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A SIGNIFICANT US SUPREME COURT DECISION ON TITLE VII

On April 17, 2024, the U.S. Supreme Court decided a Title VII discrimination case that we discussed briefly here.

In the case of *Muldrow v. City of St. Louis*,[1] the U.S. Supreme Court (SCOTUS) dealt with an issue arising under Title VII of the Civil Rights Act of 1964 (Title VII). The central issue revolved around whether job transfers, which do not result in significant material harm to the employee, fall under the purview of discrimination as defined by Title VII. In a unanimous decision, the Court concluded that even if the harm caused by a transfer is not that significant, it may well still be discriminatory. Justice Elena Kagan authored the majority decision, in which five other justices concurred. Three other justices—Thomas, Alito and Kavanaugh—concurred in the judgment but not the opinion of the majority.

Without drilling down deeply into the facts of the case, the claim by a St. Louis police officer is that she was transferred to a new position, with no loss of rank or pay, because she is a woman. The only changes to her employment conditions related to schedule, responsibilities and some perks, such as access to an unmarked take-home vehicle. She lost at the trial court and in the 8th Circuit Court of Appeals but fared better in the

[1] https://www.supremecourt.gov/opinions/23pdf/22-193_q86b.pdf

Supreme Court. While the Court of Appeals held that such a plaintiff challenging a transfer needed to show "materially significant disadvantage," the high Court rejected that formulation of the degree of proof. The lower court would have dismissed the case, absent a showing of a loss of title, salary or benefits.

The Supreme Court held that the plaintiff need only show "some harm" with respect to an identifiable term or condition of employment. The harm needn't be significant, the majority opinion said.

There was no dispute in the case that the transfer did relate to terms and conditions of employment. After all, "hours of work" are clearly a term or condition of employment. The Court said that terms and conditions of employment relate to more than just economic or tangible items. The Court stressed that adding the concept of significance would be adding words or concepts to the statute that Congress enacted.

Of the three short opinions concurring in the result, if not all of the majority's opinion, the best one has to be the concurrence by Justice Kavanaugh. The gist of his opinion is that if the plaintiff in such a transfer case can show (1) the transfer was based on their protected class membership and (2) the transfer affected a term or condition of employment, then Title VII has been violated. He found little practical difference between his analysis and the "some harm" approach of the majority of the opinion, saying that 99 out of 100 discriminatory transfer cases would turn out the same under either approach. (And his approach is much more straightforward.)

The case that Justice Kavanaugh found persuasive came out of a D.C. Court of Appeals decision in *Chambers v. District of Columbia,* 35 F. 4th 870 (2022).

The concurring opinions of Justices Thomas and Alito seemed to me mostly quibbling about the words used by the majority, i.e. a battle over semantics.

DARN THOSE TREES!

Very infrequently, the *Firehouse Lawyer* will include a discussion of legal issues unrelated to the fire service. Here is such an issue that many of us homeowners have experienced, so we felt this case was worth mentioning.

In *Chaudry v. Day,* Court of Appeals Division II No. 58179-5-II,[2] the Court affirmed a trial court that granted summary judgment dismissing a plaintiff's complaint alleging private nuisance, negligence and infliction of emotional distress.

The Chaudries claimed that their neighbor's tree had limbs that broke off, and then fell and damaged their roof. There can be valid private nuisance claims arising out of tree limbs that hang over the boundary of one's property. However, to successfully state such a claim, or at least show that the facts warrant a trial and not summary judgment of dismissal, some greater proof is required than what plaintiffs offered here. They simply did not provide sufficient evidence that the tree was dangerous or diseased.

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2 https://www.courts.wa.gov/opinions/pdf/D2%205817 9-5-II%20Published%20Opinion.pdf

After stating the legal requisites of any claims for private nuisance, negligence and negligent infliction of emotional distress, the Court delved into the law related to defective trees that create a private nuisance. Case law supports the idea that one who owns land in or near an urban or residential area, and who has actual or constructive knowledge of defective trees on the property, has a duty to correct the problem. Although the existence of this duty is a legal question, whether one knew or should have known of a defective tree is a question of fact.

As one earlier court succinctly put it: "an owner does not have a duty to remove healthy trees merely because the wind might knock them down." Based on the discussion of the record and the evidence submitted in the *Chaudry* case, it is apparent that, for such a claim to succeed, you need expert testimony that the tree was dangerous and defective, and also that the defendant/neighbor had actual or constructive notice of that fact. In this case, the forestry report was prepared *after* the litigation started, so obviously the facts and opinions stated therein did not work to provide notice of the allegedly dangerous tree some two years earlier. Held: summary judgment was proper.

WHAT IS "DISTRICTING" AND HOW DOES IT WORK?

In discussions relative to formation of new regional fire protection service authorities (RFAs) the question is often asked as to whether creation of commissioner districts might be a good idea in the Governance Section of the RFA Plan. The purpose of this memo is to explain the concept of "districting" as it is set forth in statutes relating to RFAs and also fire protection districts.

Statutory References: The following statutes are pertinent to the topic and need to be understood so that one can consider the advantages and disadvantages of "districting":

- RCW 52.26.080[3]
- RCW 52.14.013[4]
- RCW 29A.76 Redistricting
- RCW 44.05
- RCW 52.06.085

The RFA statute, at RCW 52.26.080(4) allows creation of commissioner districts within the RFA's jurisdictional boundaries. The fire district statute, at RCW 52.14.013 allows the same process, and RCW 52.06.085 mentions districting in the context of mergers of fire districts.

So what does "districting" mean in these contexts? It means dividing the entity—whether an RFA or a fire district—into sub-regions or districts *of "approximately equal" population*. But how does it work, or what is the purpose of districting? The created commissioner districts require:

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[3] https://app.leg.wa.gov/RCW/default.aspx?cite=52.26.080

[4] https://app.leg.wa.gov/RCW/default.aspx?cite=52.14.013

- Only registered voters residing within the district may file for the position of commissioner of that district;
- Only registered voters residing within the district may vote in the primary election, where persons are nominated to represent that district;
- ALL registered voters residing within the RFA or fire district must, however, be allowed to vote for each commissioner who is eligible in the general election;
- Whenever some of the board members are chosen by the governing body of one of the participating fire protection districts, it is permissible to use in part the jurisdictional boundaries of a participating fire protection district; for example, if an RFA adopted what we call a hybrid governance model, and some of the governing board were selected by one or more city councils, then the city boundaries could be used to help describe "district" boundaries.

An important caveat in the "districting" scenario is that if the designated districts are no longer approximately equal in population after the decennial census, then redistricting is required pursuant to RCW 29A.76. That statute requires the application of RCW 44.05, which governs the use of the federal decennial census conducted every ten (10) years during the years that end in a zero. If the district boundaries as previously established no longer include populations that are approximately equal, then redistricting is required. A plan that establishes such commissioner districts in 2025, for example, would not be subject to mandatory redistricting until at least 2030. RCW 29A.76 describes the process for that effort; it appears to be a costly endeavor to redraw the district boundaries.

Under RCW 44.05, the state redistricting commission must forward the latest census data to any special district with a districting plan in their governance model within 45 days after they receive that data from the federal census agency. See RCW 29A.76.010(2). By November 1st of the following year, say 2031, the local agency—RFA or fire district—must adopt a plan for redistricting in its "internal or director districts." See RCW 29A.76.010(3). The criteria for redistricting plans are set out in RCW 29A.76.010(4). Notice to the public and its participation are mandated by RCW 29A.76.010(5), including hearings, and there is recourse to the superior courts for any registered voter affected by the plan. See RCW 29A.76.010(6).

Thus, the question might well be asked: "Is it worth the trouble and expense of this process of redistricting, to adopt a plan that calls for districting in the first place?" What is the ultimate purpose that a district process was intended to accomplish? Was it to make sure that commissioners represent their constituents' interests, as contrasted with the interests of all persons residing within the RFA or fire district?

Please remember that in a districting scenario, all registered voters of the underlying RFA or fire district get to vote in the general

election in November for each of the commissioners, regardless of the district that "nominated" them in the primary in August.

Another point worth considering: What happens if an RFA or a fire district annexes according to applicable law a rather substantial populated area such as a city or a large, heavily populated urban area within a fire district? Is the agency required to redistrict? Yes. The applicable statutes do not address this scenario, but it will surely occur and in fact has occurred. At that point it is undeniable that the districts are no longer approximately equal in population. When such annexations have occurred, we know of instances when it was deemed necessary to amend the RFA Plan. This was done to reconsider the composition of the governing board anyway, so the existing districts (and their boundaries) could be addressed at the same time.

Our conclusion is that in many cases the concept of districting within a fire district or an RFA may create more problems than it solves. Time will tell. We may know more in 2030-2031.

The Municipal Research Services Center has a very good article on this subject of districts and redistricting, so that is worth perusing in addition to this article.

PUBLIC DUTY DOCTRINE STILL APPLIES TO ROUTINE 911 CALLS

Division 1 of the Court of Appeals filed an opinion on June 10, 2024, making it clear that the appeals court still believes the public duty doctrine is viable.[5] After last year's decision of the Washington State Supreme Court in *Norg v. City of Seattle,* 200 Wn.2d 749, 756, 522 P.3d 580 (2023), many commentators predicted the total demise of the public duty doctrine.

Although many of our regular readers are quite familiar with the public duty doctrine, for those who are not we will restate it here. The doctrine flows from the general historical rule that public officials carrying out duties arising under municipal law owe a duty to the general public but have no actionable duty in tort to particular individuals. In *Norg,* the Court held that the public duty doctrine did not bar a negligence claim against Seattle related to the provision of emergency medical services (EMS), because private parties (such as private ambulance companies) engage in the same exact activities.

Norg also could be interpreted as another "special relationship" case that is a well-established exception to the public duty doctrine. This is so, because in *Norg*, as emphasized in this recent case of *Zorchenko v. City of Federal Way,* No. 85449-6-1, Division 1 of the Court of Appeals stressed the facts of *Norg.* In that case, the dispatcher stayed on the line with the 911 caller for a long time and kept assuring the caller that "help is on the way." In reality, of course, the Seattle EMS personnel went to the wrong address as they thought the call originated from

[5] https://www.courts.wa.gov/opinions/pdf/854496.pdf

a nursing home. (The Norg residence was only *three blocks* from the nearest fire station.)

The fact pattern was such that, unlike in *Zorchenko,* the response was anything but routine. In *Zorchenko*, the call to the police was only to request a police presence to come to the scene of a minor motor vehicle accident to complete a police report. In effect this was not even an emergency, but rather a report of a routine police matter. The real emergency occurred well after the police arrived, when an errant vehicle slammed into the parked police car, which had its emergency lights going, on the shoulder of the road.

The upshot of this ruling is that the public duty doctrine still applies to the routine provision of nonemergency services by municipal governments, but does not apply to EMS when negligence is alleged in the provision of EMS. We would note, however, that there does exist a special qualified immunity statute that shields EMTs and paramedics from liability unless the act or omission constitutes either gross negligence or willful or wanton misconduct. See RCW 18.71.210.

Please note that this qualified immunity only applies to acts or omissions done in good faith and in the actual provision of emergency medical services.