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SEBRIS BUSTO JAMES

a professional service corporation



LABOR & EMPLOYMENT LAW YEAR IN REVIEW – 2009

Representing Employers in Labor and Employment Law

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YEAR IN REVIEW – 2009

LABOR & EMPLOYMENT LAW

Labor and employment law developments are increasingly complex and challenging for human resource managers, executives, and attorneys in both the public and private sectors. Each year the areas of risk management and claim exposure become more expensive and preventive program concerns become more demanding. To assist employers in preventive practices, SEBRIS BUSTO JAMES is pleased to share with you a summary of key developments in our practice area.

“Year in Review – 2009” highlights trends and developments in major labor and employment areas. Reviewing recent court decisions, it emphasizes Washington State rulings and decisions from the U.S. Court of Appeals for the Ninth Circuit here on the West Coast. Among the important subjects discussed are: retaliation, discrimination, wage and hour law developments, disability law, and issues related to arbitration in labor and non-labor contracts.

Our law firm emphasizes preventive practices to help reduce the risk of costly and time-draining litigation when possible. By tracking legal developments and being aware of new concerns, employers can steer their programs through the legal minefields. We trust that this summary of 2009 labor and employment law will be a helpful tool for you in 2010.

Please feel free to direct any questions or comments to Jillian Barron at (425) 450-0111 or jbarron@sebrisbusto.com. Additionally, you are welcome to visit our website, www.sebrisbusto.com, for more information or communications.

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I. NOTABLE FEDERAL COURT DECISIONS

A. Discriminatory Pay Claims – Statute of Limitations

1. The Existing Legal Framework.

Seniority systems are afforded special treatment under Section 703(h) of Title VII, which provides that “it shall not be an unlawful employment practice for an employer to apply different standards of compensation ... pursuant to a bona fide seniority ... system ... provided that such differences are not the result of an *intention to discriminate* because of race, color, religion, sex, or national origin...” (emphasis added).

2. Notable United States Supreme Court Decision.

In *AT&T v. Hulteen*, 556 U.S. ___, 129 S. Ct. 1962 (2009), the employer and its predecessors had, for nearly one hundred years, offered employees pension benefits based on a seniority system that relied on years of service minus uncredited leave time. The system gave less retirement credit for pregnancy-related absences than for medical leave generally.

In 1978, Congress passed the Pregnancy Discrimination Act (“PDA”), which amended Title VII to make it “clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions.” Upon the passage of the PDA, the employer adopted a new pension plan, which provided the same service credit for pregnancy leave as for any other temporary disability leave. These changes to the pension plan were made prospectively only, such that no retroactive adjustments were made for employees’ pre-PDA leave calculations.

Plaintiff Hulteen and other employees who took pregnancy leave prior to the change in the employer’s pension plan filed EEOC charges, and later a lawsuit, alleging discrimination based on sex and pregnancy because they received a smaller pension than they would have received had they taken general disability leave. The district court ruled in Hulteen’s favor, and the Ninth Circuit affirmed.

On review, the Supreme Court overruled the Ninth Circuit. Relying on Section 703(h), the Court stated that benefit differentials produced by a bona fide seniority-based pension plan are permitted unless they are the result of *intentional* discrimination. Although the employer’s pre-PDA service credit rule would violate Title VII *today*, at the time the practice was in place it was lawful and thus did not constitute gender-based discrimination. For the same reason, the Court explained, the recently-enacted Lilly Ledbetter Fair Pay Act did not change the result. That Act permits recovery of lost compensation when an individual is affected by application of a past “discriminatory compensation decision or other practice.” Because the challenged pension credit practice in this case was *not* discriminatory at the time it was in effect, and was eliminated upon enactment of the PDA, the Court held Hulteen was not entitled to recover the loss in pension benefits she incurred due to the employer’s past less favorable treatment of pregnancy leave.

3. The Impact/Significance of the Notable Decision.

Hulteen reaffirms the protection afforded under Section 703(h) to bona fide seniority systems that were not unlawfully discriminatory at the time they were in effect. At the same time, the case is a good reminder that employers must regularly evaluate their seniority systems to ensure they comply with current law.

B. Age Discrimination – Burden of Proof

1. The Existing Legal Framework.

In employment-discrimination cases, the burden of proof is on the plaintiff to establish that s/he was the victim of unlawful discrimination. In 1991, Congress amended Title VII to allow for “mixed-motives” discrimination cases, wherein a plaintiff need only establish that a protected characteristic was *a* motivating factor underlying an adverse employment action, even though other factors also motivated the decision. Under Title VII, the employer’s reliance on the protected factor in its decision-making is sufficient to create liability. The burden then shifts to the employer to prove that it would have made the same decision even had it not taken the protected factor into account. If the employer carries this burden, it may still be subject to declaratory and injunctive relief and attorneys’ fees, but it may not be required to pay damages such as back pay or, where the challenged action was termination, to reinstate the plaintiff. Courts frequently have applied these Title VII standards to claims made under the Age Discrimination in Employment Act (“ADEA”), which protects individuals who are 40 years of age or older from employment discrimination based on age.

2. Notable United States Supreme Court Decision.

In *Gross v. FBL Financial Services, Inc.*, ___ U.S. ___, 129 S. Ct. 2343 (2009), the employer decided to reorganize the department in which Gross, the 52-year-old plaintiff, was employed. As a result of the reorganization, Gross, who had worked for the company for over 30 years, was given a reduced title, and many of his prior job responsibilities were assigned to an employee in her early forties whom Gross had previously supervised. Although he continued to receive the same compensation, Gross brought suit against the employer alleging he was demoted in violation of the ADEA.

On appeal, the United States Supreme Court addressed the issue of the burden of proof in mixed-motives discrimination cases under the ADEA. The Court noted that, unlike Title VII, the ADEA does not expressly allow a plaintiff to establish discrimination by showing age was “*a* motivating factor.” Relying on the plain language of the ADEA which prohibits discrimination “*because of*” an individual’s age, the Court concluded that a plaintiff asserting discrimination under the ADEA must show that age was the “but for” cause of the employer’s action. In other words, the plaintiff alleging discrimination under the ADEA must prove that, regardless of other possible contributing factors, the employee’s age was the *determinative* factor, absent which the employer would not have taken the adverse employment action. Showing that age was *one* motivating factor in an adverse action is insufficient to satisfy the plaintiff’s burden of proof, and

does not shift the burden to the employer to establish that it would have taken the same employment action regardless of the plaintiff's age.

3. The Impact/Significance of the Notable Decision.

Gross makes it significantly more difficult for plaintiffs to prevail in age discrimination claims under the ADEA. Unlike plaintiffs asserting discrimination under Title VII, ADEA plaintiffs must now show that age was the *determinative* factor behind an adverse employment action. While *Gross* is good news for employers, its standard applies only to age discrimination claims brought under federal law. In interpreting and applying the Washington Law Against Discrimination (“WLAD”), Washington courts have explicitly rejected a “but-for” standard and have required plaintiffs to prove only that their protected characteristic was “a substantial factor” in the challenged employment action. Plaintiffs asserting age discrimination claims under the WLAD will only have to meet Washington’s less demanding burden of proof, and not the heightened standard *Gross* established for ADEA claims.

C. Age Discrimination – Exclusivity of ADEA Claims

1. The Existing Legal Framework.

The federal Age Discrimination in Employment Act (“ADEA”) prohibits employers from making arbitrary personnel decisions based on age. *See* 29 U.S.C. § 621. When Congress drafted the ADEA, it included a complex enforcement mechanism to accomplish this goal. For example, plaintiffs must give the Equal Employment Opportunity Commission (“EEOC”) sixty days’ notice before commencing a private action against an employer.

Another federal statute also allows plaintiffs to allege that discriminatory acts violate their constitutional right to equal protection. *See* 42 U.S.C. § 1983. Unlike the ADEA, § 1983 claims do not include similar enforcement mechanisms.

2. Notable Ninth Circuit Court of Appeals Decision.

In *Ahlmeyer v. Nevada System of Higher Education*, 555 F.3d 1051 (2009), the plaintiff, who was over forty years old, alleged that she was not allowed to take classes during work hours and was not allowed an assistant, unlike her younger coworker. The plaintiff also alleged that she was reprimanded and given substandard evaluations based on conduct for which younger employees were not reprimanded.

In her lawsuit, the plaintiff alleged that her immediate supervisor and her employer violated the ADEA by subjecting her to this treatment. On the defendants’ Motion for Summary Judgment, the District Court dismissed the plaintiff’s ADEA claim on the ground that it was barred by the Eleventh Amendment to the federal Constitution. In response, the plaintiff moved to amend her complaint and replace the ADEA claim with a § 1983 claim against her supervisor under the theory that his alleged age discrimination violated the Equal Protection Clause to the

federal Constitution. The District Court denied the plaintiff's motion to amend her complaint and dismissed her lawsuit.

On appeal, the Ninth Circuit Court of Appeals cited a U.S. Supreme Court decision to hold that § 1983 claims are not available when Congress intends to preclude such claims through other legislation. The Court then held it was implausible that Congress would allow an age discrimination claim under § 1983 because it would allow a plaintiff to circumvent the ADEA's enforcement mechanisms (*i.e.*, giving the EEOC sixty days' notice before commencing a private action). As a result, the Court concluded that the ADEA foreclosed age discrimination claims under § 1983 and dismissed the plaintiff's appeal.

3. The Impact/Significance of the Notable Decision.

Ahlmeyer is good news for public employers when they are sued by plaintiffs attempting to circumvent federal anti-discrimination laws. At the same time, the Washington Law Against Discrimination's prohibition against age discrimination still applies to public employers.

D. Disability Discrimination - Medical Examinations

1. The Existing Legal Framework.

Under the Americans with Disabilities Act ("ADA"), medical examinations or tests required of employees must be job-related and consistent with business necessity. This requirement applies to all employees, whether or not they are disabled under the ADA. Medical examinations or tests include those that measure physiological responses to activity, such as blood pressure or heart rate, procedures that are invasive and/or require taking a sample of bodily fluids or breath, and tests that are routinely performed by medical personnel or in a medical setting. Generally, physical fitness tests alone, *i.e.*, those that measure endurance or agility, are not considered medical examinations.

2. Notable Ninth Circuit Court of Appeals Decision.

After suffering work-related injuries to her knees, the plaintiff in *Indergard v. Georgia-Pacific Corp.*, 582 F.3d 1049 (9th Cir. 2009) took a medical leave of absence from work. After two years away from her job, Indergard's doctor authorized her to return to work with permanent restrictions. In accordance with Georgia-Pacific policy, Indergard was required to undergo a physical capacity evaluation ("PCE") before she could return to work from her leave.

The PCE was conducted by a state-licensed occupational therapist and took two days to complete. It included a range of motion and muscle-strength tests. The occupational therapist also took a medical history, measured Indergard's heart rate, blood pressure, and other physical conditions, and recorded observations about her breathing after conducting a treadmill test. Ultimately the occupational therapist concluded Indergard was unable to perform "the sixty-five pound lift and carry" that Georgia-Pacific said was a requirement of her job position. After

determining that Indergard could not return to her previous position, and that there were no other jobs she could perform for the company, Georgia-Pacific terminated her employment.

Indergard later filed suit in federal court claiming that the PCE constituted a prohibited medical examination under the ADA and Oregon law. The trial court disagreed, finding the PCE was a lawful fitness exam.

On appeal, the Ninth Circuit relied on the EEOC's *Enforcement Guidance on Disability-Related Inquiries and Medical Examinations* to determine whether the PCE was a medical examination. The *Enforcement Guidance*, which the Court effectively adopted, lists as factors to be considered, whether: (1) the test is administered by a health care professional; (2) the test is interpreted by a health care professional; (3) the test is designed to reveal an impairment of physical or mental health; (4) the test is invasive; (5) the test measures an employee's performance of a task or measures his/her physiological responses to performing the task; (6) the test normally is given in a medical setting; and (7) medical equipment is used. The Court noted that the *Enforcement Guidance* also provides a list of tests considered, on their own, to be medical examinations, including "blood pressure screening and cholesterol testing," and "range-of-motion tests that measure muscle strength and motor function."

The Court concluded that at least four of the EEOC's factors weighed in Indergard's favor. While the purpose of the PCE may have been to determine whether Indergard was capable of returning to work, the Court reasoned, it involved tests and inquiries capable of revealing to Georgia-Pacific whether she suffered from a disability. Therefore, the Court held, the PCE was a medical examination. It reversed the trial court and remanded the case for a determination whether the PCE was job-related and consistent with business necessity.

3. The Impact/Significance of the Notable Decision.

Indergard serves as an important reminder that disability-related inquiries and medical examinations of an employee returning to work from medical leave must be job-related and consistent with business necessity. An employer may ask questions and/or require a medical examination if it has reason to question whether an employee's ability to perform essential job functions will be impaired by a medical condition, or whether the employee can perform the job without posing a direct threat of harm to her/himself or others. However, the employer's concerns in those regards must be reasonable and supported by objective evidence.

E. Retaliation – Opposing Unlawful Practices

1. The Existing Legal Framework.

Title VII forbids retaliation against an individual who has opposed any practice made unlawful by Title VII ("the opposition clause") or participated in a Title VII investigation or proceeding ("the participation clause"). To establish retaliation, a plaintiff must initially demonstrate that s/he engaged in protected activity under the opposition or participation clauses.

2. Notable United States Supreme Court Decision.

At issue in *Crawford v. Metropolitan Government of Nashville and Davidson County*, ___ U.S. ___, 129 S. Ct. 846 (2009), was whether Title VII's opposition clause protects employees who report discrimination during an employer's internal investigation into *other* employees' complaints. The employer in *Crawford* conducted an investigation into allegations that its Employee Relations Director ("Director") had engaged in sexually-harassing behavior. During the investigation, Crawford (who had not initiated the complaint) reported that the Director had sexually harassed her on several occasions. Crawford was subsequently terminated (as were two other employees who also reported sexually-harassing conduct by the Director).

Crawford brought suit against the employer under Title VII, claiming her termination was in retaliation for reporting the Director's sexually-harassing behavior. The district court dismissed Crawford's claim, and the appellate court upheld that decision, holding that to be entitled to protection under the opposition clause, the employee must have engaged in "active, consistent 'opposing' activities." The appellate court concluded Crawford had not done so where she did not initiate a complaint or take any action other than providing information during an investigation.

The United States Supreme Court reversed the dismissal of Crawford's claim. Given the purpose of Title VII's anti-retaliatory provisions, the Court reasoned, a rule would be "freakish" if it only protected an employee who "reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question." Indeed, the Court indicated, an employee's communication to her employer that she believes the employer has engaged in discrimination virtually *always* constitutes opposition to that activity. Applying this reasoning, the Court held that Title VII's opposition clause protects employees who report discriminatory actions during investigations, regardless of whether they submitted the complaint that led to the investigation.

3. The Impact/Significance of the Notable Decision.

Crawford makes clear that activities protected from retaliation under Title VII are to be viewed broadly. As a result, any communication to a supervisor, manager, or human resources staff member expressing the belief that the reporting individual or other employees are being subjected to discrimination (including harassment) based on a legally-protected status should be considered protected opposition activity, regardless of whether the reporting employee initiates or follows formal complaint procedures. Although *Crawford* addresses only the retaliation provisions of Title VII, its holding almost certainly will guide the interpretation of other federal and state statutes prohibiting retaliation, many of which contain "opposition" language similar to Title VII. Thus, as always, employers should continue to act thoughtfully and cautiously before taking adverse action against an employee who has reported discriminatory activity.

F. Retaliation – Proof of Causation

1. The Existing Legal Framework.

The phrase “cat’s paw” traditionally refers to Aesop’s fable in which a monkey convinces a cat to pull chestnuts from a fire. In the employment law context, “cat’s paw” refers to a theory of liability that applies where a biased lower-level supervisor influences a higher-level decision-maker to take an adverse employment action subsequently alleged to be retaliatory. In *Poland v. Chertoff*, 494 F.3d 1174 (9th Cir. 2007), the Ninth Circuit Court of Appeals approved the cat’s paw theory, holding that “even if the biased subordinate was not the principal decision maker, the biased subordinate’s retaliatory motive will be imputed to the employer if the subordinate influenced, affected, or was involved in the adverse employment decision.”

2. Notable Ninth Circuit Court of Appeals Decision.

The Ninth Circuit has now addressed the converse question: can a lower-level supervisor be held personally liable if the final decision-maker made a wholly independent and legitimate adverse employment decision, uninfluenced by the lower-level supervisor’s potentially retaliatory motives? In *Lakeside-Scott v. Multnomah County*, 556 F.3d 797 (9th Cir. 2009), Plaintiff Scott filed an administrative complaint alleging that one of her supervisors, Brown, favored homosexuals in hiring and promotions. Subsequently, the department’s Director instructed Brown to search another employee’s email account in response to allegations, unconnected to Scott, about racially-discriminatory email. Brown directed another, more technically savvy employee to conduct the search, which turned up, among other things, an email from Scott attaching a journal containing derogatory comments about homosexuals and excerpts of other employees’ work documents. After reviewing the journal, Brown showed it to the Director.

In accordance with the employer’s standard practice, the Director placed Scott on administrative leave pending an investigation into her apparent misconduct. The Director had a staff investigator conduct an investigation into Scott’s possible violation of the employer’s work rules and policies. The investigator interviewed 22 witnesses, including Scott and Brown. Brown’s only involvement in the investigation was answering questions during her interview. The investigator ultimately provided the Director with a report detailing his findings and recommending that the charges against Scott be sustained. After giving Scott an opportunity to explain her side of the story, the Director decided to terminate Scott’s employment. Scott filed suit against the employer and Brown, alleging she was terminated in retaliation for filing the administrative complaint against Brown. The jury found in Scott’s favor.

On appeal, the Ninth Circuit reversed and remanded the case for entry of a judgment in Brown’s favor. The Court noted that Scott’s journal was accidentally discovered during an investigation of *another* employee’s conduct, and Scott did not contend Brown targeted her for that investigation or selectively reported her misconduct. Further, Brown did not initiate the subsequent investigation or participate in it in a way that might have tainted its neutrality. To the contrary, the evidence established that the Director made an independent and legitimate decision to investigate and eventually terminate Scott. Accordingly, the Court concluded, there was no

causal link between Brown’s alleged bias against Scott and the Director’s decision to terminate Scott’s employment. Brown therefore could not be held liable for Scott’s discharge.

3. The Impact/Significance of the Notable Decision.

Although *Lakeside-Scott* specifically addresses the potential liability of an individual supervisor, its reasoning is equally applicable to employers’ potential liability for alleged retaliation. That is, to the extent an employer can establish it made an adverse employment decision *independently* of an allegedly biased supervisor, the employer should be able to defeat a retaliation claim. Of course, to remain effective, an immediate supervisor must be able to continue ordinary supervisory duties. Nevertheless, to protect against possible retaliation claims, any investigation of the allegedly discriminatory supervisor, or of misconduct by the reporting employee, should be conducted by a neutral party. Further, ultimate decisions regarding significant adverse employment actions should be made by a neutral decision-maker after a careful and independent review of the facts, with minimal or no participation by an allegedly biased supervisor.

G. Discrimination: Disparate Treatment v. Disparate Impact

1. The Existing Legal Framework.

Title VII (and the Washington Law Against Discrimination) prohibits employment discrimination on the basis of various protected classes. For example, they specifically prohibit intentional discrimination on the basis of race. Courts designate this as “disparate treatment” discrimination. Disparate treatment cases arise when discriminatory bias is alleged to have caused an employer to take an adverse employment action (*i.e.*, termination, failure to hire, etc.) against the plaintiff. With only a few exceptions, employers do not have valid defenses to justify intentional discrimination based on an individual’s protected status.

Anti-discrimination statutes also prohibit practices that do not intentionally discriminate, but result in a disproportionately adverse effect on individuals in a protected class. Courts designate this as “disparate impact” discrimination. Disparate impact cases sometimes arise when an employer uses an objective testing or scoring mechanism to help determine an applicant’s rank or eligibility in connection with hiring or promotion. Generally, employers may justify these practices by demonstrating that they are “job related for the position and consistent with business necessity.” Even if the employer meets that burden, a plaintiff may still succeed in establishing disparate impact discrimination by showing the employer refused to adopt an alternative practice that would have less disparate impact and still serve the employer’s needs.

2. Notable United States Supreme Court Decision.

In *Ricci v. DeStefano*, ___ U.S. ___, 129 S. Ct. 1694 (2009), the U.S. Supreme Court addressed the seemingly intractable problem of whether an employer may invalidate test scores that adversely impact minorities even if that action results in disparate treatment of white employees who have more favorable scores.

In 2003, 118 firefighters of the New Haven, Connecticut Fire Department took examinations to qualify for promotion to the rank of lieutenant or captain. This was not unusual – many employers rely on “objective examinations” to avoid any suggestion of bias in a highly competitive promotion process. Due to the contentious nature of the process, the City also spent \$100,000 to hire a firm to develop a test that could withstand legal scrutiny and avoid any appearance of bias toward any particular class of applicants.

When City administrators reviewed the test results, they confronted a highly divisive problem: the white candidates had significantly outperformed minority candidates. To make matters worse, the Mayor and other politicians decided to address the issue through a public debate. Not surprisingly, some firefighters argued the tests should be discarded because their results had a disparate impact on minorities. Other firefighters said the exams were neutral and fair, and invalidating them would result in disparate treatment of the white candidates.

In a no-win situation, the City opted to invalidate the test results. As a result, seventeen white and one Hispanic firefighter sued the City and its Administrators for violating Title VII by engaging in disparate treatment discrimination on the basis of their race.

In district court, the City prevailed on summary judgment. The plaintiffs then appealed to the 2nd Circuit Court of Appeals. The Court affirmed the district court’s ruling. The plaintiffs then appealed to the U.S. Supreme Court.

On June 29, 2009, the Court reversed the 2nd Circuit. It concluded that invalidating the tests constituted disparate treatment discrimination under the circumstances of the case. In reaching that result, the Court indicated that the issue was not whether the conduct was discriminatory (the Court held that it was), but whether the City had a lawful justification for it. The Court noted that the City only *feared* a disparate impact lawsuit from the minority firefighters. This, according to the Court, did not justify invalidating the test scores. The Court held that the City could only invalidate the test results if there were a “*strong basis in evidence*” that the results created disparate impact liability.

The Court then examined the facts to ascertain whether there was a “*strong basis in evidence*” that the test results created illegal disparate impact discrimination. First, the Court found that the City and the test designer took exhaustive steps to ensure the tests were job related and consistent with business necessity. Second, the Court found that there were no alternative practices that would have had less disparate impact. Given these factors, the Court concluded, the City was not subject to disparate impact liability and was not legally entitled to disqualify the test results that favored the white firefighters. As a result, the Court entered judgment for the plaintiffs.

3. The Impact/Significance of the Notable Decision.

Even though *Ricci* was a promotion case, its holding also applies in the context of hiring, layoffs, and reductions in force. The case is a valuable reminder for employers to ensure that all testing for hiring or promotions is job related and consistent with business necessity. Particularly

where race or other protected factors are likely to become issues in the selection process, employers would be wise to: analyze the essential skills of the position in question; draw questions from sources available to the candidates; weight the exam in a manner that is not likely to disfavor a protected group; and, if money is available, hire outside professionals to develop the testing parameters and procedures. Employers also should investigate whether alternative methods of evaluating employees might result in a reduced adverse impact on minorities. Finally, employers should conduct an adverse impact analysis to ascertain whether test results raise disparate impact concerns before finalizing decisions.

H. Sarbanes Oxley Act Retaliation – Elements of Claim

1. The Existing Legal Framework.

The Sarbanes-Oxley Act (“SOX”) protects employees of publicly-traded companies from retaliation for providing information related to possible acts of fraud against shareholders. *See* 18 U.S.C. § 1514A(a)(1). Such “whistleblower” claims under SOX are governed by the procedures applicable to whistleblower claims brought under 49 U.S.C. § 42121(b), which sets forth a burden-shifting procedure by which a plaintiff is first required to make out a prima facie case of retaliatory discrimination. If the plaintiff meets this burden, the burden shifts to the employer to demonstrate by clear and convincing evidence that it would have taken the same adverse employment action in the absence of the plaintiff’s protected activity.

2. Notable Ninth Circuit Court of Appeals Decision.

In *Van Asdale v. International Game Technology*, 577 F.3d 989 (9th Cir. 2009), plaintiffs, a husband and wife each working as in-house counsel for the employer, were terminated within a short period of time of one another, the first for poor performance, the second for a bad attitude and breach of company protocol. Plaintiffs filed a whistleblower suit under SOX, alleging they were terminated for having reported possible shareholder fraud in connection with the employer’s acquisition of another company. The district court granted summary judgment for the employer.

On appeal, the Ninth Circuit addressed for its first time the substantive elements of a SOX whistleblower claim. Initially the Court cited the required elements of a prima facie case: (1) the employee engaged in protected activity; (2) the person or entity accused of retaliatory conduct knew or suspected the employee did so; (3) the employee suffered an unfavorable personnel action; and (4) the circumstances raise the inference that the employee’s protected activity contributed to the unfavorable action. To establish the first element, the Court held, an employee’s communications must definitively and specifically relate to one of the statutorily defined categories of fraud or securities violations. However, the employee need not cite a particular code section—reporting conduct related to shareholder fraud is sufficient. Additionally, employees do not have to prove that shareholder fraud has *actually* occurred. Rather, plaintiffs need only establish that they had both an actual (subjective) and an “objectively reasonable” *belief* that shareholder fraud occurred. The employee’s belief will be considered objectively reasonable if her/his theory of shareholder fraud “approximate[s] the basic elements of

a claim of securities fraud,” which are: (1) a material misrepresentation or omission; (2) scienter (intent to defraud); (3) a connection with the purchase or sale of a security; (4) loss; and (5) causation. Similar to a retaliation claim under Title VII, temporal proximity between the protected activity and the unfavorable personnel action may raise an inference of causation under SOX.

The Ninth Circuit rejected the employer’s arguments that the plaintiffs should not be permitted to proceed with their claims because doing so would necessarily involve disclosure of attorney-client privileged information. Relying on decisions in other circuits, the Court held that “confidentiality concerns alone do not warrant dismissal of [the plaintiffs’] claims.” It noted that the language of SOX provides broad protection to individuals alleging retaliation and does not expressly exclude “in-house counsel” from such coverage. Further, the Court reasoned that the district court could take steps to limit the disclosure of privileged information, such as issuing protective orders and limiting testimony that might unnecessarily disclose such information. Taking all these factors into account, the Ninth Circuit concluded the plaintiffs had demonstrated a prima facie case of retaliatory termination, and the district court had therefore erred in granting summary judgment.

3. The Impact/Significance of the Notable Decision.

Van Asdale provides employers guidance regarding the elements of a prima facie SOX whistleblower claim. Importantly, the case confirms that employees need not prove fraud to be protected from retaliation under SOX. It is sufficient that they reasonably believe fraud *may* have occurred and communicate that belief to their employer. *Van Asdale* is also noteworthy because it confirms that in-house attorneys are protected under SOX and may use attorney-client privileged information to support whistleblower claims. To avoid liability for retaliation under SOX, as under Title VII and other discrimination laws, employers who take adverse action against employees who have engaged in protected activity must be able to show they had legitimate non-retaliatory reasons for their decisions, and would have taken the adverse action even had there been no protected activity.

I. Arbitration Agreements in Labor Agreements – Enforceability

1. The Existing Legal Framework.

There is a strong federal policy in favor of arbitration, and agreements to arbitrate are generally enforceable in state and federal courts, subject to limited exceptions. For some time, however, the U.S. Supreme Court’s opinion in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), was interpreted as precluding enforcement of agreements to arbitrate *statutory discrimination claims*. Eventually, the Court upheld enforcement of such agreements between an individual employee and his employer, requiring the employee to arbitrate an age discrimination claim rather than pursue it in court. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). Still, whether a union and employer may agree in a collective bargaining agreement (“CBA”) that covered employees must use the contractual arbitration process to determine statutory discrimination claims, and thereby waive employees’ right to a judicial forum for such claims,

remained uncertain. As discussed below, the Court has now answered that question in favor of arbitration.

2. Notable United States Supreme Court Decision.

In *14 Penn Plaza, LLC v. Pyett*, ___ U.S. ___, 129 S. Ct. 1456 (2009), the plaintiffs were night watchmen and members of the Service Employees International Union (“SEIU”). SEIU agreed to CBA language that required union members to submit all claims of employment discrimination, including claims under Title VII, the Age Discrimination in Employment Act (“ADEA”), and other federal and state statutes, to binding arbitration under the CBA’s grievance and arbitration procedures. The building owner of 14 Penn Plaza contracted with the plaintiffs’ employer for night watchman services. 14 Penn Plaza subsequently contracted with a separate security company, which made the plaintiffs’ night watchman services unnecessary. As a result, their employer reassigned plaintiffs to lower paying positions. SEIU grieved the reassignments on various grounds, including alleged age discrimination, but it ultimately withdrew the age claim. The plaintiffs then filed a lawsuit in federal court against their employer and the building owner, alleging age discrimination under the ADEA. The defendants moved to dismiss the lawsuit and compel the plaintiffs to arbitrate their claims under the CBA. Citing *Gardner-Denver*, the lower court denied the motion, and the court of appeals affirmed.

On review, the U.S. Supreme Court sided with the defendants. The Court reasoned that the *Gardner-Denver* line of cases did not involve arbitration clauses that empowered the arbitrator to resolve statutory claims and those cases thus held only that an arbitrator’s ruling on *contractual* claims did not preclude pursuit of similar *statutory* claims in court. By contrast, the CBA in *14 Penn Plaza* clearly and unmistakably required arbitration of statutory claims. The Court noted that while requiring arbitration of such claims waived employees’ right to assert the claims in court, it did not waive their substantive right to be free of discrimination, which they could still vindicate through the arbitration process. Thus the arbitration agreement would only be unenforceable if the ADEA itself precluded arbitration of ADEA claims. Citing its decision in *Gilmer* that the ADEA does *not* preclude arbitration of age discrimination claims, the Court held that a CBA that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable. In such cases, a covered employee must use the CBA arbitration process to assert age discrimination claims, and may not initiate such claims in court.

3. The Impact/Significance of the Notable Decision.

14 Penn Plaza builds on the wave of increasing judicial acceptance of arbitration as an alternative to court litigation, including for statutory discrimination claims. Although the case concerned ADEA claims, in particular, its reasoning is equally applicable to claims under other federal and state statutes, including Title VII, the ADA, and the Washington Law Against Discrimination. Thus, in negotiating CBAs, employers should consider whether to seek provisions requiring arbitration of statutory claims. Of course, obtaining such a specific clause in a CBA requires agreement with the union, and unions may not readily agree to such provisions. Employers wishing to require arbitration of statutory claims, whether for union or non-union employees, must remember that to be enforceable, any arbitration agreement must contain a clear and unmistakable intention to require arbitration and thus waive the right to a judicial forum.

J. National Labor Relations Act – Withdrawal of Recognition

1. The Existing Legal Framework.

The National Labor Relations Act (“NLRA”) governs relations between unions and private employers operating in interstate commerce. Once a labor union is certified as the exclusive bargaining representative of a unit of employees, the union is entitled to a non-rebuttable presumption of majority status for a reasonable time, typically one year. During this “certification year” period, the employer must recognize and bargain with the union; it may not withdraw recognition. A perceived loss of majority status, as demonstrated through a decertification petition or otherwise, does not entitle the employer to withdraw recognition during this year.

2. Notable Ninth Circuit Court of Appeals Decision.

In *Virginia Mason Medical Center*, 558 F.3d 891 (2009), the Ninth Circuit Court of Appeals addressed the issue of when the “certification year” begins to run. In December 2000, the United Staff Nurses Union Local 141 (“the Union”) won certification to represent employees at one of the employer’s clinics in the Puget Sound region. Shortly thereafter, the employer tested the certification by refusing to bargain with the Union.

The Union litigated the employer’s refusal before the National Labor Relations Board (“NLRB”). The NLRB found against the employer and ordered it to bargain in good faith with the Union. The employer appealed the NLRB’s bargaining order to the D.C. Circuit Court of Appeals. On May 28, 2002, the D.C. Circuit similarly ruled against the employer and ordered it to bargain with the Union.

In June through September 2002, the Union and the employer exchanged information to prepare for bargaining. On October 1, 2002, the Union and employer held their first bargaining meeting. In the following months, the parties met twenty-two times. On September 23, 2003, a new wrinkle occurred. Nine of the unit’s nineteen members signed a “decertification petition,” which asserted that the employees no longer wanted the Union to represent them. On September 26, the employer withdrew its recognition of the Union and stopped bargaining.

The Union filed an Unfair Labor Practices complaint with the NLRB. During those proceedings, the Union also alleged that the employer had unlawfully withdrawn its recognition of the Union during the “certification year.” The Union and the employer then litigated when the “certification year” began.

According to the Union, the “certification year” began on October 1, 2002, the date that the Union and employer held their first bargaining meeting. According to the employer, the “certification year” actually began in June 2002, which was when the parties began to exchange information.

The NLRB ruled against the employer, which appealed the ruling to the Ninth Circuit Court of Appeals. On appeal, the Court held that the certification year began on October 1, 2002, the date that the Union and employer held their first bargaining meeting. As a result, the Court found that the employer unlawfully withdrew recognition on September 26, 2003, which was four days before the expiration of the “bargaining year” following the Court-sanctioned certification. The Court further held a “*de minimis*” exception did not apply to the four days that the employer prematurely withdrew recognition. As a result, it held that the employer committed an Unfair Labor Practice by withdrawing recognition from the Union during the certification year.

3. The Impact/Significance of the Notable Decision.

VMMC is a reminder that the NLRB and courts do not regard preparations for bargaining as part of the actual bargaining process. Therefore, an employer that may consider possible decertification options must ensure that the “certification year” is calculated correctly, it only begins when they clearly begin to bargain in good faith.

K. National Labor Relations Act – Use of Employer’s Property for Union Activities

1. The Existing Legal Framework.

An employer has a “basic property right” to “regulate and restrict employee use of company property.” *Union Carbide Corp. v. NLRB*, 714 F.2d 657, 663-664 (6th Cir.1983). The National Labor Relations Board (“NLRB”) has consistently held that there is “no statutory right...to use an employer’s equipment or media,” as long as the restrictions are nondiscriminatory. In *Guard Publishing Company d/b/a The Register-Guard and Eugene Newspaper Guild*, 351 NLRB No. 70 (2007), the NLRB reaffirmed that principle as applied to employer-owned email systems, upholding the lawfulness of a company policy that barred use of its email system for non-job-related solicitations.

2. Notable D.C. Circuit Court of Appeals Decision.

Aspects of the NLRB’s decision in *Guard Publishing* reached the D.C. Circuit Court of Appeals. *Guard Publishing Co. v. NLRB*, 571 F.3d 53 (D. C. Cir. 2009). The case arose out of the employer’s implementation of the following policy regarding use of its email system:

Communications systems are not to be used to solicit or proselytize for commercial ventures, religious or political causes, outside organizations or other non-job-related solicitations.

The employer had historically permitted employees to use its email system for personal use, such as party invitations, jokes, and selling personal items. In May 2000, however, the employer disciplined an employee, who was the local union president, for using the email system to provide information about a union rally that had occurred earlier that week. In August 2000, the employer disciplined the same employee again for sending two additional emails asking employees to take specific actions to support the union during negotiations.

Before the NLRB, the union challenged both disciplinary actions, as well as the employer's email policy itself. The NLRB held that the email policy was lawful, reasoning that employees have no statutory right to use an employer's equipment or media so long as the restrictions are nondiscriminatory. Although the employer had allowed personal email solicitations, the NLRB concluded the company's discipline based on the two August emails was non-discriminatory; the NLRB distinguished the August emails as solicitations on behalf of *an organization*, and stated there was no evidence the employer had ever permitted use of its email system to support a group or organization. By contrast, the NLRB found the May 2000 email was not a solicitation but was similar to informational email the employer had allowed in the past. Consequently, the employer had engaged in unlawful, anti-union discrimination by disciplining the union president for that message.

On appeal, the union did not challenge the legality of the employer's underlying email policy, and the D.C. Circuit therefore did not consider that issue. Rather, the Court focused on whether the employer's policy was applied in a discriminatory manner. The Court upheld the NLRB's determination that the discipline based on the May 2000 email was discriminatory and therefore unlawful. However, contrary to the NLRB, the Court concluded the discipline based on the two August emails was discriminatory based on the emails union-related content. While agreeing that the August emails were "solicitations," the Court noted that: the employer's email policy did not distinguish between personal solicitations and those for "organizations;" the disciplinary warning for the August emails, by its terms, was based on use of the email system "for dissemination of union information;" and the only emails that had ever led to discipline were the union-related emails in this case. Given these factors, the Court concluded the NLRB had erred in finding the discipline based on the August emails was non-discriminatory.

3. The Impact/Significance of the Notable Decision.

Guard Publishing leaves in place (at least for now) the NLRB's blessing for policies that even-handedly prohibit employee use of employer-owned communication systems for non-work-related communications, including those concerning union activity. At the same time, the D.C. Circuit's decision makes clear that courts will look closely at the language and actual application of such policies. Where the language or application of a policy appears to single out union-related communications for less favorable treatment, an unfair labor practice challenge is likely to be successful. Employers with policies limiting or prohibiting non-work-related communications on employer-owned systems should be sure their policies and actual practices are consistent and non-discriminatory.

L. Wage and Hour Law – Commute Time and Preliminary and Postliminary Work

1. The Existing Legal Framework.

Under the federal Employee Commuting Flexibility Act of 1996 ("ECFA"), commuting time in a company-provided vehicle is not compensable if the employee and employer have entered into an agreement regarding the employee's use of the vehicle. In addition to excluding

commuting time from compensation, ECFA provides that an employee need not be compensated for “activities which are preliminary or postliminary to said principal activity or activities.” 29 U.S.C. § 254(a)(2).

2. Notable Ninth Circuit Court of Appeals Decision.

In *Rutti v. Lojack*, 578 F.3d 1084 (9th Cir. 2009), the Ninth Circuit addressed the issue of whether employees commuting to work in company-owned vehicles are entitled to compensation for commuting time and time spent on preliminary and postliminary activities. Rutti was employed by Lojack to install and repair security systems in customers’ vehicles. Rutti was paid on an hourly basis from the time he arrived at his first job until the time he completed his final job of the day. Prior to driving to his first job, Rutti also spent time receiving assignments, mapping his route, prioritizing his jobs and completing paperwork. Upon returning home in the evening, Rutti spent an additional fifteen minutes uploading data regarding his installations from a portable data terminal (“PDT”) provided by Lojack. This task required Rutti to connect the PDT to a modem, transmit the data, and ensure that the transmission was successful.

Rutti filed suit in federal court, on behalf of himself and all automotive technicians employed by Lojack, under the Fair Labor Standards Act (“FLSA”) and California law to recover compensation for the time spent commuting and performing various preliminary and postliminary duties. The trial court granted summary judgment for Lojack because the commute time was not compensable under federal or California law, and the preliminary and postliminary activities were either: (1) not integral to Rutti’s principal activities; or (2) consumed only a *de minimis* amount of time to complete.

On appeal, Rutti argued that he should have been compensated for his commuting time because his use of Lojack’s vehicle was a condition of his employment. The Ninth Circuit disagreed because ECFA specifically provides that when the use of a vehicle “is subject to an agreement on the part of the employer and the employee,” the commute is not part of the employee’s principal activities.

Turning to the issue of whether Rutti’s preliminary and postliminary activities were compensable, the Court explained that such activities are, generally, compensable when they are an “integral and indispensable part of the principal activities for which covered workmen are employed.” Noting that “principal activities” are those that are performed as part of an employee’s regular work in the ordinary course of the employer’s business, the Court explained that an employer’s obligation to compensate employees to perform “principal activities” is tempered by the “*de minimis* rule.” As the Court explained, the *de minimis* rule recognizes “the practical administrative difficulty of recording small amounts of time for payroll purposes.” While there is no specific amount of time that may automatically be denied compensation as “*de minimis*,” the Court noted that “most courts” have found a daily total of ten minutes spent on preliminary and/or postliminary tasks to be noncompensable.

With respect to Rutti’s alleged preliminary activities, the Court concluded that some of them were noncompensable because they were related to his morning commute, and the rest were *de minimis*. However, the Court did determine that Rutti’s postliminary activity of completing

the PDT transmission could be compensable because it often took fifteen minutes to complete. Accordingly, the Court reversed the entry of summary judgment on that single issue and remanded it to the district court for trial.

3. The Impact/Significance of the Notable Decision.

Rutti confirms that commuting time is generally not compensable under federal law. Unfortunately, it is not clear whether federal travel time rules apply equally under Washington law because Washington has not explicitly adopted ECFA or the Portal to Portal Act. As a result of the Washington Supreme Court's decision in *Stevens v. Brink's Home Security, Inc.*, the treatment of employee commute time in company vehicles is more restrictive under Washington law than under federal law. Under Washington law as interpreted by the *Brink's* Court, commute time between home and work in a company provided vehicle is compensable work time when: the employer strictly controls drive time; the employer prevents employees from using the vehicle for personal reasons; the employer requires employees to remain available to assist at other jobsites while driving to or from their homes; the nature of the employer's business requires employees to drive company vehicles to reach customers and carry necessary tools and equipment; and the vehicle serves as the location where employees often complete work-related paperwork. Applying this standard to the facts in *Rutti*, his commute time claim would likely fail under Washington law because, among other things, Lojack did not strictly control Rutti's drive time, did not require him to remain available to assist at other jobsites while driving to or from his home, and the vehicle did not serve as the location where he completed work-related paperwork.

M. Fair Labor Standards Act – Effect of Bankruptcy on Failure to Pay Wages

1. The Existing Legal Framework.

The Fair Labor Standards Act (“FLSA”) generally requires employers to pay employees at least the minimum wage for hours worked, and overtime beyond 40 hours in a workweek. An employer who fails to pay minimum wages or overtime due is liable to the affected employees for the unpaid amount, plus an equal amount in liquidated damages. 20 U.S.C. § 216(b). The FLSA defines an “employer” as “any person acting directly or indirectly in the interest of an employer in relation to an employee. . . .” 29 U.S.C. § 203(d). The Ninth Circuit has held that an individual is an “employer” subject to liability under the FLSA where s/he exercises control, including economic control, over the nature and structure of the employment relationship. *Lambert v. Ackerley*, 180 F.3d 997, 1012 (9th Cir. 1999) (en banc).

2. Notable Ninth Circuit Court of Appeals Decision.

In *Boucher v. Shaw*, 572 F.3d 1087 (9th Cir. 2009), the Ninth Circuit addressed whether individual managers may be held liable under the FLSA for unpaid wages when the employing entity has taken bankruptcy. The employer in the case—the Castaways—initially filed for Chapter 11 bankruptcy and continued to operate as the debtor-in-possession for approximately six months. It then ceased operations, and the bankruptcy was converted to a Chapter 7 proceeding. Three employees who alleged they were not paid for their final pay period and accrued vacation

and holidays brought suit under Nevada wage law and the FLSA against three Castaways managers: the chief executive officer, who owned 70 percent of the company; the individual who handled labor and employment matters, who owned 30 percent of the company; and the chief financial officer. The district court dismissed both claims, holding the plaintiffs could not sue the defendants under Nevada law or the FLSA.

On appeal, the Ninth Circuit certified the question of Nevada law to the Nevada Supreme Court, which held that individual managers cannot be “employers” under that state’s wage laws. Turning to the FLSA, the Ninth Circuit confirmed its prior broad reading of “employer,” and found the defendants’ ownership interests and management positions with the Castaways were sufficient to establish them as “employers” for purposes of FLSA liability. Further, the Court held, inasmuch as the defendants were not part of the Castaways’ bankruptcy, the bankruptcy and its automatic stay had no effect on the defendants’ personal liability under the FLSA. Therefore, the plaintiffs could proceed with their FLSA claims against the individual managers.

3. The Impact/Significance of the Notable Decision.

Boucher confirms that owners and managers with significant control over the company’s finances and payment of wages cannot hide behind their company’s bankruptcy to avoid individual liability under the FLSA. Managers/owners who may be saddled with such liability would do well to ensure that their employer company is paying wages owed, particularly where it appears the company may take bankruptcy and thus be protected from wage claims. This is true for wage claims under Washington law, as well, as described in the state law section, below. *Morgan v. Kingen*, 166 Wn.2d 526 (2009).

II. NOTABLE WASHINGTON STATE COURT DECISIONS

A. Washington Wage Law – Effect of Bankruptcy on Liability for Failure to Pay Wages

1. The Existing Legal Framework.

Like the Fair Labor Standards Act, Washington law requires payment of the minimum wage and overtime. Where an employer, officer, vice principal, or agent of an employer *willfully* fails to pay wages owed, that entity or individual is liable for twice the unpaid wages, costs, and attorneys' fees. RCW 49.52.070. To qualify as a vice principal or agent who may be held individually liable for willfully withheld wages, an individual must exercise control over the payment of wages. *Ellerman v. Centerpoint Prepress*, 143 Wn.2d 514 (2001). There are two situations that negate a finding of willfulness: where the failure to pay wages resulted from carelessness or an error, and where there is a bona fide dispute whether wages are owed. An employer's alleged financial inability to pay wages admittedly owed is *not* a defense to personal liability of an owner/officer of the company. *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152 (1998). In *Schilling*, neither the company nor its owner had taken bankruptcy.

2. Notable Washington Supreme Court Decision.

The Washington Supreme Court has reached much the same conclusion as the Ninth Circuit in *Boucher v. Shaw* (above) with regard to the impact of bankruptcy on individual liability for unpaid wages under Washington law. In *Morgan v. Kingen*, **166 Wn.2d 526 (2009)**, the defendants were the CEO/president and CFO/general manager of the employer, Funsters Grand Casino, and respectively held 31 and 7 percent ownership interests in the company. Both defendants controlled the payment of wages and had authority to prioritize payment of wages and other corporate obligations. Funsters opened for business despite being in poor financial condition, and it filed for Chapter 11 bankruptcy a year later. When the defendants later indicated they were unwilling to inject additional capital to pay the company's debts, including wages owed, the court converted the bankruptcy to a Chapter 7 liquidation. Before the conversion, wages went unpaid for two pay periods, totaling over \$179,000. The bankruptcy trustee seized about \$86,000 in cash from the company, but did not permit that money to be used to pay the wages owing.

In response to claims by a class of former Funsters employees, the defendants argued that the bankruptcy court's decision to convert the proceeding to a Chapter 7 liquidation, as well as the freezing of Funsters' assets, took away their ability to be "willful" in failing to pay the wages owed. The Court disagreed. It reasoned that given the defendants' ability to control the company's financial decisions, including whether to inject sufficient capital to pay wages, their failure to pay the wages was willful, and they were personally liable for the amount owed, including double the wages plus costs and attorneys' fees. Speaking more broadly, the Court refused to consider the bankruptcy of an employer company as a defense negating a claim of willful failure to pay wages.

3. The Impact/Significance of the Notable Decision.

Morgan confirms that owners and managers with significant control over their company's finances and payment of wages may be held individually liable for unpaid wages under Washington law, despite their company's bankruptcy.

B. Wage Payments and Withholdings at Termination

1. The Existing Legal Framework.

Under Washington law, wages due an employee upon termination must be paid at the end of the established pay period. RCW 49.48.010. Employers cannot withhold or divert any portion of an employee's final wages unless the withholding is required by state or federal law, is specifically agreed to orally or in writing, or pertains to medical surgical, or hospital care or service. Any such withholding must also be openly, clearly, and in due course recorded in the employer's books and records. *Id.* If an employer willfully fails to pay an employee's wages, the employee may recover double (exemplary) damages. RCW 49.52.050(2); *Champagne v. Thurston County*, 163 Wn.2d 69 (2008). A willful withholding is "the result of knowing and intentional action and not the result of a bona fide dispute" as to whether all or a portion of the wages must be paid. *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 849 (2002).

2. Notable Washington Court of Appeals Decision.

In *Backman v. Northwest Publishing Center, LLC*, 147 Wn.App. 791 (2008), the Washington Court of Appeals addressed whether an employer unlawfully withheld a resigning employee's wages by refusing to pay him sales commissions when they came due under his contract. Plaintiff Backman sold advertising for magazines, earning a monthly salary and commissions. Under his employment contract, Backman was to be paid commissions in the two pay periods immediately after the advertisements were published, "half on the first pay period following the issue month and the balance on the second pay period following the issue month." The contract further provided that "commissions will be recovered [from the employee] on all revenue not collected after 120 days from the date of invoice."

When Backman resigned, the employer promptly paid him his salary, but not his commissions for pending advertisements. The employer informed Backman that "commissions are not earned until paid by the customer, and only if paid within 120 days of publication. As commissions are earned, we will pay them to you in like manner." Backman then filed a claim for unpaid wages. The trial court dismissed the claim on summary judgment because by that time the employer had paid all of the commissions owed.

On appeal, the employer conceded that some of the commission payments were not timely under the contract's payment schedule. Applying the terms of the contract, one payment was five weeks late, one was a month late, and one was two weeks late. The employer argued that its delay was not willful, because once Backman quit, the only way for the employer to protect itself against possible nonpayment by the advertisers was to defer paying Backman commissions until

the advertisers' payments were received. The Court disagreed. It concluded that the failure of the contract to provide the employer protection in the case of Backman's departure did not mean the employer could unilaterally change the terms of the contract. The employer's decision not to adhere to the payment schedule established by the contract was made with knowledge and intent, and therefore constituted a willful withholding of wages in violation of RCW 49.52.050(2). As a result, the employer owed Backman twice the amount of wages unlawfully withheld, costs, and reasonable attorneys' fees.

3. The Impact/Significance of the Notable Decision.

Aside from the obvious point that contracts must be adhered to, *Backman* emphasizes the importance of well thought-out employment contracts. Here, the contract failed to provide a timeframe for paying commissions to departing employees that would also protect the employer in the case payment was not received from the customer. As a result, the employer paid a premium for its decision to unilaterally alter the terms of the employee's commission payment schedule.

C. Protected Concerted Activity

1. The Existing Legal Framework.

Although the doctrine of employment at will is still recognized under Washington law, court decisions over the years have significantly eroded employers' right to terminate an employee for "good reason, bad reason or no reason." The Washington Supreme Court recently addressed the viability of a claim for wrongful discharge in violation of public policy based on the terminations of employees that resulted from their efforts to have their superior discharged.

2. Notable Washington Supreme Court Decision.

In *Briggs v. Nova Services*, 166 Wn.2d 794 (2009), the Washington Supreme Court reviewed a decision of the Court of Appeals that had upheld the trial court's grant of summary judgment in favor of the employer on claims for wrongful discharge in violation of public policy.

Eight employees of a non-profit organization did not support the executive director, Brennan, who had been appointed by its Board. The employees, including six managers, wrote a letter to the Board expressing dissatisfaction with Brennan's performance in the areas of leadership, administration, finance, Board development, corporate culture, and community and government relations. The Board retained counsel to investigate whether there were any actions of Brennan that were illegal, and the investigation concluded that there was no unlawful conduct. The Board then hired a human resources consultant to mediate the employees' concerns regarding Brennan. The mediation efforts were unsuccessful and the Board ultimately granted Brennan the authority to make any personnel changes she deemed necessary.

Brennan and the mediator then met with four of the managers, and Brennan said she was willing to make efforts to address their concerns. On the same day she terminated the other two

managers for insubordination, petitioning grievances directly to the Board, and using company time to enlist the support of other managers to undermine Brennan's authority and position. The four managers and two other employees then sent a letter to the Board with the "non-negotiable" demand that the terminated managers be re-hired and that Brennan be fired, with the threat that the employees would not return to work unless their demands were met. The Board did not meet the demands, the employees did not return to work, and Brennan began hiring replacements.

The employees brought a lawsuit claiming that the terminations of two employees and replacement of the others constituted wrongful discharge in violation of public policy. The public policy they relied on was based on the state statute granting employees the freedom of "association, self-organization, and designation of representatives of [their] own choosing, to negotiate the terms and conditions of [their] employment," and the right to be free of interference, restraint, and coercion in concerted activities for the purpose of collective bargaining or other mutual aid and protection. The questions addressed by the Court were whether the statute relied on by the employees did reflect a public policy of Washington, and, if so, whether the employer's actions violated that policy.

The Court readily concluded the statute reflects a public policy that employees may not be terminated for engaging in concerted activity designed to improve their terms and conditions of employment. However, the Court found that the employees in this case were complaining not about working conditions such as wages and hours, benefits, or work rules, but rather about perceived deficiencies in the executive director's performance. The Court then borrowed from precedent under the National Labor Relations Act ("NLRA") and found that the complaints were about "managerial decisions, which lie at the core of managerial control," a category that is excluded from the definition of "terms and conditions of employment." The Court therefore held that the employees were not engaged in protected activity, and the termination of the two managers was not unlawful. The Court also held that the other six employees could not show either that they engaged in protected activity or that they were terminated. Significantly, the Court implied that *managerial* employees also have a protected right under Washington law to engage in concerted activities to improve working conditions. Such a right would be an expansion of rights provided by the NLRA, as supervisors and managers are not protected by that law.

3. The Impact/Significance of the Notable Decision.

Briggs provides a reminder that employees have the right to engage in concerted activities designed to improve the terms and conditions of their employment. The definition of protected concerted activity is expansive: cases decided under the NLRA have found that employees engaged in protected concerted activity when complaining about wages, benefits, breaks, safety issues, discrimination, harassment, and a host of other topics of common concern. Employers need not agree to demands of employees acting in concert, but should listen to legitimate concerns, decide upon an appropriate response, and avoid taking adverse action against employees, including supervisors and managers, who act jointly to improve working conditions, or against an individual employee presenting grievances on behalf of a group of employees (complaining only about one's individual terms of employment is not concerted activity). However, as *Briggs* demonstrates, the right to engage in concerted activity does not extend so far

as to supersede an employer's right to hire and retain its directors and managers. Thus employees who demand the termination of a manager based on disapproval of his/her management style are not engaged in protected activity, and subjecting them to reasonable disciplinary action, including termination, does not violate Washington's public policy.

D. Arbitration Agreements – Severability of Unconscionable Provisions

1. The Existing Legal Framework.

In the companion cases *Adler v. Fred Lind Manor*, 153 Wn.2d 773 (2004), and *Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 753 (2004), the Washington Supreme Court held that employment discrimination claims under the WLAD are subject to arbitration pursuant to valid arbitration agreements, but that agreements to arbitrate may be invalid if found to be substantively or procedurally unconscionable. The Court explained that an arbitration agreement may be *substantively* unconscionable if, among other things, it contains terms that are one-sided, overly harsh, cost prohibitive, or vague. An agreement may be considered *procedurally* unconscionable if, for example, during the process of forming the agreement the employee was not given a reasonable time to review the agreement or was not alerted to her/his right to counsel.

2. Notable Washington Court of Appeals Decision.

In *Walters v. A.A.A. Waterproofing, Inc.*, 151 Wn. App. 316 (2009), the plaintiff challenged an arbitration provision included in his employment agreement. The provision required all disputes between the parties, other than those relating to confidentiality or noncompetition issues, to be submitted to arbitration, and provided that any such arbitration would be conducted in Denver, Colorado. Additionally, the agreement provided that the prevailing party would be entitled to all costs and expenses of the arbitration, including attorneys' fees. In 2002, ignoring the arbitration provision, Walters filed an action in court, seeking overtime pay. The court granted the employer's motion to stay the lawsuit pending arbitration in accordance with the parties' agreement.

After a series of appeals and remands, the Washington Court of Appeals ultimately agreed with Walters that the arbitration agreement was substantively unconscionable in several respects. First, by requiring proceedings in Denver, the agreement made arbitration prohibitively expensive for Walters. In discussing this point, the Court noted that whether an arbitration agreement entails prohibitive costs must be determined case by case, based on the facts, with the party opposing arbitration carrying the burden of documenting her/his financial resources, the cost of arbitration, and any offer by the other party to defray those costs. In this case, Walters had submitted a declaration that established the cost of travel, food, and accommodation for the arbitration would be excessive in relation to his income. Second, in mandating that the prevailing *party* be awarded fees and expenses, the agreement was inconsistent with governing statutes, under which only a prevailing *employee* is entitled to such an award. Third, and related, in creating the risk that loss of the arbitration would result in an employee having to pay the employer's fees and costs, the provision was a strong deterrent to employees bringing action to vindicate their rights, such as the right to overtime pay. Accordingly, the reciprocal fees and costs provision was unconscionable

and unenforceable. Nevertheless, noting that the parties' agreement contained a severability provision, and removing the unconscionable provisions would leave a valid arbitration agreement, the Court ordered the unconscionable provisions to be severed, and the case to proceed to arbitration.

3. The Impact/Significance of the Notable Decision.

Walters demonstrates that Washington courts continue to favor arbitration where the parties have agreed in advance to arbitrate rather than litigate employment-related disputes. Instead of simply invalidating such agreements when one or more provisions are found to be unconscionable, courts are taking a practical attitude, severing the unconscionable provisions where possible so that arbitration may proceed. As *Walters* indicates, including an express severability clause will increase the likelihood of that outcome. To avoid extensive litigation over arbitrability, however (*Walters*' challenges to arbitration took seven years to resolve!), and to prevent the possibility of an arbitration agreement being ruled invalid, employers should avoid provisions that would make arbitration unreasonably costly, deprive employees of legal rights, or impose burdens they would not have if they filed their claims in court.

E. Arbitration – Arbitrator's Authority – Last Chance Agreement

1. The Existing Legal Framework.

Washington law permits review of an arbitration award only to determine whether an arbitrator acted "illegally" by exceeding his or her authority under the parties' contract. Labor arbitration awards are accorded great deference by the reviewing court, and a mistake of law or fact is not a basis to reverse an award. However, if the arbitrator exceeds his or her jurisdiction then the award may be overturned.

2. Notable Washington Court of Appeals Decision.

In *City of Yakima v. Yakima Police Patrolman's Association*, 148 Wn. App. 186 (2009), Division III of the Washington Court of Appeals reviewed a trial court decision that overruled a labor arbitrator's award. The award reinstated a police officer who had been terminated. The officer had previously signed a "Last Chance Employment Agreement" that required him to comply with all police department policies and procedures and all civil service rules. The last chance agreement provided that the officer waived the right to appeal or grieve the appropriateness of termination in the event he failed to comply with the agreement; he could only challenge the determination of whether he in fact violated the agreement.

The officer had been romantically involved with an employee in the City's 911 call center. After a domestic disturbance involving the officer and the other employee, the officer was ordered by his captain not to call the employee while she was at work. The City determined that the officer nonetheless called the employee at work in violation of the police department's rule requiring obedience to a superior's lawful order. The City also concluded the officer improperly used his badge to obtain entrance to a night club without paying the cover charge, which violated

another City policy. As a result, the City terminated the officer based on his violation of the last chance agreement.

The police union filed a grievance on the officer's behalf, which proceeded to arbitration. The arbitrator found that the officer did not improperly use his badge to gain access to the night club, and ruled that though the officer did call the female employee at work in violation of his superior's order, the insubordination was not "deliberate" and thus did not warrant termination. The arbitrator therefore ordered reinstatement.

The City appealed the arbitrator's award to Superior Court. That court concluded the officer's case depended on application of the last chance agreement. Because there was no contention that the call was accidental or inadvertent (the officer admitted making the call), the arbitrator erred when he found the officer's call was not deliberate. Accordingly, the court overturned the arbitrator's award and upheld the termination. The union then appealed.

The Court of Appeals first examined state and federal cases that establish the exceedingly limited scope of review of an arbitrator's award. Those cases allow review only of whether the arbitrator exceeded his/her authority granted by the parties' contract, and not of the merits of an award. The Court found that application of this standard required it to analyze whether the arbitrator's award exceeded the power he was granted by the last chance agreement. Because that agreement permitted the City to terminate the officer for any violation of City rules, the Court held, the arbitrator had no authority to determine whether termination was the appropriate level of discipline. Rather, the only issue within the arbitrator's jurisdiction was whether the officer violated his superior's order when he telephoned the other employee at work. The arbitrator exceeded his authority by determining that violation of the order was not deliberate and therefore did not justify termination. The Court therefore affirmed the lower court's decision reversing the arbitrator's award and upholding the officer's termination.

3. The Impact/Significance of the Notable Decision.

City of Yakima reaffirms that while arbitrators' awards will rarely be overturned, they may be reversed when the arbitrator exceeds his/her authority under the terms of the applicable agreement. In particular, the case highlights the benefit of using a last chance agreement as a disciplinary tool. A properly drafted last chance agreement can prevent an arbitrator from determining whether termination was for just cause (justified under the circumstances), and instead limit the arbitrator to deciding whether there was a violation of the last chance agreement.

F. Collective Bargaining – Grievance Procedures

1. The Existing Legal Framework.

The general rule under both PERC and NLRB authority is that grievances that arise after a collective bargaining agreement ("CBA") has expired cannot be brought under the CBA's grievance procedure.

2. Notable Washington Court of Appeals Decision.

Kitsap County Deputy Sheriff's Guild v. Kitsap County, 148 Wn. App. 907 (2009), involved two CBAs between the parties: one that was effective from January 1, 2003 to December 31, 2005; and the successor agreement, fully executed on July 24, 2006, that was effective from January 1, 2006 to December 31, 2007. Kitsap County refused to arbitrate ten grievances that arose during the period between the expiration of the original agreement and the execution of the successor agreement, citing the general rule, as stated in *Maple Valley Professional Fire Fighters v. King County Fire Protection Service No 43*, 135 Wn. App. 749 (2006). The Guild countered that the grievances fit under the successor CBAs' retroactivity language and must be arbitrated.

Division II of the Court of Appeals took little time to find for the Guild and reverse the trial court. The Court applied ordinary principles of contract law, stating that it interpreted contracts to ascertain the parties' intent by looking at the writing. It further noted that it treated a retroactive contract as if it was executed on the first date of the retroactive term. In doing so, it distinguished *Maple Valley* by noting that the CBA there had expired and no retroactive agreement took its place.

3. The Impact/Significance of the Notable Decision.

Employers should not be lulled into inattention by the general rule of *Maple Valley*. *Kitsap County* demonstrates that by agreeing to retroactively apply a successor CBA, the parties may "resurrect" grievances that arose during the hiatus between two CBAs.

G. Unemployment Compensation – "Misconduct"

1. The Existing Legal Framework.

Washington's unemployment compensation statute was enacted to "lighten [the] burden [that] so often falls with crushing force upon the unemployed worker." Laws of 1937, ch. 162, § 2. Under the statute, individuals who are involuntarily out of work generally qualify for unemployment compensation benefits. An employee is not entitled to unemployment benefits, however, if s/he is discharged from employment for "misconduct." RCW 50.20.066(1).

2. Notable Washington Court of Appeals Decision.

In *Markam Group, Inc. v. Department of Employment Security*, 148 Wn. App. 555 (2009), the Washington Court of Appeals examined the parameters of disqualifying misconduct. Markam fired one of its employees, a legal secretary, because she could not perform her job as required. The employee applied for and was granted unemployment compensation benefits by the Washington Employment Security Department ("Department"). An Administrative Law Judge and, thereafter, the Department Commissioner, affirmed the benefits. The Spokane County Superior Court subsequently reversed, and the Department and former employee appealed.

The primary issue on appeal was whether the former employee's undisputed actions, which included a general inability to perform her assigned tasks effectively, amounted to disqualifying misconduct under the applicable statute, RCW 50.04.294. The Court noted that while there are some instances in which careless or negligent acts may constitute "misconduct" under the statute, most, but not all, of the specified examples of misconduct require that an employee act "deliberately or willfully." Further, the statute expressly excludes certain conduct from the definition of misconduct, including "[i]nefficiency, unsatisfactory conduct, or failure to perform well as the result of inability or incapacity." Thus, mere incompetence does not constitute statutory misconduct.

Markam argued the employee had committed "misconduct" as defined under another section of the statute by engaging in a "[w]illful or wanton disregard of the rights, title and interests of the employer." Concluding that "willful" and "wanton" behavior must be intentional, the Court disagreed. The facts did not support a finding that the employee deliberately failed to perform her job or wantonly disregarded the employer's interests. Rather, she tried to perform to the employer's standards but was unsuccessful. Accordingly, the Commissioner had correctly determined that the employee did not engage in misconduct and was entitled to unemployment benefits.

3. The Impact/Significance of the Notable Decision.

Markam confirms that mere incompetence in performing one's job does not constitute disqualifying misconduct under the statute. Although not addressed by the decision, carelessness and negligence are also insufficient to establish misconduct under the statute unless they cause or would likely cause serious bodily harm to the employer or a coworker, or they are of such a degree that they show intentional or substantial disregard of the employer's interest. As a result, absent willful or deliberate misconduct, an employee terminated for poor performance will likely be entitled to unemployment compensation benefits.

H. Workers' Compensation: The "Exclusive Remedy" Provisions of the IIA

1. The Existing Legal Framework.

Washington's Industrial Insurance Act ("IIA") (which covers workers' compensation) provides the exclusive remedy for injuries arising in the course of employment and for occupational diseases. However, it does not cover injuries or diseases that fall outside the scope of employment or do not come within the IIA's definitions of "injury" and "occupational disease."

2. Notable Washington Court of Appeals Decision.

In *Rothwell v. Nine Mile Falls School District*, 149 Wn. App. 771 (2009), Division III of the Court of Appeals addressed the parameters of exclusivity under the IIA. Rothwell was a District custodian. Her supervisor asked her to report early to replace a distraught coworker, but she was not told why. She later found out that a student she knew had committed suicide at the

front entrance to the school by shooting himself in the head. With the exception of a couple of breaks, Rothwell was required to remain at the school until 4:30 a.m. the following morning. During that time, various District managers ordered her to: remain at the front gate to prevent unauthorized persons and media from entering; go through the classrooms the victim attended during the day to determine if he had left any bombs; and, clean the suicide scene and the location where the bomb squad detonated a pipe bomb removed from the student's backpack, which Rothwell had handled earlier. The District then ordered Rothwell to return to work early the next day to hand out coffee and food to students and parents. And, for several days afterward, the District required Rothwell to pick up candles and cards left at the scene.

Rothwell sued the District for intentional and negligent infliction of emotional distress she alleged to have suffered because of the District's actions. The District moved to dismiss Rothwell's complaint, arguing that her claimed injury occurred during the scope of her employment, and that her claims were therefore precluded by the IIA. The trial court dismissed the action based on the exclusivity provisions of the IIA.

The Court of Appeals agreed with the District that Rothwell's stress occurred during the scope of her employment, because she was acting at the direction of her employer and in furtherance of its interests. Even so, the Court concluded that Rothwell's mental stress was not a "sudden and tangible happening [] of a traumatic nature, producing an immediate or prompt result," as "injury" is defined in the IIA. Nor was the stress an "occupational disease," which must arise "naturally and proximately out of employment." The Court noted that although mental conditions caused by stress do not constitute "occupational diseases" under the IIA, stress resulting immediately from a "single traumatic event" can constitute a covered "injury." In Rothwell's case, though, her mental condition did not result from one particular task assigned by the District, but developed over time in response to a series of orders and duties over several days. Therefore, the Court concluded, Rothwell's injuries were not covered by the IIA and were not barred by its exclusive remedy provisions. The Court reversed the dismissal of Rothwell's claims, allowing them to proceed in the trial court.

3. The Impact/Significance of the Notable Decision.

The IIA's provisions result in workers' compensation benefits being the exclusive remedy for most on-the-job injuries and diseases arising out of employment. *Rothwell* is a reminder, however, that not all injuries or medical conditions that occur during or as a result of employment are covered by the IIA. Where a condition does not fall within the IIA's definitions of "injury" or "occupational disease," employees may seek compensation through tort claims such as those filed by Rothwell.

I. Definition of Disability – Retroactive Application (WLAD)

1. The Existing Legal Framework.

In 2006, the Washington State Supreme Court found that the meaning of "disability" as used in the Washington Law Against Discrimination ("WLAD") was consistent with the

definition of disability found in the Americans with Disabilities Act (“ADA”). *See McClarty v. Totem Elec.*, 157 Wn.2d 214 (2006). In 2007, the Washington Legislature rejected the ADA’s narrow definition of “disability” and amended the WLAD to include a new and far more expansive definition of “disability” than that applicable under the ADA. The legislature purported to make the new definition retroactive to all claims occurring *before* July 2006, the date of the *McClarty* decision. The amendment exempted from its coverage conduct occurring after *McClarty* issued but before the effective date of the amendment. Thus it avoided reversing *McClarty*.

2. Notable Washington Supreme Court Decision.

In *Hale v. Wellpinit School District No. 49*, 165 Wn.2d 494 (2009), the Washington Supreme Court considered whether the legislature’s retroactive amendment of a statute the Court had previously construed violated the separation of powers doctrine. The Court held that there was no constitutional violation in the legislature’s application of the new WLAD definition of disability to claims predating the *McClarty* decision. Although statutory amendments are generally presumed to be prospective, where there is no constitutional prohibition, an amendment may be retroactive if “the legislature so intended or if it is curative.” Here, at the time of the Court’s *McClarty* decision, the WLAD contained no definition of the term “disability.” Thus, *McClarty* was merely an attempt to fill the legislative void. However, the legislature believed *McClarty* failed to recognize that the WLAD is independent from and provides greater protection than the federal ADA. In amending the WLAD, the legislature unequivocally and explicitly expressed the intent to apply what lawmakers believed was the proper definition of “disability” retroactively. At the same time, the legislature was careful not to reverse the *McClarty* decision or interfere with any judicial function. Under these circumstances, the Court concluded, the legislature’s action did not infringe upon the Court’s independence or integrity, and the new definition of disability could be applied retroactively.

3. The Impact/Significance of the Notable Decision.

Hale makes clear that the more expansive amended definition of disability under the WLAD applies to any disability claim based on conduct occurring either before July 2006 or after the amendment became effective in July 2007. [Conduct occurring between July 2006 and July 2007 remains governed by *McClarty*.] The case also serves generally as a reminder to Washington employers of the need to be exceedingly careful in addressing employee medical conditions, which now almost always constitute protected disabilities under Washington’s expansive definition of disability.

J. Negligent Hiring - Duty to Conduct Background Checks

1. The Existing Legal Framework.

Washington courts have held that to establish a claim for negligent hiring of an employee who subsequently causes harm, the plaintiff must prove: (1) the employer knew or, in the exercise of ordinary care, should have known of the employee’s unfitness at the time of hiring;

and (2) the employee proximately caused the plaintiff's injury. *E.g., Carlsen v. Wackenhut Corp.*, 73 Wn. App. 247 252 (1994).

2. Notable Washington Court of Appeals Decision.

In *Rucshner v. ADT Security Systems, Inc.*, 149 Wn. App. 665 (2009), Division II of the Court of Appeals found that at least in some circumstances, an employer's failure to conduct a criminal background check may support a negligent hiring claim. The case arose out of conduct by Robinson, an employee of one of the defendants, Puget Sound Protection ("PSP"). Pursuant to contracts with ADT, PSP employees made sales calls on and installed ADT alarm systems in residences. In the contracts, PSP warranted to ADT that all PSP employees providing those services had passed a drug screen and a criminal background check. Based on monetary considerations, however, PSP did not actually conduct drug tests or background checks on all employees, instead doing so on a discretionary basis.

Robinson had several past convictions for theft and drug-related activity but did not disclose that information on his PSP application form. PSP hired him without doing a drug test or criminal background check. In connection with one of his sales calls, Robinson spoke with MH, the 14-year-old daughter of the resident. He subsequently called MH repeatedly, despite her requests that he stop doing so. After a couple of months, Robinson forced his way into the home and raped MH. He eventually pleaded guilty to third degree rape and unlawful possession of a controlled substance in connection with that conduct.

MH's guardian, Rucshner, sued ADT and PSP, arguing they breached a duty of care by failing to perform a criminal background check on Robinson. The trial court granted summary judgment, dismissing the claims.

The Court of Appeals reversed the dismissal as to PSP. It reasoned that PSP's contractual warranty to ADT to conduct criminal background checks and drug screens on all applicants created a duty to people such as MH, who, even though not parties to the contracts, arguably suffered harm as a result of PSP's failure to properly perform its contractual duties. In addition, the Court held, even when an employee acts outside the scope of his employment, as did Robinson, the employer has a limited duty to foreseeable victims to prevent the "tasks, premises, or instrumentalities entrusted to the employee" from endangering others. In Robinson's case, his assigned duty to make sales calls on residences necessarily put him in contact with anyone present in the homes, including children such as MH. Given these factors, the Court concluded there was a genuine issue of fact as to whether PSP's hiring of Robinson and sending him out on sales calls without having conducted a criminal background check proximately caused MH's injury. The claims against PSP were therefore remanded for trial.

3. The Impact/Significance of the Notable Decision.

As *Rucshner* demonstrates, employers would be well advised to conduct reasonable background checks tailored to the circumstances of a given position. Failure to conduct such checks where the employer has contractually promised to do so may result in liability, not only to the other contracting party, but also to any third parties arguably injured as a result of the failure.

In addition, where a position will provide an opportunity for an employee to cause harm to third parties—such as where an employee will be given access to private homes or to customers’ personal information—failure to conduct reasonable background checks that would reveal past inappropriate conduct by a job applicant may subject the employer to liability for any harm the applicant later causes in connection with the job. Background checks also enable employers to avoid hiring individuals whose past criminal or employment history indicates problems that may cause harm to the employer itself.