly after, Martinez supposedly made note of the ethics complaint and mocked it. ¶ 8. Plaintiff’s work hours were changed which led to further ethics hotline calls. ¶ 9.

Various other changes occurred in Plaintiff’s work situation including infantile “pranks” by co-workers. ¶ 10.

In this appeal the Court was satisfied that Plaintiff produced evidence of disparate treatment due to military status, disability, or national origin. ¶¶ 16-18. It was a fact issue whether the changes in his employment situation constituted an “adverse employment action.” ¶¶ 18-20.

Similarly, the evidence of harassment was sufficient to show that it was “pervasive” and therefore actionable. ¶¶ 26-35. Here, the decision took note of the fact that Plaintiff was so distraught he “visited a psychiatry emergency room. . . .” ¶ 35.

The retaliation claim failed because in his reports to the ethics hotline he did not claim that his ill-treatment was due to a protected status. ¶ 38. “A general complaint about an

employer's unfair conduct does not rise to the level of protected activity . . . absent some reference to the plaintiff's protected status." ¶ 41. However, one might reasonably think that after placing the employer on notice of "unfair conduct" that the employer would then either reach out to learn more or initiate an investigation.

P. *Lodis v. Corbis Holdings, Inc.*

172 Wn. App. 835, 292 P.3d 779 (2013)

Discrimination, age, same actor defense in retaliation case; scope of "opposition" activity, fiduciary duty of officer, waiver of physician patient privileges in WLAD action.

This is a fact-intense case procedurally and otherwise. There were two trials below involving a former Senior VP for Human Resources and his former employer. There are counterclaims by the former employer for breach of fiduciary duty and unjust enrichment. This shows how the conduct of a highly placed executive may come under more exacting scrutiny than the conduct of the former employer.

As the VP for HR, Employee told the CEO that certain of his actions were indicative of age discrimination while at about the same time the CEO promoted the Employee. ¶¶ 4, 5. The Employee was put on a PIP at around this time after a consultant was brought in to evaluate his job performance. ¶ 6. Employee was fired and brought suit claiming age discrimination.

In discovery, the employer learned Employee received a double payment of a \$35,000 bonus and that he accepted payment of over \$40,000 for accrued and unused vacation pay when there was no record of actual vacation taken. ¶ 10.

During discovery, the Employee would not release medical records despite making a claim for general damages. ¶ 9.

A jury determined that there was no breach of fiduciary duty by accepting the second bonus by mistake and that the duty was breached with respect to the vacation pay. ¶ 13. Another jury determined that there was no age bias, ¶ 11, after the trial judge dismissed on summary judgment a retaliation claim.

The summary judgment was premised on a theory adapted from the FLSA which requires an employee to 'step outside' her usual job functions in order to have a valid retaliation claim. ¶ 17. That argument fails in the context of a discrimination claim because of the more broadly worded anti-retaliation protections provided in both Title VII and RCW 49.60.210. ¶¶ 18-24. It is worthwhile to read this portion of the decision if only to have a better grasp of those differences.

And, Martini v. The Boeing Co., 137 Wn.2d 357, 971 P.2d 45 (1999) instructs that there are vast differences between the state and federal anti-discrimination statutes - the state statute being even broader.

Here, the Employee was the employer's HR person and was not required to 'step outside' of that function in order to claim protection from retaliation. His retaliation claim should not have been dismissed. ¶¶ 25-27.

The employer claimed that the 'same actor' defense of *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 189-90, 23 P.3d 440 (2001), should apply: The CEO who fired Employee was the same person who promoted him. ¶ 28. That defense ought not to apply in a retaliation claim. *Id.*

By claiming general damages, the Employee put his physical and mental health at issue. RCW 5.60.060(4)(b) provides that physician-patient privileges are waived ninety days after filing an action claiming those damages. ¶ 32.

This should be a reminder to all those who represent potential claimants: Before asserting a claim for general damages, it may be best to obtain medical records, including those from any mental health professionals. What is in those records and how could they affect the case?

Whether a fiduciary duty is owed is a question of law, not fact. ¶ 38. It was a fact question, however, whether that duty was breached by the Employee's failure to record time taken for vacation. Corporate officers must act in the best interests of the corporation. ¶ 46 Here, the jury's determination that the Employee profited at the corporation's expense was affirmed. *Id.*

Q. *Thomas v. State Dep't of Employment Security*

179 Wn. App. 809, 309 P.3d 761 (2013).

Unemployment compensation, school teacher, summer break, RCW 50.44.050.

RCW 50.44.050 disqualifies school teachers from receiving unemployment compensation benefits between academic years if they have "reasonable assurance" of re-employment.

Plaintiff was a Seattle Public Schools employee. For several years he and his colleagues were given the opportunity to have summer employment with the school district. Before the end of the 2010-2011 school year he learned that a summer position would not be available but that he would be working the 2011-2012 academic year. ¶¶ 3-4. He applied for benefits and was denied them through the Department and then in Superior Court. Division I affirmed.

The fact that he previously had year-round employment with the schools did not persuade the Court that he was entitled to benefits. He had 'reasonable assurance' of continued employment in the coming academic year. ¶ 18.

R. *Barnett v. Sequim Valley Ranch, LLC*

174 Wn. App. 475, 302 P.3d 500, *rvw. denied*, 178 Wn.2d 1014 (2013).

Wrongful termination, constructive discharge, statute of limitations.

Employees believed they were being coerced by the employer to give false testimony in a lawsuit in which the employer was involved. ¶¶ 3-5. They resigned and brought a lawsuit alleging wrongful termination in violation of public policy based upon their alleged constructive termination. They prevailed in Superior Court.

In this appeal the employer claimed the limitation period barred the claims. Division II disagreed.

A three year limitation period applies to wrongful termination claims. ¶ 16. Where the claim is based on constructive discharge, the limitation period starts on the day the employee gives notice or the last day of actual employment. ¶¶ 18, 22.

The employer also objected to jury instructions on the elements of constructive discharge. It was not necessary for the employees to prove that they had no other alternative but to leave employment. ¶¶ 25-28.

Note that in discrimination actions brought under RCW 49.60 constructive discharge does not have to be proved in order to recover for future wage loss occasioned by a voluntary quit. Rather, it is necessary only for the plaintiff to establish that the decision to quit was proximately caused by the discrimination. This is a far lower burden. *Martini v. The Boeing Co.*, 137 Wn.2d 357 (1999).

The employer did not preserve for appeal any objection to a jury instruction defining the 'jeopardy' element of wrongful discharge in violation of public policy. ¶ 37.

The employees were awarded attorneys' fees on appeal because they recovered wages. This award was made under RCW 49.48 and RAP 18.1. Ouch.

S. *Alaska Structures, Inc. v. Hedlund*

180 Wn. App. 591, 323 P.3d 1082 (Apr. 21, 2014)

petition for review filed May 28, 2014 (90284-4)

Anti-SLAPP statute defense, issue of public interest.

Employer sued its former employee for breach of a confidentiality agreement arising from critical comments posted on internet job posting websites. The former employee counter claimed under RCW 4.24.525 - the Strategic Lawsuit Against Public Participation ("SLAPP") Statute. Trial court determined the state Anti-SLAPP statute applied and awarded fees and a statutory penalty to the former employee. ¶¶ 2-5.

Division I reversed.

Here, the former employee did not establish that his internet postings were made in connection “with an issue of public importance” as required by RCW 4.24.525(4)(b). ¶ 8. The Court applied California precedent because of similarities between that state’s Anti-SLAPP Statute and Washington’s.

The postings were arguably of concern to the former employee and potential job applicants - a “relatively small, specific audience.”

There are three Anti-SLAPP cases percolating in the Supreme Court.

T. *Yakima County v. Yakima County Law Enforcement Officers’ Guild*
174 Wn. App. 171, 297 P.3d 745, *rvw. denied*, 178 Wn.2d 1012 (2013).
Collective bargaining, mandatory/permissive bargaining.

The issue here was whether paid work release time was a permissive or mandatory topic of collective bargaining and, when that bargaining failed, interest arbitration.

Division III held that release time to attend certain conferences was permissive and therefore not subject to interest arbitration and that release time to attend certain union meetings was a mandatory topic of bargaining and therefore subject to interest arbitration in the event the bargaining process came to impasse.

The decision provides a good discussion of mandatory and permissive bargaining topics at ¶¶ 14-17. Generally, the former consists of topics of direct concern to employees while the latter are matters that remotely affect personnel matters. ¶ 16.

Paid release time to conduct union business is a mandatory topic of bargaining when the time involves administration of the labor agreement. ¶ 10. Two judges agree that time spent in general membership “and/or Guild board” meetings related to collective bargaining or enforcement of the labor agreement is a mandatory topic. ¶ 26. A dissenting judge was bothered by the “and/or” union proposal. As she reads the proposal, only the Guild board meetings would have to deal with bargaining or enforcement of the agreement and attendance at general membership meetings was not so limited. ¶ 49.

U. *University of Washington v. Washington Federation of State Employees*
175 Wn. App. 251, 303 P.3d 1101 (2013).
Public employees, bargaining units, transfer to different bargaining unit.

A public employer’s insistence on moving a group of employees at Harborview into a bargaining group of employees at the main campus doing the same work but represented by a different union runs afoul of the statutory promise that employees have the right to bargain collectively through representatives of their own choosing. RCW 41.80.050.

Turns out that the Harborview employees were on a lower pay scale than the main campus employees although both groups were doing essentially the same work. ¶ 2. Different unions were involved. The Employer believed it would be more efficient to have both groups represented by the same union.

Not surprisingly, the union representing the Harborview folks felt differently. ¶ 7. That union filed a ULP charge against the employer. The Public Employment Relations Commission determined that the Employer properly reallocated employees to a different job classification but the unilateral move of the one group of employees to a different bargaining unit amounted to an interference with employee bargaining rights. ¶ 9.

Superior Court reversed PERC and ordered dismissal of the union ULP complaint. Division I reversed.

The Employer had no right to insist on the change in bargaining units; that task was left to PERC. ¶ 19. The Employer should have filed a unit clarification petition with PERC. ¶ 20.

V. *Michelbrink v. Washington State Patrol*

180 Wn. App. 656, 323 P.3d 620 (2014)

Worker Comp., immunity from suit, deliberate injury.

The Court of Appeals granted discretionary review of a superior court denial of summary judgment for the employer. Plaintiff claimed he was intentionally injured in a taser training exercise and sought damages. The Court of Appeals affirmed the trial court.

Plaintiff is a WSP trooper who participated in a taser training course. ¶ 3. The exposure to the device stunned Plaintiff and he fell and fractured a vertebra. *Id.*

Product information of the taser was known to WSP and related that exposure to the device could result in physical injuries including muscle strain and stress/compression fractures. ¶ 15, fn 13. The lead WSP instructor knew that “the most typical effects” of exposure to a taser included temporary pain and minor bleeding. ¶ 16.

Generally, the availability of worker compensation benefits immunizes an employer from common law claims. RCW 51.04.010. ¶ 11. An exception is when “injury results . . . from the *deliberate intention* of [the] employer to produce such injury.” RCW 51.24.020. ¶¶ 11, 13. “Deliberate intention” is constructed to mean that the employer had actual knowledge that an injury was certain to occur and that it willfully disregarded that knowledge. ¶ 13.

Here, summary judgment for the employer was inappropriate given the knowledge it had about the taser device and its own trainer’s testimony. “[T]he record shows WSP was aware that certain initial injury would result when a Taser barb contacted a human body.” ¶ 20.

W. *Tamosaitis v. Bechtel National, Inc.*

182 Wn. App. 241, 327 P.2d 1309 (2014)

Tortious interference, business expectancy, pecuniary damage.

Plaintiff is a decades-long employee of URS. In 2003 he came to Washington to work for URS on its contract at the Hanford Nuclear Reservation. ¶ 2. URS is a subcontractor to defendant Bechtel.

Plaintiff did not get along with certain of Bechtel's managers. ¶ 6. They resented his call for additional testing before closing out a certain project. ¶ 7. Delay would preclude additional federal funding. ¶ 8. Plaintiff was critical of Bechtel's actions in an email with individuals who supported his position. Bechtel got word of this and had the URS manager removed from his role at Hanford. ¶ 10. He was not fired and did not lose any pay. ¶ 11. He did suffer emotional distress. *Id.*

This suit is against Bechtel and some of its managers for tortious interference with Plaintiff's business relationship with URS. ¶ 12.

Bechtel obtained summary judgment. The Court of Appeals affirmed.

While the appeal was pending, Plaintiff learned that for the first time in his career with URS he would not receive an incentive bonus. His employment was then terminated after the trial court summary judgment. ¶ 15.

A claim for tortious interference requires, among other things, "resultant damage." ¶ 18. The decision "expressly hold[s]" that tortious interference with a business expectancy "requires a threshold showing of resulting pecuniary damages." ¶ 19. The analysis for this relies on Restatement (Second) of Torts §766B Cmt. C (1979). ¶¶ 24-25. Absent the pecuniary loss, the emotional distress damages are not separately actionable. ¶ 30.

The Court of Appeals denied Plaintiff's motion to supplement the record with information about the bonus and termination because it was made in the body of a brief. ¶ 34. Only a dispositive motion or a motion for attorney fees may be made in a brief. *Id.*

However, even if the court considered the fact of Plaintiff's termination, that was "after-occurring evidence" that could not have affected the trial court's ruling. ¶ 36, fn. 3. **[But couldn't that warrant a remand?]**

Relief by way of consideration of the facts of failure to obtain a bonus and termination under CR 60 failed. Newly discovered evidence must be brought forward within one year of judgment. CR 60(b)(3). ¶ 39. The "catch-all" of CR 60(b)(11) is inapplicable as there is a difference between "a change in facts that had not yet occurred at the time judgment was entered" and newly discovered evidence. ¶ 42.

Sheesh.

All of that seems to invite a new action against Bechtel and, perhaps, URS, based on the facts occurring after summary judgment in that case.