The Firehouse Lawyer

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December 2019

THE YEAR IN REVIEW – HIGHLIGHTS OF 2019 IN *FIREHOUSE LAWYER*

We thought it might be beneficial to review the most important issues dealt with in the *Firehouse Lawyer* this year, from January to November editions. We found it interesting to note that (1) some of these issues remain unresolved and (2) some of them represent major trends or developments, taken together or in the context of the larger picture that comes with a more historical viewpoint.

January/February: We start with the January and February editions, in which we focused on certain issues arising under the new Paid Family and Medical Leave Act, codified now at RCW 50A.04. Our main issue was with the position of the Employment Security Department (which administers the Act) that elected officials must be considered "employees" under the Act, and must therefore have premiums paid on their behalf.

Our analysis, set forth in the January and February editions, is that elected officials such as fire district and RFA commissioners are not employees. We believe that the new PFLMA law cannot be read in isolation, but rather must be interpreted in light of the federal FMLA law and the prior state FMLA

law, with regard to such definitional questions. At one point in our analysis we noted that the federal FMLA statute, as enacted by Congress and never amended, provides that the term "employee" is to be defined as set forth in the federal Fair Labor Standards Act and implementing regulations.

As we noted, the FLSA definition of "employee" provides that such elected officials fit within an express exception and are therefore not employees under the FLSA or the federal FMLA. Would it be good policy (or more importantly, would it be consistent with fundamental principles of statutory construction) for the definition of employee to be different in the state PFMLA from the seminal statute—the federal FMLA—that started this whole concept of family and medical leave in the first place? Obviously not.

The Attorney General was asked early in the year to do a formal opinion on the matter, but as of now we know of no formal AGO on the subject.

We also mentioned in February that an historic interlocal agreement was being negotiated between fire districts and King County, pursuant to RCW 52.30.020. Now, as the year winds down, it appears that our clients and other King County fire departments are executing such agreements, so finally some funds will be paid for services provided by fire districts to counties—no free lunch.

March/April. In the March/April edition we reported on a case (*Volkert v. Fairbank Construction Co,, Inc.* No. 77308-9-1) in which Division I of the Court of Appeals ruled that the statutory process must be followed when attorneys request health care information from health care providers, even if the person was not that provider's patient.

This was a timely reminder to attorneys and to our clients that RCW 70.02.060 means what it says. The primary law applicable to attorneys' requests for medical records provides for (1) a 14-day notice to the health care provider and the patient of the request for the records, followed by (2) a subpoena. Unless a protective order is obtained, the health care provider must produce the records. If a requestor complies with these requirements and the records are not produced, the provider can even be liable for damages. RCW 70.02.170.

May. In May, Division II of the Court of Appeals (*Save Tacoma Water,* Case Number 49892-8-II) weighed in with an important decision of their own. This time it involved the statute—RCW 42.17A.555—applicable to expenditure of public funds in relation to ballot propositions or campaigns.

As our readers should know, a public agency such as the Port of Tacoma or a fire district/RFA cannot use public funds or resources to support or oppose a ballot proposition. See RCW 42.17A.555.

In this decision, the Court of Appeals found that the Port of Tacoma's legal expenditures (in bringing legal actions such as declaratory judgment complaints) did not fit within any exceptions to the FCPA. First, the Court found that the exception for actions taken at an open public meeting does not include an action to authorize a lawsuit.

The second issue was whether the initiation of litigation might fit within the "normal and regular" exception. Incredibly, the port basically argued that it is normal and regular for the port to engage in litigation of many types and therefore the exception applied. The Court of Appeals disagreed.

We said: The lesson to be learned from this case is that, when using that "normal and regular" exception to the PDC rules, an agency had better be prepared to cite statutory authority for the specific expenditure. Also, never forget that the exceptions to this statute must be construed narrowly, not broadly.

Also in the May issue, a minor statutory change was previewed, but now we might want to feature it a bit more. We said:

"Here is a subtle but relevant legislative change going into effect on July 28, 2019: Engrossed Senate Bill 5958 would amend RCW 39.34.030 only slightly but significantly for those agencies that would like to engage in cooperative purchasing or "piggybacking" on another agency's procurement.

This bill would change RCW 39.34.030(5)(b) as follows:

"(b) With respect to one or more public agencies purchasing or otherwise contracting through a bid, proposal, or contract awarded by another public agency or by a group of public agencies, any ((statutory)) obligation ((to provide notice for)) <u>with respect to competitive</u> bids or proposals that applies to the public agencies involved is satisfied if the public agency or group of public agencies that awarded the bid, proposal or contract complied with its own statutory requirements…."

While we always thought that was what the law meant, some have contended that the statute really only spoke to the notice provisions of applicable bid laws. This statutory change really clarifies that or eliminates any ambiguity. We must realize, however, that the statute still requires compliance and therefore some in-depth study of the procurement you intend to piggyback upon.

In other words, assume you want to piggyback upon a procurement that was governed by the bid laws of Oregon. The "piggybacking" agency would have to make sure the Oregon agency that accomplished the original procurement complied with the applicable provisions of Oregon law (not just notice provisions). Besides notice, typical state laws often contain not only dollar thresholds but also (perhaps more importantly!) "lowest responsible bidder" requirements or some sort of "best value criteria." The bottom line is: you need to check applicable state laws or have your attorney do that for you.

<u>June.</u> Now let us turn to the June issue.

Recently, the Washington Supreme Court (hereinafter "Court") found that a person who has been shot multiple times by a police officer may sue the city employing that officer under a negligence theory, even though the on-duty actions of the officer may have been intentional *and* negligent. To be clear, the underlying reason

why a plaintiff may wish to sue under a negligence theory and not merely an "intentional tort" theory is due to the "vicarious liability" of an employer arising out of the negligent acts of its employees.

In *Beltran-Serrano v. City of Tacoma,* 95062-8 (2019), the plaintiff, a mentally ill homeless man, sued the City of Tacoma (hereinafter "City") because a Tacoma police officer shot him multiple times during an encounter. He sued under the theory that the City "failed to properly train and supervise officers to deal with the mentally ill and exercise appropriate force."

Why is this case important? A general principle of personal injury law is that an *employer* is generally *not* liable for the *intentional torts* of its employees. *See Dickinson v. Edwards,* 105 Wn.2d 457, 466, 716 P.2d 814 (1986). However, another general principle of personal injury law is that an employer *may be held liable* for the *negligent* conduct of its employees when those employees are acting within the scope of their employment, i.e. when those employees are "on the clock" and are not on a "frolic and detour" of their own. *See Id.* This doctrine is known as "respondeat superior."

The second issue that the Court dealt with in *Beltran* was whether the police officer owed a "duty of care" to the mentally ill homeless man. As we have discussed on numerous occasions, government agencies are generally shielded from liability for negligence under what is called the "public duty doctrine," unless an *individualized* duty is owed to a particular person (who is typically the plaintiff in a lawsuit).

The Court, without recognizing one of the four established exceptions to the public duty doctrine, found that the officer—and by extension the City—owed an *individualized* common law duty of "reasonable care" to the plaintiff. The Court found this duty may have been violated, and therefore the City-employer may be found liable in *negligence*—under the doctrine of respondeat superior.

This *Beltran* decision may be seen as a major step toward the public duty doctrine's demise.

July. In July, we discussed the idea that obesity may be considered a "disability" for purposes of the Washington Law Against Discrimination, and the implications of that for fire departments.

In July, the Supreme Court (*Burtlington Northern Railroad Holdings, Inc.*, Case Number 96335-5) held that, under the Washington Law Against Discrimination, obesity always qualifies as a disability. The federal case law interpreting the ADA is much less clear on that question. Our high court said that the medical community recognizes obesity as a primary disease, and not merely being overweight. The Court said the body mass index (BMI) is not the sole determinant of obesity but it is important. We asked about the implications of this decision for the fire service. Will we see an upswing in cases alleging discrimination by failing to hire due to perceived obesity or BMIs that are too high? Will we see existing employees who become obese or fail to maintain operational fitness claim discriminatory practices? Stay tuned for those developments.

August. In August, our lead article related to the WAC change in the definition of "ordinary maintenance" as the term is used in the public works context, and particularly how that might affect the prevailing wage law interpretation.

Prior to the change in the WAC, the "ordinary maintenance" exception to the definition of what was a public work stressed that to be considered ordinary maintenance and therefore not public work, the work had to be (1) not performed under a contract and (2) regularly scheduled. However, there was a 2000 Court of Appeals decision holding that to be "ordinary" maintenance, the work had to be performed by the in-house employees of the agency. The Department of Labor and Industries had embraced that interpretation.

Now, in a 2019 change to the WAC, the State made that official. The departmental definition of "ordinary maintenance" now—as of August 23, 2019—is that this means "maintenance work performed by the regular employees" of the state or local government agency. In some ways, this makes the definition or ordinary maintenance even more narrow or limited. However, we did note that the maintenance no longer needs to regularly scheduled, so now even repairs could be ordinary maintenance. We wonder if more local government agencies or municipal corporations will hire maintenance personnel or use other personnel to perform ordinary maintenance as a portion of their regular duties.

September. In September, we turned our attention to Public Records Act cases, of which there have been many this year. The first case involved a prior version of RCW 42.56.520(3), which dealt with the duty to provide an estimate of time to produce requested records. Basically, the court held that an estimate must be given in the acknowledgment letter due within five days after receiving the PRA request. However, the court added that, if the request is a large one to be fulfilled in installments, then the estimate need only be of the time to produce the first installment. The main lesson here: *always* provide an estimate of time in the acknowledgment letter. It goes without saying that you must acknowledge all PRA requests within five days of receipt and you must estimate the time, should ask for any needed clarifications, and probably should produce any obviously non-exempt records that are ready at hand, such as your annual budget or final minutes of meetings.

The second PRA September case involved the amount of penalties. In this Kittitas County Sheriff case, the court upheld a penalty of $63 per day for a total of more than $15,000. The case was instructive, however, in its discussion of the mitigating and aggravating factors derived from the *Yousoufian* case. Go back and re-read the September issue[1] if you do not know the *Yousoufian* factors! Every public records officer should have that instruction included in their periodic, statutorily-required training.

October. In October, we kept the emphasis right there on the PRA, as a case came down dealing with the concept of the "standing" PRA request. Importantly, the court debunked that concept, saying there is essentially no such thing as a standing or continuing request for records.

The case had an interesting twist, however. The records request pertained to results of an investigation in a personnel matter. But there is an exemption for records relative to an "active and ongoing investigation." We call that a "temporal" exemption or in other words, an exemption that only applies for a period of time, and which would logically expire after the time period expires or a defining event concludes (such as the investigation).

[1] https://www.firehouselawyer.com/Newsletters/September2019FINAL.pdf

The court held that the records request was satisfied because at the time it was made, and responded to, the above exemption did apply. Furthermore, the court held that, since there is no such thing as a continuing or standing request for records, after that the agency was no longer required to produce records after the investigation ended, absent a new request. It really did not matter, the court found, that the particular request was being fulfilled in installments, as the response was accurate when given. This was a state Supreme Court decision so that is the final word on the matter. It would be interesting to speculate as to whether the same reasoning would be applied to the "deliberative process" exemption of RCW 42.56.280. That exemption protects drafts, notes or intra-agency recommendations unless they are publicly cited, such as being mentioned at an open meeting. We wonder if a request was denied under this exemption and then the draft was "finalized" by becoming an actual decision, would that be subject to the same reasoning? There was no standing request.

November. Finally, in November we revisited a topic covered earlier in the newsletter. The question was whether minimum staffing may sometimes be considered a mandatory subject of bargaining, even though it has historically been viewed as a permissive subject. The Court of Appeals affirmed the earlier PERC decision that we reviewed in an earlier edition of the newsletter. The law now is that minimum staffing may indeed be a mandatory subject of bargaining. It depends on the history of bargaining, and the history of agreements that included a minimum staffing clause.

And lastly, in November we reported on still another important PRA case. This was a case we reported on two years ago in the *Firehouse Lawyer*. The issue was whether the birth dates of state employees were protected by privacy rights or were exempt on a constitutional basis. The Court of Appeals held in 2017 that, although such information was not protected by the privacy exemption of the state Public Records Act, there was a constitutional basis for claiming privacy under Article I, Section 7 of the Washington Constitution.

But the Washington Supreme Court reversed, holding that such information is already in the public domain. In this *Freedom Foundation* case,[2] the Court said the nonprofit was not seeking the information for commercial purposes, but rather because they wanted to approach such public employees to persuade them against union membership. The request was a natural (albeit political) follow-up to the U.S. Supreme Court's decision in the *Janus* case that the First Amendment right of freedom of association protects the right of a person to not join a public employee union.

We would note, however, that the Court did not entirely negate our theory that there may be constitutional arguments to a right of privacy, independent of the state's Public Records Act.

[2] https://www.firehouselawyer.com/Newsletters/November2019FINAL.pdf