

**A Discussion of Organizing and Legal Strategies in a High Technology Environment:
The Microsoft-WashTech/CWA Case**

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INTRODUCTION

The descriptions and analyses reported in this paper flow from the authors' field study of high-end contingent workers conducted primarily at Microsoft Corporation's corporate headquarters in Redmond, Washington.¹ Extensive interviews with union and rank-and-file activists, "temporary employment" agency² representatives, Microsoft managers, and the legal team challenging Microsoft's "permatemp" strategy have left us with some understanding of the complexities of organizing in the high technology industry (high tech).³

Although high tech contingent workers differ from their low-wage counterparts, in educational level, skill level and wage-earning power, high tech contingent workers are vulnerable to many of the same forces that affect contingent workers in other industries: job insecurity, fewer benefits, and lower levels of compensation.⁴ Employer motivations for utilizing contingent workers in high tech workplaces and the difficulty of coordinating suitable union organizing responses are consistent with most of the industries examined by this Subcontracted Worker Initiative Strategy Forum.

The joint employer doctrine ministers over workplaces that use contingent labor and compels activists to pursue new union and/or legal strategies in both low and high-wage environments. Our paper discusses the effort that is underway at Microsoft, explains why it is so

¹ This paper represents a preliminary report of observations gathered during field research conducted this past summer. A more complete discussion of the Microsoft-WashTech/CWA case will be presented in Danielle van Jaarsveld's forthcoming Master's Thesis.

² Given the long-term duration of work assignments, temporary employment agencies will also be referred to as "payrolling agencies" throughout this paper.

³ For the purposes of this paper, a high technology firm is "engaged in the design, development, and introduction of new products and innovative manufacturing processes, or both, through the systematic application of scientific and technical knowledge." Daniel Hecker, (1999) "High-Technology Employment: A Broader View," *Monthly Labor Review*, Vol. 122, No. 6, p. 18.

⁴ Chris Benner, (1996) "Shock Absorbers in the Flexible Economy: The Rise of Contingent Employment in Silicon Valley," (Working Partnerships USA), pp. 1-2.

shaped, and offers a perspective that will hopefully permit each of us to think and act more clearly about this subject.

We begin by describing the experience of Microsoft contractors and mention some of the literature that has informed us about the contingent workplace.⁵ For the purposes of this paper, we will discuss a subset of the contingent classification. Although the Microsoft workforce consists of different types of contingent workers, this discussion will focus on what Microsoft refers to as “contractors.”

We will proceed by detailing the early stirrings among Microsoft workers that resulted in the formation of the Washington Alliance of Technical Workers (WashTech) and affiliation with the Communication Workers of America (CWA). In doing so, we will describe how workers obtain contract employment at Microsoft, the role of temporary employment agencies, and detail WashTech/CWA’s strategies in this organizing drive. We will complete our discussion by outlining the innovative litigation undertaken by contingent workers against Microsoft and explain its significance in the struggle to bring economic fairness to the contingent workplace.

I. Characteristics of Contract Employment at Microsoft Corporation

Approximately thirty-five percent of Microsoft’s high tech workforce in Washington State consists of contractors.⁶ Contractors, also referred to as “agency temps,” are hired by Microsoft through companies referred to as “temporary employment agencies.”⁷

According to one temporary employment agency (TEA) which supplies contractors to Microsoft, TEA responsibilities include providing workers with “a comprehensive benefits

⁵ Contractors, also referred to as “agency temps,” are placed at Microsoft by temporary employment agencies in positions ranging from software testing to technical writing.

⁶ Testimony of David F. Stobaugh, Bendich, Stobaugh & Strong, P.C., “An Employee By Another Name Is Still An Employee,” before the U.S Department of Labor on September 8, 1999, p. 11. Microsoft’s Puget Sound workforce consists of approximately 15,392 workers.

package, regular timely paychecks, computing and withholding taxes, and career development and assistance in finding [the] next assignment or direct hire position.”⁸ Meanwhile, an alternative interpretation of the TEA’s function is offered by the law firm of Bendich, Stobaugh and Strong, P.C. (Bendich) which represents a large, undefined class of former and current Microsoft workers who are suing for benefits.⁹ The firm believes that the primary function of TEAs is to provide “payrolling” services to clients.¹⁰ They assert that the agencies are central to Microsoft’s strategy to avoid legal responsibility and employment taxes by shifting contingent workers to the payrolls of TEAs.¹¹

At Microsoft, the contracting relationship begins when an applicant seeks work at one of Microsoft’s workgroups or one of the TEAs. In either case, before starting work applicants must contract with a Microsoft-approved TEA. When a contractor becomes an “employee” of a TEA and works at Microsoft, the TEA remains the “employer” for that worker unless Microsoft decides to convert the contractor into a full-time employee.¹²

The relationship between Microsoft’s contractors and its TEAs fits George Gonos’ description in his detailed discussion of temporary help firms.¹³ He refers to the existence of a “triangular employment relationship” between the worker, the temporary help agency, and their client.¹⁴ This arrangement enables the client, in this context, Microsoft, to shift the legal and payrolling responsibility for its contingent workers to temporary help firms.¹⁵ The ongoing relationship between Microsoft’s TEAs and contractors distinguishes their activities from

⁷ There are fifteen temporary employment agencies that supply contractors to Microsoft.

⁸ Sakson & Taylor OnSite Employee Handbook, p. 1.

⁹ *Vizcaino v. Microsoft Corp.*, 97 F.3d 1187 (9th Cir. 1996).

¹⁰ Interview with Bendich, Stobaugh & Strong, P.C. on July 13, 1999.

¹¹ *Ibid.*

¹² *Ibid.* According to Microsoft, thirty-five percent of contractors become full-time Microsoft employees.

¹³ George Gonos, (1997) “The Contest Over ‘Employer’ Status in the Postwar United States: The Case of Temporary Help Firms,” in *Law & Society Review*, Vol. 31, No. 1, pp. 81-110.

¹⁴ *Ibid.*, pp. 85-86.

traditional employment agencies that sever their relationship upon placing a worker in a position.¹⁶ The TEAs carefully refer to their workers who contract with Microsoft as “agency employees.” These practices distinguish TEAs from other forms of employment agencies.¹⁷

These TEAs often describe themselves as providers of staff for short-term projects which “last from three to nine months.”¹⁸ Other sources suggest a different reality at Microsoft. According to a WashTech/CWA survey of Microsoft contractors, “Sixty-three percent of Microsoft contractors said that they had been with the company for more than a year, and their average time of employment was twenty months. Thirty-seven percent say they have worked at Microsoft for more than two years.”¹⁹ As Gonos notes, the term “temporary employment agency” is misleading because work assignments are frequently long-term in duration.²⁰ Because clients like Microsoft have a need for longer term non-employee assignments, TEAs have responded by creating “permatemps.”²¹

For Microsoft, the advantages of using contingent workers outweigh the disadvantages. According to Carrie Olesen, a senior training manager in Microsoft’s Contingent Staffing Group (CSG), the benefits for Microsoft include “the ability to end the relationship at any time, add or reduce staff at different times in the product cycle, and agencies can respond faster than Microsoft can.”²² These and other corporate explanations we gathered are consistent with the objectives of the triangular employment relationship Gonos describes.

¹⁵ *Ibid.*, p. 85.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ Interview with Eric Sonnett, Sakson & Taylor OnSite Inc. on July 14, 1999.

¹⁹ WashTech/CWA Survey of Microsoft Contractors, February 1999, http://www.washtech.org/roundup/contract/ms_survey_summary.html.

²⁰ Gonos, (1997), pp. 84-85.

²¹ A permatemp is a worker who is classified as a contingent worker, e.g. contractor, even though “they perform the same work for years side-by-side other workers who are called ‘employees.’” Testimony of David F. Stobaugh, p. 15.

²² Interview with Carrie Olesen, Senior Training Manager, Contingent Staffing Group, Microsoft Corporation on July 15, 1999.

While contractors enhance Microsoft's flexibility in a number of ways, the outcome for contractors is less favorable. Many Microsoft contractors, perhaps because of the practice of converting contractors to full-time employees, are less mobile than other contingent workers.²³ Contractors believe that if they stay with Microsoft they will be converted.²⁴ The TEAs restrict the mobility of Microsoft contractors by requiring them to sign non-compete clauses and penalizing contractors who try to change agencies.²⁵

Microsoft also limits contractor mobility by only hiring into certain job classifications from specific TEAs.²⁶ Internal mobility, meanwhile, has been curtailed by policies designed to discourage Microsoft managers from poaching talent, also known as "sharking," from other Microsoft workgroups.²⁷

In other contexts, these developments might make workers receptive to an organizing drive. Several characteristics of the high tech workplace, however, frustrate unionization. High tech workers, for the most part, are comparatively well-compensated. In 1997, median wages in every high tech industry exceeded the median for all industries.²⁸ High tech contractors are aware that their skills are in great demand, and they have a stunning sense of economic independence and labor market invincibility. Interview after interview confirmed these observations.

²³ Chris Benner, (1996), p. 1.

²⁴ Telephone interview with Marcus Courtney, WashTech/CWA staff member, on October 30, 1999.

²⁵ Contractors recounted stories about being offered a higher paying position in different Microsoft workgroup but chose not to accept the position because it would require switching to a different TEA and incurring a monetary penalty.

²⁶ For example, a tester with technical editing skills who has a contract through Volt, a TEA, cannot switch to a technical editing job because certain agencies supply certain skills. The TEA non-compete clause and the agreement that Volt supplies testers and not technical editors work together to discourage contractor mobility.

²⁷ Interview with Mike Blain, WashTech/CWA staff member, on July 13, 1999.

²⁸ Hecker, (1999), p. 18.

The decentralized nature of the workplace decreases the amount of contact between workers company-wide and complicates the identification of possible union members.²⁹ This is true both for internal activists and external union organizers. Since high tech contingent employment, by definition, means a non-collective bargaining environment, it is also more difficult to convey to workers the benefits offered by a union.

Other ideas, models, and strategies for organizing in this difficult environment have surfaced in recent years.³⁰ The intellectual formulations of these approaches are beyond the scope of this paper. However, our interviews brought us into contact with strategists who are presently struggling with organizing the contingent workplace. In short, they explained how the role of unions is and will be different in non-collective bargaining workplaces like Microsoft.

Because of our Microsoft focus, it was important to understand why the CWA has advanced considerable resources in the WashTech/CWA drive. The CWA's Director of Organizing, Larry Cohen, explained that this organizing drive is an extension of their historical organizing focus. In Cohen's mind, Bell Atlantic wireless workers, many of whom are young, talented, contingent, and unorganized, resemble Microsoft's contractors. The wireless segment of the communications industry and the high tech industry both represent the changing workplace. Their similarities require an active union response because the CWA believes that a substantial portion of their traditional work is headed in this direction. Seeing no difference between the need to unionize various contingent workplaces, the CWA has stepped forward at

²⁹ Eric Lekus, "Unions Confront Obstacles in Organizing High-Tech Workers," *Daily Labor Report*, May 29, 1998.

³⁰ Virginia L. duRivage, Francoise J. Carre, and Chris Tilly, (1998), "Making Labor Law Work for Part-Time and Contingent Workers," in *Contingent Work: American Employment Relations in Transition*, Eds. Kathleen Barker and Kathleen Christensen, (ILR Press: Ithaca), p. 276. For a further discussion of alternative models to traditional organizing, see Howard Wial's discussion of geographical/occupational unionism in "The Emerging Organizational Structure of Unionism in Low-Wage Services," *Rutgers Law Review*, 45 (3), pp. 671-738 (1993); see Dorothy Sue Cobble's discussion of occupational unionism in "Organizing the Post Industrial Work Force: Lessons from the History of Waitress Unionism," *Industrial and Labor Relations Review*, Vol. 44, No. 3 (April 1991), pp. 419-436;

Bell Atlantic Wireless, Microsoft, and IBM. Without question, the CWA's credibility among workers in technology-related industries has been enhanced by their work with WashTech/CWA.³¹

When asked how a union represents its members in the absence of a collective bargaining agreement, Cohen answered that a collective bargaining agreement is just a formal means for a union to represent its members on important issues. The key is to build an organization by representing contingent workers on issues meaningful to them.³²

WashTech/CWA is capitalizing on this strategy. Through surveys, listservs, their website and frequent on-site visits, the WashTech/CWA organizers are becoming a strong voice on issues such as training, that are important to high tech contingent workers. Converting the information they have gathered into specific strategies aimed at building their new organization shall be detailed in the latter part of the next section.³³ For now, we turn to the factors that created first WashTech and then WashTech/CWA.

II. The Microsoft-WashTech/CWA Case

A. The Birth of WashTech/CWA

The Labor Movement has begun to focus on strategies designed to organize contingent workers. For decades, the joint employer doctrine has stalled the labor movement's efforts to

see Charles C. Heckscher's discussion of associational unionism in *The New Unionism*, (Basic Books, Inc., New York, 1988).

³¹ Telephone interview with Marcus Courtney, WashTech/CWA staff member, on October 30, 1999.

³² Interview with Larry Cohen, CWA Director of Organizing, September 1999.

³³ The activities of the South Bay AFL-CIO Labor Council and Working Partnerships USA, based in San Jose, California merit mention. During an interview on September 24, 1999, Amy Dean explained her vision for bringing social and economic justice to the contingent workplace. Through leadership training, research and policy development, and building alliances, her organization is creating a new voice for contingent workers. She believes that the Labor Movement must focus on grassroots organizing and create value-based strategies that allow unions to intervene in labor markets on their own terms. To that end, she has created a non-profit employment agency paying \$2 more per hour than their competitors and rolling the remainder of the agency's margin into benefits funding for the workers.

organize contingent workplaces. No longer anticipating legal reform, labor organizations have adopted different initiatives.³⁴ We believe that one of these initiatives is underway in Seattle. The overall sense of frustration with working conditions and the “lack of voice” expressed by many of the contractors we interviewed account for much of the sense of purpose we encountered at WashTech/CWA.

Interviews with contractors revealed that the desire for more respect is a central reason driving their interest in WashTech/CWA. Like contingent workers in other industries, job insecurity, lack of decent benefits and lower levels of compensation are common to their experience. The failure by Microsoft to improve on the working conditions endured by contractors in the face of its rising profits constantly feeds their sense of disrespect.

Moreover, Microsoft emphasizes the difference between full-time employees and contractors by distributing blue identification badges to full-time employees and orange ones to contractors. Contractors cannot use Microsoft’s playing fields, shop at the company store for discounted products, or attend morale-building events without special permission. Being reminded daily of their vulnerable status explains, in part, why some Microsoft contractors have been receptive to WashTech/CWA and its collective urgings.

Microsoft’s treatment of its contingent workforce, especially the prolonged duration of temporary employment without conversion to full-time status, motivated some contractors to critically review their situation. In January 1996, the Encarta Encyclopedia workgroup (Encarta), also known as ghetto@microsoft, became active in creating a collective response. The decision to become active was, partially, a response to Microsoft’s decision to pilot the

³⁴ See footnote 33.

“sharking” policy in the Encarta workgroup.³⁵ Mike Blain, one of the Encarta contractors, expressed an interest in launching a website to broadcast the efforts started at Encarta.³⁶

During the Fall of 1997, Blain connected with Marcus Courtney, another union-directed Microsoft contractor. Both had participated in discussion groups with other dissatisfied Microsoft contractors who viewed a union-type association as a possible solution to their workplace problems. Based on these discussions, they approached and started a dialogue with the King County Labor Council about the prospect of organizing at Microsoft. Initially, they encountered reluctance because the Council’s leadership did not seem to understand the high tech workplace or recognize that organizing opportunities existed. Despite these initial difficulties, Blain, Courtney and Andrea de Majewski, a CWA organizer, convinced the King County Labor Council and others that a union-led organizing drive at Microsoft made sense.³⁷

After recognizing the opportunity, the Communication Workers of America (CWA) and the International Federation of Professional and Technical Engineers (IFPTE) became interested in organizing at Microsoft. In part because of Andrea de Majewski’s persistence, the CWA was the only union to express a serious commitment to the campaign. Jonathan Rosenblum, the Director/Lead Organizer of Seattle Union Now, AFL-CIO, recounted a 1997 conversation with Larry Cohen, the CWA Director of Organizing, during which Cohen told him: “We’ll make a commitment if you can show there’s interest.”³⁸

³⁵ Telephone interview with Marcus Courtney, WashTech/CWA staff member, on October 30, 1999. This policy, designed to reduce poaching of skilled contractors by Microsoft managers, limited to five percent the increase in wage rates managers could offer contractors.

³⁶ The Encarta workgroup, overwhelmingly populated by contractors, consisted of writers and editors who created content for Microsoft’s CD-ROM Encyclopedia.

³⁷ Telephone interview with Marcus Courtney, WashTech/CWA staff member, on October 30, 1999. Blain, Courtney, de Majewski and Gretchen Wilson were part of the team of organizers and staff members involved in the founding of WashTech/CWA.

³⁸ *Ibid.*

While the King County Labor Council was fostering an early relationship between Blain, Courtney, and the CWA, the Washington State Department of Labor and Industries (L & I) unintentionally delivered an organizing issue that united the high tech workforce in the Seattle area. In October 1997, L & I announced that it would enact a rule, the Computer Overtime Exemption to the Washington Minimum Wage Act, eliminating the right of “computer professionals,” who earn more than \$27.63/hr, to earn overtime. This proposed change provoked outrage among workers in the “computer professional” category such as programmers, writers, and editors.

During the comment period, L & I received 750 “letters” of protest, most of which were e-mail. Contingent high tech workers were the most vocal opponents. In December 1997, L & I held a hearing regarding the proposal, and surprisingly, two unions, IFPTE Local 17 and the Seattle Professional Engineering Association, testified in support of the rule change because workers whom they represented were exempt. Despite the strong opposition, L & I still adopted the exemption for the industry.

The overtime issue cut through several factors impeding unionization of high tech workers and motivated them to use their voice to protest the ruling. Tapping into this opposition, the King County Labor Council obtained copies of the protest letters through the Public Records Act. Some of the content revealed the darker, abusive side of the industry:

Microsoft is famous for working its employees long hours. Like the rest of the software industry, it tends to manage its projects in crisis mode. Not long ago, a developer in my building was found **dead** at his desk.³⁹ The ambulance wasn’t called immediately, because his co-workers just thought he was asleep. It’s not unusual for somebody to be asleep in their offices, having worked all night trying to make some milestone or other. The entire company deliberately operates in a mode of critical high stress.

³⁹ Emphasis Added.

In this atmosphere, is it reasonable to remove the brakes? What is going to prevent the inevitable abuse?⁴⁰

A review of the protest letters such as this one further convinced Courtney, Blain and the Council that a serious interest and need for a high tech workers' organization existed.

The authors of the best written "letters" were invited via e-mail to join the Coordinating Committee for High Tech Labor Issues (CCHTLI), an informal organization sponsored by the King County Labor Council. The initial group of members started meeting every two weeks to discuss the core issues of interest to high tech workers. This group created a database of five hundred names using the e-mail L & I received to begin creating an organization building listserv.

Shortly thereafter, in March 1998, CCHTLI became WashTech. The group selected the name "WashTech" to combine a geographic locale with a reference to technology. A few months later, in part prompted by Microsoft's "break in service" policy,⁴¹ WashTech members voted to affiliate with the Communication Workers of America (CWA).⁴²

III. The Progress of WashTech/CWA

WashTech/CWA intends to build its organization by representing constituents on important issues and providing access to advanced training opportunities. By placing pressure on TEAs, state government and Microsoft, it has already gained legitimacy. Although this paper focuses primarily on Microsoft contractors, WashTech/CWA also represents vendors and a few

⁴⁰ Excerpt from a contractor's letter to Mr. Greg Mowat, Program Manager, Employment Standards, Department of Labor and Industries written in opposition to the L & I proposed change to the state labor laws.

⁴¹ "Microsoft to Mandate Forced Time-Off for Some Contractors", June 24, 1998, <http://www.washtech.org/roundup/contract/break.html>. The "break in service" policy forced contractors to leave the Company for thirty-one "consecutive calendar days upon finishing an assignment."

⁴² Telephone interview with Marcus Courtney on October 30, 1999. During this conversation, Courtney explained that CCHTLI organizers and many listserv subscribers were concerned about the thirty-one day "break in service" policy and it was a major reason why WashTech decided to affiliate with the CWA. They recognized the need for the support and protection that the CWA could offer.

full-time employees. A number of WashTech/CWA's 1,400 listserv subscribers and some of their more than two hundred members work for other high tech firms in the Seattle area.

A. Organization Building

Although WashTech/CWA primarily represents contingent workers, when a Seattle-based high tech firm, DecisionOne Corp., an information technology support service provider decided to lay off 500 employees, the workers contacted WashTech/CWA for help. Faced with layoffs and an unattractive severance package, eighteen employees sought WashTech/CWA's assistance to organize a bargaining unit.

In December 1998, the Company challenged the organizing drive by arguing that the group was not an appropriate bargaining unit.⁴³ The NLRB rejected the Company's challenge and ruled in favor of the employees.⁴⁴ In response, the Company sweetened its severance package and encouraged the workers to dismantle the bargaining unit. DecisionOne succeeded on both counts, but this campaign strengthened WashTech/CWA internally and demonstrated that some high tech workers were interested in unionization.

In April 1999, WashTech/CWA experienced a type of "organizing" success at Microsoft when a group of eighteen highly skilled Microsoft contractors declared themselves a "bargaining unit" and demanded that Microsoft and their TEAs negotiate a contract with their representatives, WashTech/CWA.

The formation of this "bargaining unit" also strengthened WashTech/CWA's reputation. Despite its modest size, the workers' campaign received the attention of the Seattle and national media. This particular workgroup had significant bargaining leverage both because of their skills

⁴³ Jerry Rosa, "Looking To Bargain – DecisionOne Vote Is Latest Labor Ripple To Hit Service Market Shore," *Computer Reseller News*, January 18, 1999.

⁴⁴ 19-RC-13728

and the critical importance of their project to Microsoft. Their collective work experience provided them with a strategic understanding of their rights.

Frustrated by the indifference of their TEAs, they contacted WashTech/CWA and met with Courtney. When the group considered affiliating with WashTech/CWA, Courtney carefully explained to the group that they and not WashTech/CWA would decide which issues to focus on. The group decided to formalize their demands despite understanding that the NLRA does not require Microsoft or the TEAs to negotiate with them.⁴⁵ WashTech/CWA encouraged them to write a mission statement outlining their bargaining unit's goals. From there they drafted a petition signed by their co-workers which both endorsed the mission statement and the decision to affiliate with WashTech/CWA.

Consistent with Larry Cohen's beliefs, the result of "representing these members on issues" is that Microsoft has responded to some of their demands by reducing the pay wage inequities across the group and upgrading certain job classifications to 'business systems analyst.'⁴⁶ This progress has buoyed the workers and kept them united despite the refusal of Microsoft and the TEAs to recognize them as a bargaining unit.

Providing access to accurate and reliable information regarding Microsoft's policy changes has also helped WashTech/CWA build its organization. Two central issues of concern for Microsoft contractors, the thirty-one day "break in service" and the disclosure of TEA bill rates illustrate this point. By being the first to report on the thirty-one day "break in service" policy, and providing analysis about its significance, WashTech/CWA enhanced its reputation among contractors.⁴⁷ In September 1999, WashTech/CWA acquired and published the highly

⁴⁵ Interview with Barbara Judd, Microsoft contractor on July 14, 1999.

⁴⁶ Formerly classified as financial analysts, the group sought a change in their classification to upgrade their status by recognizing that their job includes coding.

⁴⁷ Telephone interview with Marcus Courtney, WashTech/CWA staff member, on October 30, 1999.

sought after bill rates (the amount TEAs charge a client for a contractor). Access to this information enabled contractors to calculate the difference between their wage per hour or “pay rate” and the amount of money the agencies were receiving. In this case, WashTech/CWA decided to restrict access to this information to members. This decision upset non-members who normally access their website.⁴⁸ This step, however, indicates that Washtech/CWA is moving towards organization building as opposed to being just an information source.⁴⁹

Another development at Microsoft has challenged WashTech/CWA’s ability to represent its constituents. Recently, Microsoft announced the conversion of several permatemp positions into full-time positions to reduce their reliance on permatemps.⁵⁰ Contingent positions would be converted into full-time positions while some short-term contractor positions would continue to exist or be eliminated.

WashTech/CWA obtained and published confidential documents detailing Microsoft’s plan to treat its contractors in the same way as external candidates for the new positions. Some believe that Microsoft will not hire former contractors for the new full-time positions because TEAs will charge Microsoft a premium for converting a contractor to full-time status.⁵¹ Resolution of this issue is of great concern to thousands of contractors. WashTech/CWA’s future will be, in part, determined by how effectively it represents and leads its members at this crossroads.

Beyond its campaign to organize Microsoft, WashTech/CWA continues to advocate on behalf of contingent workers at the legislative level. In April 1999, WashTech/CWA won its first victory in the legislative arena when the Washington State Senate passed Senate Resolution

⁴⁸ WashTech’s website receives, on average, 50,000 hits per month.

⁴⁹ Telephone interview with Andrea de Majewski, September 1999.

⁵⁰ “Microsoft Manager Confirms Reduction in Permatemps,” September 9, 1999, www.washtech.org/conversion_update.

8402 (Contingent Workforce Study Bill). This bill created “a bipartisan task force to study Washington’s growing contingent economy.”⁵² WashTech/CWA and the Washington Labor Council worked together to garner support for the bill. WashTech/CWA built community support for this legislation through a letter writing campaign and phone banks. This success in legislative lobbying has also helped to broaden respect for WashTech/CWA among high tech workers.

B. Training Initiatives

As discussed earlier, high tech workers are not necessarily responsive to traditional union rhetoric. Because of the critical issue of skills obsolescence in the constantly changing high tech industry, access to advanced training opportunities is a primary concern for workers and represents a means for unions to gain access to this workforce.⁵³ Contingent workers, unlike full-time employees, do not usually have access to training opportunities through their job. “The idea of latching onto an organization that will continue to elevate their skills is really important.”⁵⁴ Accordingly, one of the services WashTech/CWA provides to its members is access to formal high tech training courses.

Following an internal review of its training offerings, WashTech/CWA decided to form a partnership with a Microsoft Certified Training Center to provide high tech workers with access to “affordable, industry-recognized training.”⁵⁵ The provider, “Micro Learning Centers” has state of the art equipment and a technologically advanced faculty.⁵⁶ The access, at discount pricing for its members, to a program such as this is significant because completion of a

⁵¹ Telephone interview with Andrea de Majewski, WashTech/CWA staff member, September 1999.

⁵² <http://www.WashTech/CWA.org/roundup/legislate/legislate.html>.

⁵³ Telephone interview with Marcus Courtney, WashTech/CWA staff member, on October 30, 1999.

⁵⁴ Telephone interview with Andrea de Majewski, WashTech/CWA staff member, September 1999.

⁵⁵ “WashTech/CWA Partners With Microsoft-Certified Training Center,” September 16, 1999, <http://www.washtech.org>.

⁵⁶ Telephone interview with Andrea de Majewski, WashTech/CWA staff member, September 1999.

Microsoft Certified training program is a recognized credential equated with a high level of technical knowledge. Interestingly, part of the arrangement also requires that Micro Learning Centers display WashTech/CWA's promotional material at its teaching sites.

By relying upon these different approaches and strategies, WashTech/CWA is slowly but surely building an organization by providing skills growth and a voice for high tech workers in the Puget Sound community. Its progress will certainly be scrutinized as a possible model for organized labor's response to a non-collective bargaining environment.

C. The Legal Situation

Although WashTech/CWA and the Bendich law firm are focused on different goals, their efforts do overlap. Whether representing Microsoft workers in the workplace or in the courtroom, they both advance the struggle for legal and economic justice for the contingent workforce. Other conference papers discuss the overall legal landscape for contingent workers in greater detail. They no doubt cover the suffocating reality of the "joint employer rule"⁵⁷ which, in layperson's terms, all but precludes union organizing where employees of two different employers (e.g. Microsoft and S & T Onsite) work together at the same work site. In this section, we move away from the union-based approach for promotion of workplace justice and shift our attention to the advancement of contingent workers' rights through litigation.

Key to the growth and success of contingent employment has been the legal system's cooperation with and recognition of TEAs as bona fide employers. This "legal" recognition of staffing agencies was substantively and ideologically critical in promoting the evolution of the flexible workplace.⁵⁸ The legislative branches of several state governments also facilitated these

⁵⁷ *Greenhoot, Inc.*, 205 NLRB 250 (1973).

⁵⁸ George Gonos (1998), "The Interaction Between Market Incentives and Government Actions" in *Contingent Work: American Employment Relations in Transition*, Eds. Kathleen Barker and Kathleen Christensen, (ILR Press: Ithaca), pp. 170-191.

changes by their responsiveness to employee leasing agency lobbyists from the mid-sixties to the early seventies.⁵⁹ These developments enabled traditional employers to shift the “employer” responsibility to TEAs and both minimize their legal obligations and thwart union organizing.⁶⁰ The people who worked for them simply became contingent workers.

In spite of these developments, low-wage contingent workers have found some success by pursuing claims, often related to wage or overtime payments, through the Agricultural Workers Protection Act⁶¹ and the Fair Labor Standards Act (FLSA).⁶² Under these Acts, the broad interpretations of who is an employee and who might be responsible employers have been used by low-wage contingent workers to obtain workplace justice.⁶³ This breadth of analysis evaluating who is an employee or employer under FLSA has often not carried over to the courts’ interpretation of other work benefits for contingent workers. However, a broader construction of the concept of employee has been successfully applied against Microsoft and we will now turn to a discussion of this important litigation.

Throughout the 1980s, Microsoft added greater numbers of professional, technical and other workers whom they called independent contractors. These workers were paid through Microsoft’s “accounts receivable” and not their payroll department. Some of these workers were also employees of TEAs. These workers all signed documents (waivers) stating that they were not Microsoft employees, yet nearly all worked side by side with full-time employees and, in some cases, supervised them.⁶⁴

⁵⁹ *Ibid.*, p. 184.

⁶⁰ *Ibid.*, p. 174.

⁶¹ 29 U.S.C. 1801, et seq.

⁶² 29 U.S.C. 201, et seq.

⁶³ Recent examples of this type of litigation are *Lopez v. Silverman*, 14 F. Supp. 2d 405 (S.D.N.Y. 1998), and *Torres-Lopez v. May*, 111 F.3d 633 (9th Cir. 1997).

⁶⁴ Interview with Bendich, Stobaugh & Strong, P.C., on July 13, 1999.

Following a 1990 IRS ruling that Microsoft had incorrectly classified many of these workers, the Company essentially agreed for tax purposes that these individuals were common law employees. This misclassification meant that Microsoft had wrongfully failed to withhold income and social security taxes from their paychecks. Some were offered jobs as full-time employees while others were converted to agency temp (contractor) status, “but in other respects the workers’ relationship with Microsoft remained unchanged.”⁶⁵

The combination of Microsoft’s original misclassifications, the IRS ruling against Microsoft, and its subsequent refusal to pay these common law employees the same benefits and stock options received by regular employees, compelled Donna Vizcaino and others to sue Microsoft. This seven-year-old class action litigation has yet to enter the discovery phase, but it has already generated three major analyses of contingent workers’ rights in the Ninth Circuit Court of Appeals.⁶⁶

Although Ms. Vizcaino and the Bendich law firm have many more struggles ahead in order to consolidate their appellate successes to date, these cases have created legal opportunities for contingent workers. In its third review of the facts, *Vizcaino v. US Dist. Ct.*, 173 F.3d 713, 716 (9th Cir. 1999) (*Vizcaino III*), the Court rejected the trial court’s analysis favorable to Microsoft and stated that “Even if for some purpose a worker is considered an employee of the agency, that would not preclude his status of common law employee of Microsoft. The two are not mutually exclusive.”⁶⁷

The use of this language suggests that the Ninth Circuit may be applying a broader, FLSA-type analysis to identify the responsible “employer(s)” in these contingent worker cases.

⁶⁵ *Vizcaino v. U.S. Dist. Ct.*, 173 F.3d 713, 716 (9th Cir. 1999).

⁶⁶ See *Vizcaino v. Microsoft Corp.*, 97 F.3d 1187 (9th Cir. 1996), *modified en banc*, *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006 (9th Cir. 1997), *cert. denied*, 118 S.Ct. 899 (1998), *enforced by mandamus*, *Vizcaino v. U.S. Dist. Ct.*, 173 F.3d 713 (9th Cir. 1999).

This is quite important because the application of a broader analysis of who is an employee or responsible employer usually yields better results for the worker, contingent or otherwise.

Additional support for this interpretation is found later in *Vizcaino III*. The Court, in further describing why a Microsoft contractor can be both Microsoft's common law employee while being a TEA's employee, applied a formalized set of legal principles that often has the force of law called the Restatement (Second) of Agency, § 225: "A person may be the servant of two masters, not joint employers, at one time, as to one act, if the service to one does not involve abandonment of the service to the other."⁶⁸

This is one of the key principles that was cited by a unanimous Supreme Court when it upheld the broad definition of "employee" under the NLRA to include a job applicant, paid by her union, who only applied to a non-union work site to "salt" or organize the job.⁶⁹ If indeed the legal question of who is a "common law employee" continues to be subject to analysis developed in these other, broader, areas of the law, it is a positive development for contingent workers who come after Ms. Vizcaino.

We do not expect the historic chill experienced by workers' rights advocates in the courts to change because of the *Vizcaino* cases. Recent contingent worker decisions in the Fifth and Tenth Circuits confirm what we all learned over time.⁷⁰ The Ninth Circuit is likely to remain more broad, and the Bendich law firm will continue to do its part as evidenced by their *Vizcaino* type class action lawsuit against Arco's misclassification of its contingent workers. The truly important part of this discussion is that the pressure of these lawsuits coupled with WashTech/CWA's organizing efforts have combined to operate as vehicles for change

⁶⁷ *Vizcaino v. U.S. Dist. Ct.*, 173 F.3d 713, 716 (9th Cir. 1999). Upon remand, those *Vizcaino* plaintiffs who are found to be common-law employees will likely be entitled to regular employee benefits such as stock options.

⁶⁸ *Vizcaino v. U.S. Dist. Ct.*, 173 F.3d 713, 723 (9th Cir. 1999).

⁶⁹ *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85 (1995).

CONCLUSION

The organizers at WashTech/CWA have used their technological and organizing skills to effectively begin the unionization process in a new industry.⁷¹ The high tech industry does not lend itself easily to traditional organizing strategies. Even so, a key principle that often propels organizing drives is present here – Microsoft’s contractors want some respect. WashTech/CWA organizers have listened to what Microsoft and other contractors want and have represented workers with these issues in mind.

Although we are unable to determine whether they have changed their practices due to WashTech/CWA or *Vizcaino* pressures, we believe that Microsoft has responded to both. Microsoft has forced TEAs to improve their benefits, declined to implement the overtime exemption approved by L & I, started to reduce their long-term reliance upon permatemps, and, in part, responded to the collective bargaining demands of eighteen Microsoft workers represented by WashTech/CWA.

Whether these gains can be truly consolidated, and an effective labor union presence established at Microsoft, remains to be seen. What we do know is that both the prestige of WashTech/CWA and the Bendich law firm have been enhanced by their differing efforts and high tech contingent workers in the Puget Sound area have truly benefited as a result.

⁷⁰ *Abraham v. Exxon Corp.*, 85 F.3d 1126 (5th Cir. 1966); *Bronk v. Mountain States Tel.*, 140 F.3d 1335 (10th Cir. 1998).

⁷¹ An excellent example that illustrates WashTech/CWA’s most recent efforts is expressed by their recent (October 26, 1999) discovery that Microsoft could be maintaining secret personnel files on contractors. If true, maintaining these personnel files and denying contractors access to them could violate Washington state law. A more detailed discussion of this development is included in the Appendix.

APPENDIX

Reports from WashTech/CWA's website:

1. "Microsoft Keeps Secret Personnel Files on Contractors" (October 26, 1999)

http://www.washtech.org/roundup/contract/ms_personnel_files2.html

WashTech has discovered that, since at least 1995, Microsoft has been keeping secret personnel files on its contract and vendor employees. Thus, anyone who has ever worked at Microsoft as a "temp" or an independent contractor likely has a file that rates him or her as "eligible," "eligible with feedback," "eligible with serious feedback" or "ineligible" for future employment at the company. By denying workers access to these files, the company may be violating a Washington state law that allows employees to access their personnel records.

B. Microsoft managers consult these secret files on contractors and vendors before interviewing

candidates for contract or full-time employment. The software giant effectively blacklists someone if he or she is marked as ineligible in the personnel file. Microsoft employs more than 6,500 people, or approximately 35 percent of its Puget Sound area workforce, through employment agencies.

WashTech anonymously received a number of printed personnel files, and then verified the existence of thousands of similar electronic files on Microsoft computers via company sources.

Microsoft's "If Asked, Lie" Policy

According to e-mail messages in personnel files obtained by WashTech, Microsoft directs human resource representatives or managers, when questioned by contract employees about the existence of any performance feedback, to say, "We don't keep a file on nonemployees." Agencies know of these files and reference them through Microsoft human resource representatives to verify that a contractor can be submitted for assignment at Microsoft.

Several contractors have e-mailed Microsoft's Contingent Staffing Group (CSG) requesting access to their personnel records. CSG is the arm of the company's human resources department that handles temporary and contractor issues. CSG rebuffed them with e-mail messages saying, "Talk to your employer, the agency, for any customer feedback."

By denying contractors access to these personnel files, Microsoft may be violating state laws that grant workers' access to such files, as well as the right to rebut any information they feel is inaccurate (RCW 49.12.240 and RCW 49.12.250). The secret files' discovery could also place Microsoft in legal jeopardy if contractors demonstrate that Microsoft has denied someone employment for reasons related to sex, race, age, or disability or in violation of other laws protecting workers' rights on the job.

Microsoft currently has "workforce planning" changes under way that aim to reduce the company's reliance on long-term contractors by turning their positions into full-time "headcount" jobs. Contractors whose jobs are going to be converted will not automatically become Microsoft employees, but rather will be treated as external candidates who need to apply for the jobs in question and then be selected for interviews. The ratings and comments made by Microsoft managers in the hidden personnel files will likely be a significant factor in determining if contractors will be interviewed and hired "full-time" at the company.

What the Files Say

The contractors who requested to review their files expressed dismay over Microsoft's actions. One contractor who did not want to be identified said, "I found my feedback to be positive and very helpful. It is unfortunate that Microsoft is not being up front with this information, because it would help me to do a better job. That is why we need an organization like WashTech to make sure that we can exercise our rights to see this information, and make my job easier to do."

Another contractor said, "The evaluation my former manager wrote was very misleading and inaccurate about my contributions to the team. I want to have the opportunity to rebut their comments so my future managers have the complete story."

In some cases, manager comments written in the files may violate federal labor laws. One woman was marked ineligible by her manager because she discussed wages with another employee. The file read: "It came to my attention that Sally (not her real name) divulged her pay rate to another employee, which to me is not acceptable." The National Labor Relations Act protects the rights of workers to voluntarily discuss their wages and working conditions with other employees free from management retribution.

An independent contractor was banned from any future employment as a independent contractor, temp or employee by managers and company human resource representatives because he complained that Microsoft owed him some \$30,000 under his contract and that the company had been holding off payment for months. One Microsoft manager wrote in his personnel file, "Let's make sure he isn't offered work for some period of time. He is too much of a legal risk." A human resources representative responded, "You got your wish (and mine), he is being banned from the company."

The e-mail message goes onto describe how to blacklist someone from employment at Microsoft: "To make him ineligible as an agency temp or employee you need to get him marked ineligible in SAP. With former employees, I ask the HR rep to mark the PSR 'ineligible' or CSG handles the chore for temps." SAP and PSR are databases that track the evaluations of contractors, vendors and employees concerning their future eligibility for employment at Microsoft.

How Microsoft Stores the Files

Until recently, Microsoft kept these records not on a secure computer, but on the company's extensive e-mail system. Both contractors and regular Microsoft employees could locate the files on the e-mail system under a section of public folders. The personnel files were located in a subfolder labeled "Procedures" under a subfolder titled "CSG," which was stored in a folder named "HR & Benefits."

As the company has increased its use of contractors over the past five years, it has increased its reliance on the evaluation system. In the folder for 1994-95, there were approximately 2,300 records, while the 1998-99 folder contains more than 9,300 records. The main content of most files is e-mail threads between Microsoft human resource representatives, agency representatives and company managers who are considering hiring particular contractors.

After WashTech started informing Microsoft contractors of the files' existence so they could look up their own information, Microsoft blocked access to the files.

How the Evaluation System Works

Microsoft managers typically use the secret personnel files to evaluate contractors when an assignment has ended. Contractors can also be reviewed by their agencies on an annual or biannual basis, with input from their Microsoft managers. The assignment-end evaluation, written by CSG, requests a manager to rate a contractor's performance on a scale of one through five, where five means the highest level of satisfaction. It then asks the manager if he or she would recommend that contractor for any future work at the company. If the manager was dissatisfied, CSG asks that he or she explain why.

The company cautions managers to limit their comments to work-related issues. "These comments may be relayed to the Temporary Agency employer when considering placement of temporary personnel on future assignments at Microsoft, please limit your comments to appropriate business related performance issues. DO NOT make comments that are not business related such as: John Doe was always late due to child care issues; John Doe's disability prevented him from performing at a satisfactory level." From these comments, CSG then gives the contractor a ranking of eligible, eligible with feedback, eligible with serious feedback or not eligible.

Despite CSG's warning, one record details how a manager may have terminated a contractor due to a disability. To preserve anonymity, we have not used the contractor's real name. "Bob was terminated today. I have provided a synopsis of the performance issues below. Bob had a disability (deafness and dyslexia). The perspective on the feedback shared is that he feels that the performance concerns are mostly related to the lack of communication. He said that he relied heavily on his officemate." Later in the e-mail string, an agency representative discusses with a

Microsoft manager a grammar software program that might help, but neither the agency nor Microsoft seemed willing to buy it outright for Bob so that he could better do his job.

When contractors apply for contract or regular Microsoft positions, CSG checks whether they are eligible in the personnel files before the contracting agency offers employment at Microsoft. In the case of contractors who are marked eligible with feedback, the hiring Microsoft manager will be encouraged to review the contractor's personnel file before making a hiring decision, for example: "I'm sending mail ... discussing the approval process that needs to be done ... prior to an Agency Temp starting assignment (i.e., eligibility check complete...)"

Law Gives Employees Personnel File Access

Washington state law gives employees the right to inspect personnel files kept on them by employers. The law states that "each employer shall make such file(s) available locally within a reasonable period of time after the employee requests the file(s)." The law goes on to say that "an employee annually may petition that the employer review all information in the employee's personnel file(s) that are regularly maintained by the employer as part of his business records or are subject to reference for information given to persons outside of the company."

The law also states that workers have the right to rebut any information in their files that they believe is inaccurate. "If an employee does not agree with the employer's determination, the employee may at his or her request have placed in the employee's personnel file a statement containing the employee's rebuttal or correction. A former employee shall retain the right of rebuttal or correction for a period not to exceed two years."

Microsoft will likely claim that the state law does not apply to contractors because it requires the "employer" to give access to such files, and Microsoft argues that the agencies are the employers.

In the class-action *Vizcaino v. Microsoft* case, however, the courts have repeatedly ruled that, for the purpose of benefits, Microsoft is a "common-law employer" of long-term contractors. In May 1999, a three-judge panel of the 9th U.S. Circuit Court of Appeals unanimously ruled that workers are common-law employees if a company controls their services and otherwise maintains an employer-employee relationship. "Even if for some purposes a worker is considered an employee of the agency," the court wrote, "that would not preclude his status of common-law employee of Microsoft."

Besides the federal court rulings against Microsoft on employee status, Jill Wrigley, an attorney with Barr and Camens, a law firm based in Washington, D.C., believes that state law supports contractors' right to see their personnel files. Wrigley's firm represents several national unions, including WashTech's parent union, the Communications Workers of America.

"The people of Washington have expressed a clear commitment to the rights of workers to review their own personnel records and to have an opportunity to rebut offensive or incorrect material in those records," Wrigley said. "Microsoft is running roughshod over this important

principle by hiding behind the claim that it is not the employer of any of its agency workers. Microsoft is flouting the law, evading its responsibilities as an employer and needs to be held accountable for such abuses."

2. "Microsoft Stonewalls Contractors on Personnel File Access" (October 29, 1999)

http://www.washtech.org/roundup/contract/ms_personnel_files2.html

Company Denials Regarding Existence of Files Ring Hollow

Current and former Microsoft contract workers who have been e-mailing the company to request access to their personnel files have been met with a generic denial claiming that the company does not keep such information. The replies, sent by representatives of the company's Contingent Staffing Group, all say the following:

"Microsoft does not maintain personnel files for employees of temporary agencies. Please contact your agency if you wish to request a copy of any personnel file the agency may maintain."

After WashTech published a story on Wednesday detailing how Microsoft maintains secret personnel files on thousands of current and former contractors, many workers began cc'ing WashTech with the e-mail requests they were sending to Microsoft asking to see their files. Most of these workers have also forwarded to WashTech the company's generic response. (For more info, read about What We Can Do at the end of this report).

Based on Microsoft's blanket claim that it does not keep such files, some workers have questioned the accuracy of the initial WashTech report.

WashTech has since obtained from company sources a number of screen shots of the e-mail folders where Microsoft stores some of its contractor personnel files. These electronic files generally include performance feedback from Microsoft managers and recommendations on whether the worker in question should be eligible for any future contract or regular employment at the company. These screen shots provide further evidence that Microsoft does, indeed, maintain personnel files that rate contractors and vendors as "eligible," "eligible with feedback," "eligible with serious feedback" or "ineligible" for employment at the company.

Former Microsoft contractor and current WashTech staffer Mike Blain e-mailed the company Thursday and requested access to any personnel information being kept on him by Microsoft. As in its response to other workers, Microsoft replied with a generic e-mail claiming that it does not keep personnel files on "employees" of temporary agencies.

However, according to information obtained from company sources, Microsoft does, indeed, maintain a file on Blain that comments on his performance and rates his eligibility for future work at the company.

Another former Microsoft contractor and current WashTech staffer, Marcus Courtney, also e-mailed the company on Thursday and requested access to any personnel information being kept on him by Microsoft. Courtney received the same reply as Blain and other current and former contractors.

It turns out Microsoft also maintains a file on Courtney that comments on his performance and rates his eligibility for future work at the company.

Microsoft Concedes to Press It Has Files

At the same time that Microsoft was denying the existence of its contractor personnel files to workers that e-mailed the company, Microsoft spokesman Dan Leach was admitting to the press the existence of these personnel records. In a Wall Street Journal article published Wednesday, Leach said, "We regret that information was made available through some security breach."

Leach told the Journal that the company does collect performance feedback from Microsoft managers, but described the information as "customer feedback" that is passed along to the staffing companies that payroll contractors at Microsoft.

In a Seattle Times article published Wednesday, however, Microsoft appears to have changed its tune to harmonize with its canned e-mail responses to contractors. "We don't keep personnel files on employees of other companies," Leach told the Times.

When it came to the Tacoma News Tribune, which also published an article on Thursday, Leach flip-flopped again and admitted that Microsoft does maintain files on contractors, but claimed that Microsoft considers these files to be "customer feedback data", not personnel files. "Microsoft for quite some time has a routine practice of collecting customer-feedback data at the end of assignments," Leach told the Tribune.

What is a Personnel File?

Not only is Microsoft trying to evade state laws based upon its claim that it is not the employer of any of its contract workers, the company is also playing word games with the definition of "personnel file." Legal experts and officials from the Washington State Department of Labor and Industries (L&I) have noted that state law is quite vague when it comes to defining exactly what constitutes a personnel file.

Employers such as Microsoft can take advantage of this vagueness to maintain files that clearly contain performance feedback and other personnel information, yet deny that they maintain personnel files by simply calling the files something else.

"I think I know what a personnel file looks like," said Greg Mowat, program manager for L&I's Employment Standards Division.

Mowat's division is charged with investigating any wage & hour complaints filed with the state, including complaints regarding employers' refusal to grant workers access to personnel files. Based on the information that has been reported to be in these files - especially performance reviews and eligibility ratings -- Mowat said it was his personal opinion that the files "clearly fall within the definition of personnel file." He added, however, that any state decision about what constituted a personnel file would need to be made by the state Attorney General's office.

Mowat said that he is seeking an advisory opinion from the AG's office regarding the legal definition of what constitutes a personnel file, and the "common-law employee" status of long-term contractors working at Microsoft. These opinions will be based on any relevant state and federal statutes, as well as court precedent.

Newspaper Articles:

3. "Microsoft kept files on temporary workers" (October 27,1999)

by Jay Greene
Seattle Times technology reporter

Microsoft has kept files evaluating the performance of temporary workers for several years, a practice that has led one group to suggest the software giant was trying to sidestep state law.

While Microsoft denies they are personnel files, documents obtained by the Washington Alliance of Technology Workers (WashTech) show managers criticized workers for everything from lacking focus to comparing pay with co-workers. According to the documents, Microsoft managers used those evaluations to determine whether workers should be given other temporary assignments.

WashTech, which is trying to persuade temporary workers to form a union, believes Microsoft is hiding behind the temporary agencies that hire the workers to shield the documents from them. Under Washington state law, workers have the right to inspect their personnel files and request changes or submit a rebuttal to information in the file with which they disagree.

"A person could be blacklisted and have no idea this file exists," said Marcus Courtney, co-founder of WashTech and a former Microsoft temp.

Microsoft maintains that it does not employ temporary workers, temporary agencies do. Company spokesman Dan Leach said the files - the company calls them "customer-feedback forms" - are sent to temporary agencies.

"We do not keep personnel files on employees of other companies," Leach said.

Whether Microsoft employs those workers is at the heart of a long-running class-action lawsuit that accuses the company of treating temporary workers like full-time staff in every regard but compensation.

The suit seeks millions of dollars in gains from employee stock-purchase plans for which temps aren't eligible.

While Microsoft has lost a number of important decisions in the case, no judge has issued a final ruling that Microsoft is the employer of its temporary workers. Courtney contended Microsoft is hiding behind that to shield workers from their personnel files.

"Temporary workers are being denied rights available to all other workers under Washington state law," Courtney said.

Cornelius Peck, professor emeritus at the University of Washington Law School, said the state's statute is vague about what constitutes a personnel file and a temporary employee. Employers often seize on that.

"When a statute is vague, people make use of the vagueness," Peck said.

But if Microsoft loses the temp case and is determined to be the so-called "common-law employer" of the temps, there is a good chance the company will have to open the files to workers.

"The assumption is the law always meant what the court ultimately says it means," Peck said. "It's very seldom that we fail to give retroactive effect to a court's decision."

About 6,000 temp workers work alongside the roughly 31,000 full-time Microsoft employees.

4. "Permatemps Seek Access To Reviews"

By Rachel Zimmerman
Staff Reporter of The Wall Street Journal

The skirmish between Microsoft Corp. and its temporary work force is escalating. The Washington Alliance of Technology Workers, which represents contract workers at Microsoft, is accusing the company of violating a state labor law that requires employers to make personnel files available to employees and to give them the opportunity to dispute or rebut irrelevant or erroneous information.

This week, the alliance is encouraging its members to demand their job evaluations from the Redmond software giant, and to file labor grievances with the state if the requests are denied.

"Microsoft has been secretly and systematically evaluating its contractors without their knowledge," says Marcus Courtney, co-founder of the alliance and a former temporary worker at

Microsoft. "If those evaluations are negative, that, in effect, blacklists workers from future employment and is in violation of Washington law."

Dan Leach, a Microsoft spokesman, says the alliance's charge that the company is flouting the law is unfounded, for a simple reason: Microsoft isn't the temps' employer. "The employer in these cases is the contingent staffing company," he says, referring to the agencies that provide Microsoft with its contractors, many of whom work for the company for years and have come to be known as "permatemps."

Mr. Leach says Microsoft does evaluate all temporary workers at the end of their assignments and passes the information along to the agencies that supplied them. But he describes the task as nothing more than "collecting customer feedback."

If workers request their job evaluations, Mr. Leach says, they are directed to the agency through which they landed their Microsoft position. The problem, according to the alliance, is that most agencies won't pass along the Microsoft evaluations to employees who ask for them. For example, Sakson & Taylor, a Seattle staffing and consulting company, collects a slew of customer feedback reports -- Microsoft's among them -- and folds them into its own personnel reviews, which are conducted every six months.

"We do get customer feedback periodically" from Microsoft, says Cheryl King Berry, director of S&T Onsite, a division of Sakson & Taylor that contracts the temp workers. "But not on everyone." Ms. Berry says that information is considered confidential "client information," according to the agency's policy. She says when the agency does receive such evaluations, they include "a little verbiage and a rating scale from 1 to 5."

Jill Wrigley, a Washington, D.C., lawyer who represents the alliance, says Microsoft's refusal to consider itself the temps' employer "is obstructing the spirit of the law."

Her argument, based on past court is that the company is either technically a "common-law employer" -- one that general understanding and legal precedent considers to be the employer -- or a "joint-employer" with the temp agency in the case of most permatemps. "If you look at who has the power in terms of hiring and firing and who has direct control over the person's work," says Ms. Wrigley, "it's clearly Microsoft."

Adds Mr. Courtney: "Microsoft's continued assertion that they are not the employer is like Microsoft saying the earth is flat."

The flare-up over personnel files is the latest round in a protracted battle between Microsoft and its permatemps. Contract workers filed a class-action suit against Microsoft over their status in 1992, which was taken up by the U.S. District Court in Seattle in 1993. The plaintiffs claimed Microsoft treats them as full-time employees in every regard except compensation and benefits. In 1994, Judge Carolyn Dimmick ruled in favor of Microsoft. But the 9th U.S. Circuit Court of Appeals in San Francisco ruled in 1997 that Microsoft should have allowed contingent workers to take part in a stock-purchase plan through which full-timers can buy shares at a 15% discount.

The case was then sent back to Judge Dimmick. Last summer, she limited the scope of the case to include only certain temps who worked at Microsoft. The plaintiffs appealed that ruling, and they filed a new suit to cover those excluded by Judge Dimmick.

U.S. District Court Judge John C. Coughenour took over the seat from Judge Dimmick and is overseeing the case. Last May, Microsoft sought a review by a wider panel of the 9th Circuit Court; the request was denied. A request by Microsoft to the U.S. Supreme Court for review is pending.

The latest scuffle began when alliance members were tipped off about the existence of personnel files. These were at least for some time last month kept in a "procedures" file, a public folder accessible via Microsoft's internal e-mail system.

One current temp says she was able to read her own evaluations in the file last month. And, she says, she was able to see those of thousands of other Microsoft temp workers. She says that when she tried to look at the folders again last week, the words "You do not have sufficient permission to perform this operation on this object" appeared on the screen.

Microsoft's Mr. Leach says an investigation has been launched to determine why the evaluations were accessible, however briefly, in a public file. "We regret that information was made available through some security breach." Several current and former temp workers, including Mr. Courtney, say they had no idea until recently that Microsoft was keeping any sort of files on their job performance. They say the evaluations include a numeric rating and labels that rank workers either "eligible," "eligible with feedback" or "ineligible" for future jobs.

Mr. Courtney says the issue is pressing now, as Microsoft is in the process of cutting back on temps and perhaps increasing the number of full-time jobs, according to an internal memo acquired by the alliance and widely reported by the local media.

Mr. Leach won't comment on the memo, saying only that the company has no new policy to announce.

In any event, Mr. Courtney argues, if former temps were to apply for full-time jobs, it would be helpful to know what their former managers thought of them.

Take David Turim, a permatemp with Microsoft from 1995 to 1997. He says when he applied for a permanent job after his temp assignment ended, he was surprised when he wasn't even granted an interview. Mr. Turim says he asked both his temp agency, S&T Onsite, and his Microsoft manager for evaluations to see if he could discover any "blot" on his record. But he never received anything from Microsoft and was simply told by the temp agency that his skills weren't transferable.

"I had no opportunity to make my case," says Mr. Turim, who this week received a copy of his evaluation from the alliance, which says it was obtained through Microsoft insiders.

Mr. Courtney also says he has personal experience in the matter. He says he recently obtained a copy of an e-mail written about him by a manager in 1998, while he was working at Microsoft. It

reads: "This guy's previous determination was eligible. However, in light of the circumstances, I think that we should move him to eligible with feedback." The downgrade, according to the e-mail, was because Mr. Courtney "used poor judgment" in talking to a reporter about the court case. "Future hiring managers with very press-sensitive data may not be comfortable with him."

Mr. Leach won't comment on any specific e-mail exchange or Mr. Turim's evaluation, saying "it would be inappropriate to discuss internal processes."