SEBRIS BUSTO JAMES Employment Law Note September 2014

Employment law Update: Summer 2014

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This summer has been one of the warmest and sunniest in recent memory. But while the rest of the Northwest has been enjoying the weather, local courts have been busy deciding employment law issues. So as summer turns to fall, we reflect on four noteworthy cases decided by Washington courts and the Ninth Circuit.

Joint Employers Must Ensure Compliance with Washington's Minimum Wage Act

In early August, the Supreme Court of Washington ruled that a joint employer may be liable for minimum wage law violations, regardless of the existence of a formal employment relationship with the affected employee. In *Becerra v. Expert Janitorial, LLC*, the plaintiffs were janitors that cleaned Fred Meyer stores for a subcontractor. The subcontractor classified the janitors as independent contractors to avoid paying minimum wage, overtime, and payroll taxes. The janitors sued the subcontractor, the main contractor, and Fred Meyer, claiming minimum wage and overtime violations.

The trial court dismissed the janitors' claims against the main contractor and Fred Meyer after an examination of four factors to determine the "economic reality" of the work relationship. The Supreme Court reversed, holding that an "economic reality" test was appropriate but that the trial court should have considered 13 factors, not just four. The decision brought Washington's minimum-wage jurisprudence in line with the 13-factor test used under federal law and makes it important for employers to ensure that their contractors and subcontractors follow minimum wage laws. Otherwise, employers may unwittingly be responsible for unpaid wages.

Washington Court Expands Scope of Public Policy Wrongful Discharge

Washington's Court of Appeals continued the state's trend of allowing wrongful-discharge-in-violation-of-public-policy claims, even when other remedies exist to protect the public policy. Historically, public policy claims have been limited to only those cases where the claim was necessary to protect some important public policy. Thus, a public policy claim has traditionally been unavailable where other remedies exist. Yet in *Becker v. Community Health Systems, Inc.*, the Court of Appeals recognized a public policy claim for a former chief financial officer who had been discharged after projecting a larger-than-expected operating loss. The employer had allegedly asked him to revise his projection to show a smaller loss, and when he refused to do so, the employer fired him. The CFO sued for wrongful discharge in violation of public policy. The employer countered that several statutes adequately protected the public policy of honesty in corporate financial reporting, including the Sarbanes-Oxley Act and the Securities Act of Washington among others. Nonetheless, the Court of Appeals allowed the CFO's claim to proceed, opining that the statutes were inadequate to "fully vindicate public policy."

All employers should take note of this decision because public policy claims are often a catch-all for employees seeking to sue their former employers, and public policy claims by their nature tend to stretch outside of well-known litigation boundaries. The decision in *Becker* will allow more of these claims to survive pretrial motions, ultimately increasing employers' defense costs. An employer's best defense to these and other wrongful-discharge claims is a well-documented termination for legitimate reasons.

Independent Contractors are Protected by the Washington Law Against Discrimination

The distinction between employees and independent contractors often determines the applicability of employment laws. However, the Washington Court of Appeals recently held that this distinction is immaterial with respect to the Washington Law Against Discrimination (WLAD). In *Currier v. Northland Services, Inc.*, an independent contractor truck driver overheard another independent contractor making a racist joke. He reported the incident and the employer terminated his contract two days later for "customer service issues." In the ensuing lawsuit, in which the plaintiff alleged retaliation in violation of the WLAD, the employer argued that the plaintiff was not protected by the WLAD because he was an independent contractor. The court held that the WLAD makes no distinction between employees and independent contractors, instead protecting "any person" from retaliation.

The court's decision in *Currier v. Northland Services, Inc.* requires those who retain independent contractors to ensure that they do not discriminate against those contractors. Businesses should also be sure that their anti-discrimination policies explicitly protect independent contractors.

Plaintiff Fails to Show that His Interpersonal Problems Resulted from a Disability

In contrast to the three worker-friendly decisions above, the Ninth Circuit recently dismissed a police officer's claim under the Americans with Disabilities Act (ADA) for failure to show a disability. The employer fired the officer for severe interpersonal problems with other employees, which the officer blamed on attention deficit hyperactivity disorder (ADHD). The Ninth Circuit Court of Appeals found that the plaintiff had not produced sufficient evidence to show that his ADHD limited his ability to work in any way. The court also found that even if the plaintiff's ADHD had contributed to his interpersonal problems, "one who is able to communicate with others, though his communications may at times be offensive, inappropriate, ineffective, or unsuccessful," is not "disabled" as defined by the ADA. If applied in the right circumstances, this decision ought to give employers relief from "cantankerous" employees who insist that their offensive behavior is a symptom of a disability.

These cases illustrate the ever-changing legal landscape for employers. It is therefore imperative that employers keep up with developments like these to make sure their practices and policies comply with the latest legal developments.