

# Employment & Labor Law Update

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**Washington Cities Insurance Authority  
& Washington Counties Risk Pool**



- **Who are they?**
  - Created by local government to jointly group-self insure.
- **What do they do?**
  - Coverage
  - Defense Counsel
  - Training and Education
  - Risk Management Recourses
- **Why are they important to WASPC's event?**

# Roadmap

- Jurisdictions for labor and employment legal decisions
- Recent decisions re:
  - Unlawful labor practices
  - Union activity discrimination
  - Duty of fair representation
  - Protected concerted activity
- Severance agreements
- First Amendment
- Legality of work rules
- Employment discrimination
- Trends in damages awards in litigation
- Spoliation
- Affirmative action
- Religious accommodation
- Employee rights review



# Jurisdiction

- WA Human Rights Commission (HRC)
  - Discrimination based on protected status
- WA Public Employment Relations Commission (PERC)
  - Unfair labor practices
  - Discrimination/retaliation for asserting labor rights
- Grievance Arbitrator
  - CBA violations



# Unfair Labor Practices

**RCW 41.56.140 – Unfair labor practices for public employers include:**

- (1) To interfere with, restrain, or coerce public employees in the exercise of their rights to collectively bargain;
- (2) To control, dominate, or interfere with a bargaining representative;
- (3) To discriminate against a public employee who has filed an unfair labor practice charge;
- (4) To refuse to engage in collective bargaining with the certified exclusive bargaining representative.

# Unfair Labor Practices

- There is a six-month statute of limitations for unfair labor practice complaints. RCW 41.56.160(1).
- The six-month statute of limitations begins to run when the complainant knows or should know of the violation. *City of Bellevue*, Decision 9343-A (PECB, 2007) (citing *City of Bremerton*, Decision 7739-A (PECB, 2003)).
- The start of the six-month period, also called the triggering event, occurs when a potential complainant has “actual or constructive notice of” the complained-of action. *Emergency Dispatch Center*, Decision 3255-B (PECB, 1990).

# Union Activity Discrimination

- To state a cause of action for this union activity discrimination, the complainant must allege:
  - (1) the employee participated in protected activity or communicated to the employer an intent to do so;
  - (2) the employer deprived the employee of some ascertainable right, benefit, or status; and
  - (3) a causal connection exists between the employee's exercise of protected activity and the employer's action. *City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. 333, 348–49 (2014).

# Union Activity Discrimination

- If employee establishes the initial elements:
  - The burden shifts to employer to provide a legitimate, nondiscriminatory reason for the action
  - The employee must then prove the reason is a pretext or union animus was a substantial factor in the action taken. *Port of Tacoma*, Decision 4626-A.



# Factors Considered

- Timing
- Who made the decision/had knowledge of union activity
- Past practices



# Factors Considered

- *Gilmore v. Benton County*, Decision 13709 (PECB, 2023)
- Alleged employer discriminated against employee for filing ULP against the union by denying employee's grievance
- However, grievance was denied before the ULP was filed



# Factors Considered

- *Franklin County*, Decision 13726 (PECB, 2023)
- Two deputies investigated and demoted for making false statements in a ULP complaint
- They alleged discrimination for filing the ULP
- PERC ruled they were disciplined for dishonest statements and violating policies, not because they filed a ULP
- No interference when telling deputy the union's threat to take a grievance to arbitration "should be carefully weighed" in light of recent legislation and possible decertification by CJTC b/c factual and not threatening



# Duty of Fair Representation

In *Allen v. Seattle Police Officers' Guild*, 100 Wn.2d 361 (1983), the Washington State Supreme Court adopted three standards to measure whether a union has breached its duty of fair representation:

- The union must treat all factions and segments of its membership without hostility or discrimination.
- The broad discretion of the union in asserting the rights of its individual members must be exercised in complete good faith and honesty.
- The union must avoid arbitrary conduct.

# Duty of Fair Representation

- *King County (King County Corrections Guild)*, Decision 13622 (PECB, 2023)
- Employee filed ULP alleging religious discrimination and violation of duty of fair representation when union declined to file a grievance after he was involuntarily separated for not getting Covid 19 vaccination due to his Muslim faith
- ULP denied as other employees of differing faiths were in same situation and grievances were not filed on behalf of anyone
- Denied complaint of religious discrimination against employer as it was outside jurisdiction of PERC



# Protected Concerted Activity

- *Miller Plastic Products, Inc.*, Case 06–CA–266234 August 25, 2023
- Terminated employee for raising concerns about Covid protocol and staying open in March 2020
- Employer argued it was “individual griping”
- Right to engage in concerted activity for mutual aid or protection
- Concerted = engaged with or on behalf of others, not just for the employee herself



# Protected Concerted Activity

- *Miller Plastic Products, Inc.*, Case 06–CA–266234 August 25, 2023
- Includes seeking to initiate, induce or prepare for action
- Activity that involves one speaker and one listener at initiation can be sufficient
- Object of inducing action need not be express
- Totality of the factual circumstances is standard



# Severance Agreements

- *McLaren Macomb*, Case 07-CA- 263041 February 21, 2023
- Due to Covid, stopped non-essential medical services and permanently furloughed 11 nurses
- Offered severance agreement with non disparagement clause
- Engaged in direct dealing by bypassing the union
- Non disparagement clause required employees to forfeit concerted activity rights and can be coercive





# Severance Agreements

- *McLaren Macomb*, Case 07-CA- 263041 February 21, 2023
- Prevented former employees from assisting current employees or cooperating with the NLRB in ULP cases
- Consistent with the EEOC rules in discrimination cases
- Consistent with RCW 49.44.211



# Severance Agreements

- RCW 49.44.211 – Prohibited conduct includes:
- Provision in an agreement that requires employee to not disclose or discuss conduct employee reasonably believed to be illegal harassment, discrimination, retaliation, wage and hour violation, sexual assault or public policy violation
- Discipline for discussing the above at work related events coordinated through employer, between employees, or between employer and employee whether on or off work premises



# Severance Agreements

- RCW 49.44.211 – Does NOT prohibit:
- Protecting confidential information that does not involve illegal acts
- Employee means a current, former or prospective employee or independent contractor



# Severance Agreements

- *Elgiadi v. Washington State University*, 24 Wn.App.2d 261 (Nov. 2022)
- Unlawful to refuse to rehire employee b/c they opposed unlawful discrimination
- However, public policy does not forbid employee to waive right to be rehired in settlement agreement
- WA Supreme Court denied review



# First Amendment

- The problem in any case is to arrive at a balance between the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the public employer, in promoting the efficiency of the public services it performs through its employees.

*-Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, 391 U.S. 563 (1968).*

- Promoting workplace efficiency and avoiding disruption is a valid government interest that can justify speech restrictions.
- Whether speech disrupted the workplace is fact-specific and depends on the manner, time, and place in which the employee's speech took place.
- Must show speech created disruption beyond that which accompanies controversial speech

# First Amendment

- *Dodge v. Evergreen Sch. Dist.*, (December 2022, 9<sup>th</sup> Cir.) = teacher wore MAGA hat to training
  - There was no actual disruption beyond coworkers who disagreed with the speech
- *Roberts v. Springfield Utility Board*, (May 2023, 9<sup>th</sup> Cir.)
  - Investigation related speech restriction did not violate 1<sup>st</sup> Amendment
  - It only prevented speech about his personal, private conduct; not a matter of public concern
  - It only applied during the pendency of the investigation

# First Amendment

- *Project Veritas v. Schmidt*, (July 2023, 9<sup>th</sup> Cir.)
  - Oregon law prohibiting recording conversations without permission was an unconstitutional restriction on free speech
  - The recording is a form of speech
  - It allowed some recording based on content, e.g. if felony is occurring
  - It was not narrowly tailored because it restricted speech occurring in public places
  - Invasion of privacy and defamation claims adequately protect privacy interest
  - May call into question RCW 9.73.030

# First Amendment

- *Doe 1 v. Seattle Police Department*, June 2023
- Officers attended former President Trump's political rally on January 2, 2021 in D.C.
- Investigation found no unlawful or unprofessional conduct
- Officers sought injunctive relief = redaction of their names from public records
- Held right to privacy in attendance at political rally



# First Amendment

- *Doe 1 v. Seattle Police Department*, June 2023
- Compare with RCW 43.101.105:
  - Commission may deny, revoke suspend certification if officer...
  - Engaged in any conduct or pattern of conduct that: Fails to meet the ethical and professional standards required of a peace officer or corrections officer; disrupts, diminishes, or otherwise jeopardizes public trust or confidence in the law enforcement profession and correctional system; or demonstrates an inability or unwillingness to uphold the officer's sworn oath to enforce the Constitution and laws of the United States and the state of Washington

# Legality of Work Rules

- *Stericycle, Inc.*, Cases 04– CA–137660, 04–CA–145466, 04–CA–158277, and 04–CA–160621 August 2, 2023
- **Test** = if an “economically dependent employee” could reasonably believe a work rule has a coercive meaning it is presumptively unlawful
- Employer may rebut this by showing the rule advances a legitimate and substantial business interest that cannot be advanced by a more narrowly tailored rule
- Examples: investigation confidentiality, prohibiting outside employment, personal use of email/premises



# Legality of Work Rules

- Employers have an undisputed right to maintain discipline in their establishments. *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793, 798, 65 S. Ct. 982, 985, 89 L. Ed. 1372 (1945).
- To help prevent misconduct, enhance peace officer and corrections officer accountability through the imposition of sanctions commensurate to the wrongdoing when misconduct occurs, and enhance public trust and confidence in the criminal justice system, upon request by an officer's employer or on its own initiative, the commission may deny, suspend, or revoke certification of, or require remedial training for, an officer. RCW 43.101.105(1).
- It is the policy of the state of Washington that all commissioned, appointed, and elected law enforcement personnel comply with their oath of office and agency policies regarding the duty to be truthful and honest in the conduct of their official business. RCW 43.101.021.



# Legality of Work Rules

- Review policies and practices
- Do you give notice emails, text messages, etc. may be subject to public disclosure and are not confidential?
- Do you have a blanket rule against outside employment?
- Review reasons for requiring confidentiality during investigations
- Update investigation confidentiality advisement to complainants, subjects and witnesses when it involves a potential illegal act (RCW 49.44.211) vs. a policy violation
- Consider process for employee to request an exception to rules?



# Employment Discrimination

- *Muldrow v. St. Louis*, U.S. Supreme Court granted review
- Female police officer alleged gender discrimination and retaliation
- Had various roles assigned to Intelligence Unit, including being deputized by FBI as a temp field officer and receiving OT pay
- Interim police commissioner appointed new commander over Intelligence Unit who made personnel changes



# Employment Discrimination

- *Muldrow v. St. Louis*, U.S. Supreme Court granted review
- Transferred 4 officers out of Intelligence Unit including the plaintiff
- Now she had to supervise patrol and work a rotating shift
- Salary was the same although no longer eligible for FBI annual \$17,000 in overtime
- She filed EEOC complaint and applied for a transfer to a different district and other positions. Eventually, she was transferred back to the Intelligence Unit.



# Employment Discrimination

- *Muldrow v. St. Louis*, U.S. Supreme Court granted review
- At issue is whether the transfer was an “adverse employment action” sufficient to create discrimination
- She argued she was transferred to a less prestigious position of patrol supervisor
- 8<sup>th</sup> Circuit found this was not an adverse employment action – she just liked one job better than the other
- Similarly, the positions she applied for would not have resulted in a material beneficial change to her employment
  - Being “high profile” and giving her the “inside track” was not enough



# Employment Discrimination

- *Muldrow v. St. Louis*, U.S. Supreme Court granted review:
- Does Title VII prohibit discrimination in transfer decisions absent a separate court determination that the transfer decision caused a significant disadvantage?





# Hostile Work Environment

- *Sharp v. S&S Activewear*, (June 2023, 9<sup>th</sup> Cir.)
- Repeated and prolonged sexually graphic and violently misogynistic music can create a hostile work environment for employees
- This is true even if it is offensive to men and women
  - “After all, allowing an employer to escape liability because it equally harassed whites and blacks [or men and women] would give new meaning to equal opportunity.”
- And even if it is not directed at the plaintiff in particular
- 9<sup>th</sup> Circuit rejected the “equal opportunity harasser” defense



# Evolving Damages Strategies In Employment Litigation

- **Plaintiff unanchored damages requests**
- **Defense anchoring and counter strategies**



# WA Jury Instruction on Damages

- RCW 4.56.250(1)(a)
- The statute defines economic damages as objectively verifiable monetary losses, including:
  - medical expenses,
  - loss of earnings,
  - burial costs,
  - loss of use of property,
  - cost of replacement or repair,
  - cost of obtaining substitute domestic services,
  - loss of employment and loss of business or employment opportunities

# WA Jury Instruction on Damages

- RCW 4.56.250(1)(b)
- The statute defines noneconomic damages as subjective, nonmonetary losses, including:
  - Pain and suffering
  - Mental anguish
  - Disability or disfigurement
  - Emotional distress
  - Loss of society and companionship
  - Loss of consortium
  - Injury to reputation and humiliation
  - Destruction of the parent-child relationship

# WA Jury Instruction on Damages

- The burden of proving damages rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.
- Your award must be based upon evidence and not upon speculation, guess, or conjecture.
- The law has not furnished us with any fixed standards by which to measure noneconomic damages. With reference to these matters, you must be governed by your own judgment, by the evidence in the case, and by these instructions.

# Spoliation



Attorney General Bob Ferguson stands on the steps of the federal courthouse March 15 in Seattle. (Elaine Thompson / AP file)

## Oso mudslide case spurs reform at Attorney General's Office

## Judge slaps sanctions on Seattle for deleting thousands of texts between top officials

Jan. 20, 2023 at 6:00 am | Updated Jan. 20, 2023 at 9:13 am

# Spoliation

## **Giuliani loses defamation lawsuit from two Georgia election workers**



By Katelyn Polantz, CNN Reporter, Crime and Justice

Updated 10:18 PM EDT, Wed August 30, 2023

“Giuliani has given only lip service to compliance with his discovery obligations and this Court’s orders by failing to take reasonable steps to preserve or produce his ESI...bottom line is that Giuliani has refused to comply with his discovery obligations and thwarted plaintiffs’ procedural rights to obtain any meaningful discovery in this case.”

# Spoliation

- *Seattle Tunnel Partners v. WSDOT*, March 27, 2023
- Party must show the spoliating party owed a duty to the party seeking sanctions to preserve the missing, lost, or destroyed evidence
- Adverse inference jury instruction is only appropriate for the intentional destruction of evidence or willful failure to preserve evidence with an improper motive (bad faith)
  - Was the lost evidence sufficiently important to justify the harsh sanction?



# Affirmative Action

- *Students for Fair Admissions v. Harvard College*
  - U.S. Supreme Court, June 2023



# Affirmative Action

- Seattle mayor's office demanded fewer White men, military in police recruitment: memo | Fox News
- Activist against affirmative action sues law firms over diversity fellowships - The Washington Post
- Court halts Fearless Fund's grants for Black women - The Washington Post - 9/30/23



# Update on *Henderson v. Thompson*

- U.S. Supreme Court denied review as premature...but...
- Commented the decision raises serious and troubling issues of due process and equal protection
- Defense used common litigation strategies of undermining credibility of witnesses, talking about pecuniary motives and suggesting witnesses were coached

# Update on *Henderson v. Thompson*

- “This decision appears to mean that in any case between a white party and black party, the attorney for the white party must either operate under special, crippling rules or expect to face an evidentiary hearing at which racism will be presumed and the attorney will have to prove her innocence”
- WA is on a collision course with the Equal Protection Clause and our opinion in *Students for Fair Admissions v. Harvard*

# Religious Accommodation

- *Groff v. DeJoy*,
  - U.S. Supreme Court, June 2023



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# Religious Accommodation

- *Groff v. DeJoy*
  - Evangelical Christian who believed Sunday is for worship
  - Was required to make Sunday deliveries for USPS
  - He refused and other employees had to do it
  - He eventually resigned after receiving progressive discipline for refusing to work on Sundays



# Religious Accommodation

- *Groff v. DeJoy*
  - Prior standard = it was an undue hardship to require an employer to bear more than a de minimis cost to provide a religious accommodation
  - New standard = employer must now show the accommodation would result in substantial increased costs in the conduct of the business



# Religious Accommodation

- *Groff v. DeJoy*
  - Impacts on coworkers are relevant only to the extent they go on to affect the conduct of the business
    - Must do more than conclude forcing others to work overtime would constitute an undue hardship – must consider other options
  - Hostility to a particular religion or religion in general cannot be considered “undue” or supply a defense





# Religious Accommodation

- *Kumar v. Gate Gourmet*, 180 Wn.2d 481, 2014
  - Recognized the cause of action of failure to accommodate a religious practice
  - Must show 1) bona fide religious belief that conflicts with job duties; 2) informed employer of the belief and the conflict; and 3) employer responded by subjecting employee to threatened or actual discriminatory treatment



# Religious Accommodation

- WA faces spate of lawsuits from workers fired for refusing COVID vaccines | The Seattle Times
- Massachusetts State Police Must Reinstate 7 Troopers Who Refused to Be Vaccinated, Arbitrator Says (usnews.com)
- King County RFP for Vaccine litigation attorneys
- Common theme = failure to genuinely engage in the interactive process for accommodation



# Trial Trends from 2021-2023

- Only 21 reported jury verdicts for state discrimination/retaliation cases and 8 for federal cases
- Majority of cases in state court were cases against public entities
- Approximately half resulted in defense verdicts

# Trial Trends from 2021-2023

- *Hockett v. City of Seattle*, October 2022
- Police officer alleged he suffered from CO exposure having to access patrol car in underground garage and requested medical accommodation. Later alleged retaliation when passed over for promotion and allegedly mocked and ostracized.
- City asserted it tested the air quality and it exceeded standards and officer did not show his ability to do his job was limited.
- Jury found in favor of the officer and awarded \$1,325,000

# Trial Trends from 2021-2023

- *Verduzco v. King County*, May 2022
- Plaintiff was a project manager in hazardous waste management program and involved in hiring an investigator. He raised concerns about racially biased hiring practices. He alleged he subsequently received negative performance reviews and a one week suspension for raising his voice at a diversity conference.
- Plaintiff's verdict for \$2,070,123 + attorney fees

# Trial Trends from 2021-2023

- *Peterson v. Virginia Mason Medical Center*, March 2021
- Plaintiff verdict on claim of failure to accommodate - \$75,000
- Defense verdict on claims of pregnancy discrimination and retaliation
- Post trial, plaintiff was awarded \$252,603 in attorney fees and \$19,500 in costs

# Garrity Advisement

- *Garrity v. New Jersey*, 385 U.S. 493 (1967)
  - Must be under threat of dismissal
  - Must be narrowly tailored to past performance of official duties
  - Consequences in civil litigation



# Weingarten Rights

- *NLRB v. Weingarten*, 420 U.S. 251 (1975)
  - Only applicable when interview could lead to discipline and employee requests union representation
  - Does not apply in non-union settings
  - Employer does not have a duty to advise of *Weingarten* rights, but many proactively do to avoid a claim later that a rep was requested
  - Not entitled to the rep of choice





# Weingarten Rights

- *NLRB v. Weingarten*, 420 U.S. 251 (1975)
  - No right to have someone other than union rep present
  - Union rep cannot impede the interview
  - Cannot terminate the interview early
  - Cannot object to questions being asked, but can ask for clarification
  - Can take a break to confer with employee



# WA Equal Pay Act

- RCW 49.58.020
  - No discrimination in pay between similarly situated employees
  - Job requires similar skill, effort and responsibility under similar working conditions
  - Okay to pay differently based on bona fide job factors including:
    - Education, training or experience
    - Seniority or merit system
    - If it accounts for the entire differential in pay

# WA Equal Pay Act

- RCW 49.58.020
  - Must advertise salary or salary range
  - Cannot ask for prior salary information until after initial offer is made
  - If you are hiring at a higher market rate, review past hires for gender pay disparities

# Discussion

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