Washington Courts Labor & Employment Update

Authors

Kandis M. Sells
John Peterson

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Washington courts have recently issued a handful of decisions that are instructive to employers.

Anfinson v. FedEx Ground Package System

On July 19, 2012, the Washington Supreme Court issued its opinion in *Anfinson v. FedEx Ground Package System*, No. 85949-3. The issue before the Court was to determine the proper test for classifying workers as employees or independent contractors for the purposes of the Washington Minimum Wage Act (MWA), RCW 49.46. In *Anfinson*, FedEx delivery drivers brought an action seeking overtime wages under the MWA. The MWA and its overtime provisions apply to "employees," but not independent contractors. The parties disagreed on what test should be applied to determine whether the delivery drivers were "employees" under the MWA. The drivers argued that the "economic-dependence" test applies, which looks at whether an individual is dependent economically on the business to which he or she is rendering service. FedEx argued that the "right-to-control" test applied, that is, whether the employer possessed the right to control the alleged employee's physical conduct in the performance of his or her duties.

The Washington Supreme Court affirmed the Court of Appeals' determination that the correct standard is the "economic-dependence" test. The Court held: in determining whether someone is an "employee" under the MWA the relevant inquiry is "whether, as a matter of economic reality, the worker is economically dependent upon the alleged employer or is instead in business for himself." The Court found that because the MWA adopted nearly verbatim the federal Fair Labor Standards Act definition of "employee," there was a legislative intent to adopt the federal standards in effect at that time. The federal courts had already rejected the right-to-control test in favor of the economic-dependence test. Also, because the MWA is remedial legislation that is to be afforded liberal construction, the Court found that the economic-dependence test provides broader coverage than the right-to-control test.

This clarification of the correct independent contractor test provides employers with helpful guidance as they determine whether to classify workers as independent contractors or employees. It also provides an opportunity for employers to get ahead of potential lawsuits or government investigations, both by properly classifying workers at the outset and auditing their current independent contractor agreements to ensure proper classification under the "economic-dependence" test.

Potential costs to the employer if a worker is misclassified as an independent

contractor include:

- Payment of back pay and overtime compensation going back for a period of two years or more, as well as penalties equaling the amount of back and overtime pay;
- Payment of the full amount of the worker's income tax which should have been withheld, both the employer and the worker's portions of the FICA tax, plus penalties;
- Damages for failing to provide certain benefits made available to similarly situated employees; and,
- Liability for attorneys' fees, criminal sanctions, and other penalties against the employer and, if the employer is an entity, against its corporate officers personally.

In light of this new guidance, and the severe penalties associated with misclassification, we recommend that companies conduct an audit of their existing independent contractor agreements to determine whether the workers should be classified as independent contractors or employees under the Anfinson test. We also recommend that companies consider this guidance when determining whether to enter into a new independent contractor agreement.

Short v. Battle Ground School District

The Washington Court of Appeals recently declined to allow a religious discrimination claim under state discrimination statutes based on a "failure to accommodate" theory. In *Short v. Battle Ground School District*, No. 42011-2-II (Div. 2, June 26, 2012), the plaintiff, Ms. Short, was a "devout Christian woman with deeply held religious beliefs." Plaintiff's job was to assist the school district superintendent, but she was also assigned to assist the school district's public information officer at times. The superintendent eventually asked the plaintiff to lie to the public information officer, which violated plaintiff's religious beliefs. Plaintiff refused to lie, allegedly causing the superintendent to yell at plaintiff and conduct herself in a manner that the plaintiff found "increasingly intolerable." Plaintiff asked to take leave because of the alleged treatment from the superintendent, eventually resigning while on leave.

Plaintiff sued the school district and the superintendent alleging, among other things, "failure to accommodate" her religious beliefs under the Washington Law Against Discrimination (WLAD), RCW 49.60. While federal law allows a religious discrimination claim for "failure to accommodate" religious beliefs, the court of appeals determined that the WLAD does not recognize such a claim. In making its determination, the court cited a previous Washington Supreme Court opinion (*Hiatt v. Walker Chevrolet Co.*) pointing out that federal Title VII was amended at one point to expressly impose an affirmative duty on employers to accommodate their employees' religious beliefs, while the Washington legislature and Human Rights Commission (HRC) did not similarly amend the WLAD. In Hiatt, the Washington Supreme Court left open the question whether the WLAD might *implicitly* require accommodation of religious beliefs. In *Short*, the court of appeals found that it does not. The court declined to find that the WLAD implied a "failure to accommodate" religious beliefs, citing no indication from the legislature or HRC that such a claim was originally contemplated. The court stated that they cannot judicially promulgate legislation or administrative regulations for a "failure to accommodate" claim under the WLAD when the "government branches tasked with establishing public policies relating to WLAD have remained silent, despite

sweeping changes at the federal level."

Fiore v. PPG Industries, Inc.

A recent Washington Court of Appeals case shows the potential dangers and costs involved in a relatively small wage and hour case. In *Fiore v. PPG Industries, Inc.*, No. 66956-7-1 (Div. 1, July 2, 2012), the parties stipulated to a small amount of damages—$12,203.10—but the plaintiff was awarded over *$500,000* in legal fees by the trial court.

The parties in *Fiore* were fighting over whether the plaintiff was an administrative employee exempt from the overtime provisions of the Washington Minimum Wage Act (MWA). However, the more interesting and frightening point for employers is the amount of legal fees awarded. After receiving an unfavorable arbitration decision, the plaintiff sought a trial de novo in Superior Court. In seeking the trial de novo, the plaintiff faced the risk of having to pay the defendant's attorney fees if he did not improve his position from the arbitration decision.

Both parties moved for summary judgment with the trial court. The trial court granted in part the plaintiff's motion for summary judgment ruling that the defendant could not demonstrate that plaintiff was exempt from the MWA. The trial court also found that defendant willfully withheld the additional wages owed to plaintiff. The parties thereafter stipulated to damages of $12, 203.10, and due to the finding of willfulness, the trial court entered judgment against defendant for $24, 406.20.

Plaintiff requested an award of attorney fees and costs, and asked for a fee multiplier of .50 for the risk associated with seeking a trial de novo. The trial court awarded plaintiff fees and costs in the amount of $596,559.47, including a .25 multiplier. Not surprisingly, the defendant appealed. The court of appeals held that the trial court did not err in granting plaintiff's motion for summary judgment as to the MWA claim.

More importantly, the court of appeals also addressed the awarding to plaintiff of attorney fees and costs. The court of appeals affirmed the trial court's determination of the "lodestar" amount of attorney's fees. The "lodestar" amount is calculated by "multiplying the reasonable hourly rate by the reasonable number of hours incurred in obtaining the successful result." Under Washington law, a large attorney fee award in civil litigation won't necessarily be overturned merely because the amount at stake in the case is small. The court of appeals found that the trial court's determination of the number of hours spent and hourly rate billed was reasonable.

However, the appellate court found that the trial court erred by awarding plaintiff a .25 multiplier on the attorney fee award, stating that the extensive and time-consuming nature of the litigation was encompassed within the lodestar amount and the policies cited by the trial court as justification for the multiplier do not support such an award. A fee multiplier is occasionally warranted when the lodestar amount does not adequately account for the high risk nature of the case. Here, the appellate court found that the litigation was not high risk and did not present risky trial strategies or problems of proof. The appellate court overturned the trial court's award of the multiplier, but affirmed the award of attorney fees and costs in all other respects. As an added kicker, the court awarded plaintiff his fees incurred in the appeal.

This case is a good example of how a relatively small matter can balloon into a much larger overall end cost.