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Change on the Horizon

Great news! Attorney Eric Quinn is now a partner of the firm, and therefore the name of the firm shall be changed from "Joseph F. Quinn, P.S." to "Quinn and Quinn, P.S." Furthermore, as of February 5, the firm's office landline, 253-858-3226 will no longer be in service. Instead, the office telephone will be 253-590-6628.

CASE NOTE: The Washington Court of Appeals Delivers Another Blow to Firefighters

The Washington Court of Appeals, Division One, recently re-affirmed the "professional rescuer" doctrine, aka the "fireman's rule,"[1] in Washington State. Division One held that "[W]hen a professional rescuer is injured by a known hazard associated with a particular rescue activity, the rescuer may not recover from the party whose negligence caused the rescuer's presence at the scene." *Loiland v. State of Washington*, No. 76096-3-1 (2017).[2]

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[1] The Firehouse Lawyers have written about this doctrine before:
https://www.firehouselawyer.com/Newsletters/v05n06jun2005.pdf

https://www.firehouselawyer.com/Newsletters/v02n03mar1998.pdf

[2] http://www.courts.wa.gov/opinions/pdf/760963.pdf

To briefly state the facts of this case: Firefighter Wynn Loiland responded to a report of a motor-vehicle crash on Interstate Five. While he was on scene on the shoulder of I-5, he was struck by a car that had slid on a patch of ice. According to Loiland, there was a patch of ice on I-5 that the Washington State Department of Transportation should have known about. This patch of ice could have been remedied with cursory maintenance of I-5, and the DOT failed to do so. This failure did not merely cause Loiland's presence at the scene, but was instead intervening negligence that caused his injury. Therefore, Loiland cogently argued, the "professional rescuer" doctrine did not apply to bar his claim.

Division One disagreed. Although Division One admitted that "the professional rescuer doctrine does not bar recovery where the rescuer is injured by the act of an intervening third party," Division One nevertheless concluded that the DOT's failure to de-ice I-5 did not constitute such intervening third-party negligence. Instead, Division One found that DOT's negligence was what caused Loiland to be at the scene, and therefore the professional rescuer doctrine prevented him from recovering.

Loiland has petitioned for review by the Washington Supreme Court.

CASE NOTE: A Reminder about Free Speech in the Workplace

The Washington Supreme Court recently decided *Sprague v. Spokane Valley Fire Department*, No. 93800-8 (2018).[3] The Court couched its holding in the free-speech realm, but this was really more a case of free speech, the free exercise of religion, and the establishment of religion in the workplace.

To briefly state the facts, a captain and other fire department employees formed a Christian Fellowship. The department had an electronic billboard that was used for personal business often, including selling snow tires, requesting tickets to a concert, or seeking recommendations for a babysitter. The captain posted a schedule of Fellowship meetings and newsletters on the electronic billboard. One post included discussion of suicide, and contained two "scriptural quotes." Importantly, the department had an employee assistance program sponsored through the department health insurer, which also sent employees newsletters about suicide.

Additionally, the captain sent a slew of emails regarding the Fellowship to department employees, on department-owned computers. The department had a policy that stated that the department e-mail system was to be used for department business only and "should not be used for *personal business*." (emphasis added).

The Court indicates that the department "took progressive discipline" against the captain. The department sent the captain two letters strongly discouraging his use of department email systems for Fellowship purposes, claiming that the emails were not "content neutral"—legalese for content

[3] http://www.courts.wa.gov/opinions/pdf/938008.pdf

that does not favor a specific set of beliefs. One of the letters expressed concern over the following: "The inappropriate and prohibited behavior involved written content that was of a religious nature, including religious symbols. . . . The inappropriate and prohibited behavior involved the use of language and written content that was of a religious nature, specifically the quotation of scripture."

The captain continued to send the emails on department equipment, not his personal devices. The department fired the captain. His termination "was a direct result of the e-mails and bulletin board postings, as well as his failure to obey his superiors' orders to cease the communications."

There are some procedural facts that do not bear mentioning here. Suffice it to say that the lower tribunals agreed with the department that it applied its policies on use of district equipment for "personal business" equally, and therefore did not violate various constitutional provisions when terminating the employee. The Court disagreed, in a divided opinion.

The Court found that the central issue in the case was whether the department restricted the speech of its employees in a "viewpoint-neutral" manner. In other words, the issue was whether department policies regarding the use of department equipment for personal use were applied evenhandedly. Importantly, the Court found that "the department's interest in avoiding an establishment clause violation does not outweigh [the captain's] interests under the First Amendment." In other words, an employer's worry about the excessive presence of religion in the workplace is not enough to restrict religious views. Any restrictions must be applicable to all employees and not be related to religion, is really what the Court was saying in *Sprague.*

The Court proceeded to perform the traditional free-speech-in-public-employment analysis,[4] and found that the employer's interest in efficiency did not outweigh the captain's right to speak as a public citizen on matters of public concern—presumably the matter of public concern was suicide. The Court reasoned that "'a reasonable restriction (on free speech) cannot be justified when it 'is in fact based on the desire to suppress a particular point of view,'" citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc*., 473 U.S. 788 (1985). In other words, an employer cannot claim that a policy is designed to encourage efficiency when the policy is truly meant to prohibit a particular type of speech.

The all-important lesson from *Sprague*: Be careful with your *words*. To ensure that your content-neutral policies, that are merely designed to

[4] The *Firehouse Lawyer* has discussed this analysis on multiple occasions:

https://www.firehouselawyer.com/Newsletters/v06n06jun2006.pdf

https://www.firehouselawyer.com/Newsletters/December2016FINAL.pdf

http://www.firehouselawyer.com/Newsletters/v06n12dec2006.pdf

http://www.firehouselawyer.com/Newsletters/v06n05may2006.pdf

prevent the excessive use of agency-owned equipment for personal use, do not use *words* that evidence a different intent. Do not use the same words used by the department in *Sprague*:

> "The inappropriate and prohibited behavior involved written content that was of a religious nature, including religious symbols. . . . The inappropriate and prohibited behavior involved the use of language and written content that was of a religious nature, specifically the quotation of scripture."

SAFETY BILL

Recently, a question arose as to whether an employer must self-report de minimis violations of a safety rule of the employer to L&I. The Washington Industrial Safety and Health Act gives the employer discretion to self-report violations of safety or health standards:

> "Any employee or representative of employees who in good faith believes that a violation of a safety or health standard, promulgated by rule under the authority of this chapter exists that *threatens physical harm* to employees, or that an *imminent danger* to such employees exists, **may** request an inspection of the workplace by giving notice to the director or his or her authorized representative of such violation or danger."

RCW 49.17.110 (emphasis added). In other words, the employer (or employee) does not have an obligation to self-report de minimis safety violations, but certainly *could*—and should—when such violations threaten physical harm to all employees or pose an imminent danger to employees.[5] If certain safety violations do not threaten physical harm to employees or present an imminent danger to employees, then without question, the employer has no obligation to request an inspection by L&I. Whether there is grounds for discipline for a safety violation is another question entirely.

The only reference to reporting in the federal Occupational Safety and Health Act (OSHA) is for *false maintenance* of reports required by OSHA:

> "Whoever knowingly makes any false statement, representation, or certification *in any* application, record, report, plan, or other document filed or required to be maintained pursuant to this chapter shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both."

[5] Remember the whistleblower laws as well, set forth at RCW 42.41.

29 U.S.C. § 666 (g).[6] (emphasis added).

Is Your Website ADA Compliant?

Title III of the Americans with Disabilities Act prohibits the owner of a place of "public accommodation" from discriminating "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation..." 42 U.S.C. § 12182(a). Recently, not only did a federal district court find that a website shared a "nexus" to a place of "public accommodation" subject to Title III, but also found that a private company's website violated Title III. *See Gil v. Winn Dixie Stores*, 242 F.Supp.3d 1315 (2017).[7]

The *Winn Dixie* court admitted that "[C]ourts are split on whether the ADA limits places of public accommodation to physical spaces." The *Winn Dixie* court outlined the "nexus" test that other federal courts have used when determining whether a non-physical space shared a sufficient nexus with a physical space, enough to deem that non-physical space to preclude equal access to a place of public accommodation.

Ultimately, the *Winn Dixie* court **did not** explicitly hold that a website is a place of public accommodation. Instead, the *Winn Dixie* court reversed a summary judgment granted in favor of the private company, which owns and maintains various department stores across the country. What the *Winn Dixie* court did find, is that when a website prevents a person with a disability from accessing services *of* a place of public accommodation, such as a public-agency-owned office building accessible to the public, or a privately owned department store, that this website has a sufficient "nexus" to the physical place of public accommodation and bars access to that place of public accommodation. In that case, such a website violates Title III.

In *Winn Dixie*, the person with a disability was a blind man who successfully alleged that the company's website permits the sighted to get information about store locations, educates the sighted on store items, and provides the sighted with the ability to re-fill prescriptions.

The *Winn Dixie* court agreed that the blind man was physically precluded from

[6] Of course, the employer has an obligation to report work injuries and illnesses, pursuant to state and federal law. 29 U.S.C. 673 (e); *See Also* 29 U.S.C. § 657 (c): *"* Each employer shall make, keep and preserve, and make available to the Secretary or the Secretary of Health and Human Services, such records…for the enforcement of [OSHA] or for developing information regarding the causes and prevention of occupational accidents and illnesses"; WAC § 296-27-031

[7] https://scholar.google.com/scholar_case?case=18300351207500145842&q=%22Winn+Dixie%22+AND+2017&hl=en&as_sdt=3,48

obtaining the benefits *of* the department stores of the private company, because he could not see the store locations and other amenities afforded by the department stores. Consequently, the *Winn Dixie* court could not grant summary judgment to the private company. The *Winn Dixie* court found that the blind man stated a claim for violations of Title III.

What does *Winn Dixie* mean for public or private agencies that maintain a website that directs the public to services performed by the agency in physical locations owned by the agency? It means that your agency should consider upgrading your websites to make it just as easy for a person with a disability to use the website to locate services performed in physical locations of the agency—places of public accommodation—as it would be for a person without a disability.

Take note that the private company in *Winn Dixie* contended that the blind man did not adequately argue that "the inaccessibility of the website prevented him from visiting a Winn-Dixie store or pharmacy." The *Winn Dixie* court responded that Title III prohibits even "intangible barriers" that would preclude an individual from enjoying a place of public accommodation.

Therefore, to the extent that your agency website would impose a barrier to a person with a disability from learning office locations or class schedules, etc., you may have a Title III problem.

Winn-Dixie is one of those cases that could lead to unintended consequences. This is not a case decided by the Washington Supreme Court, or the United States Supreme Court, and we feel that this question will eventually have to be resolved by the Supreme Court. Until then, be aware of *Winn-Dixie*.

A Slew of Employer-Friendly National Labor Relations Board Rulings

To begin, it is well-settled that the Washington State Public Relations Commission often relies on decisions of the National Labor Relations Board (NLRB) when issuing decisions impacting labor relations. Recently, the NLRB overruled various NLRB precedents. Whether these rulings are politically motivated or not is irrelevant. The thrust of these rulings could shift labor-relations in a few fundamental ways:

First, in *Hy-Brand*,[8] the NLRB abandoned the "joint-employer" precedent set forth in *Browning-Ferris*, an Obama-era ruling. The *Hy-Brand* Board found that *Browning-Ferris* was too broad. The Board found that under *Browning-Ferris*,

[8] https://dlbjbjzgnk95t.cloudfront.net/0995000/995174/hy-brand.pdf

a "joint employer" situation arose even though the two separate employers "never exercised joint control over essential terms and conditions of employment, and even when any joint control is not 'direct and immediate.'" The Board ultimately ruled that "a finding of joint-employer status requires proof that the alleged joint-employer entities have [1] *actually exercised* joint control over essential employment terms (rather than merely having 'reserved' the right to exercise control), [2] the control must be 'direct and immediate' (rather than indirect), **and** [3] joint-employer status will not result from control that is 'limited and routine.'" (emphasis added).

This means that a mere contractual relationship between two employers will not give rise to a "joint employer" situation. Of course, the NLRB found in *Hy-Brand* that there actually was a "joint employer" relationship, but saw fit to overrule *Browning-Ferris.* The ultimate consequence of *Hy-Brand* is that arms-length business relationships will not be as closely scrutinized to establish a "joint employer" relationship.

Second, in *Boeing*,[9] the NLRB reversed the *Lutheran Heritage* decision, in which the Board found that a "facially neutral" employee handbook that sets forth standards of employee conduct could be deemed to violate the National Labor Relations Act (NLRA) if an employee "would reasonably construe the language to prohibit" activity protected by the NLRA. The Board found that "[E]mployees are disadvantaged when they are denied general guidance regarding what standards of conduct are required and what type of treatment they can reasonably expect from coworkers. In this respect, *Lutheran Heritage* has required perfection that literally is the enemy of the good."

Ultimately, the Board found that a facially neutral employee handbook setting forth standards of conduct in the workplace is *lawful* when "(i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights[10]; *or* (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule." What this means is that even if a facially neutral policy could be reasonably interpreted to interfere with employee rights to bargain or organize, such policies are still lawful if the potential for such interference is outweighed by legitimate justifications, such as setting forth "basic standards of civility." The Board admitted that this will require a case-by-case analysis.

9 https://dlbjbjzgnk95t.cloudfront.net/0995000/995170/decision.pdf

10 Perhaps the most commonly litigated NLRA-based right is the right of employees to engage in "concerted activities," i.e. the right of employees to discuss terms and conditions of employment among one another, in the workplace or otherwise.

The consequence of *Boeing* is favorable: Employer policies that prohibit activities that would impede the "business needs" or "reputational interests" of a particular agency may be found lawful under the NLRA. For example, the policy at issue in *Boeing* was a company policy that the use of cameras on company property "to capture images or video is prohibited without a valid business need."

Again, PERC ordinarily applies NLRB precedent. Importantly, Washington Courts have explicitly found that the NLRA does **not** apply to public employees. *Teamsters Local Union No. 117 v. Washington Dep't of Corrections*, 179 Wn.App. 110 (2014).[11] In the public-employment context, the employer should be more worried about policies running afoul of the First Amendment, not merely whether the policy would violate the NLRA. However, *Boeing* is persuasive authority.

Third, in *Raytheon*,[12] the NLRB ruled on when an employer can make a unilateral change to a mandatory subject of bargaining without giving notice and an opportunity to bargain. The NLRB noted that the "(United States) Supreme Court in *Katz* held that [the NLRA] requires employers to refrain from making a *change* in mandatory bargaining subjects unless the change is preceded by notice to the union and the opportunity for bargaining regarding the planned change."[13] (emphasis added).

But the Board ruled that when a past practice of an employer is so clear that there really is no "change" to a mandatory subject, the above rule from *Katz* (notice and opportunity to bargain) does not apply.[14] Again, the NLRA does not apply to public employees. PERC relies on NLRB precedent, but PERC has its own precedent regarding "unilateral changes" to mandatory subjects (see below). Therefore, we warn the Washington public employer not to view *Raytheon* as a bombshell.

[11] https://www.firehouselawyer.com/Newsletters/v12n01mar2014.pdf

[12] https://www.nlrb.gov/news-outreach/news-story/nlrb-clarifies-duty-bargain-over-%E2%80%9Cchanges%E2%80%9D-are-consistent-past-practice-0

[13] The *Firehouse Lawyer* has discussed PERC precedent on when such unilateral changes are permissible: http://www.firehouselawyer.com/Newsletters/October2015_FINAL%20.pdf

[14] The employer in *Raytheon* had changed employee medical benefits every year without bargaining, from 2001 to 2012. It did so again in 2013 but this was challenged as a "unilateral change." The employer won.

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