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SAFETY BILL: COVID-19 AND DISABILITIES

Governor Jay Inslee has issued a directive that businesses must enact *written safety plans* for operation during *Stage 3*—whenever that occurs in your county.[2] These written safety plans must be at least as protective as the L&I guidelines pertaining to Covid-19 safety measures, which may be found here: https://www.lni.wa.gov/forms-publications/f414-169-000.pdf

The question becomes: How will the above guidance[3] impact your agency when your county enters Phase 3?

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[1] We will hopefully publish an Extra Edition of the July 2020 *Firehouse Lawyer* due to the ever-evolving demands of public agencies at the present time.

[2] https://www.governor.wa.gov/sites/default/files/BusinessTemplate_Phase3_1.pdf?utm_medium=email&utm_source=govdelivery

[3] Governor Inslee also extended the prohibition on in-person meetings (with the exception of agencies in Phase 3 counties which *may* hold in-person meetings while at the same time being *required* to provide an option for remote attendance): https://www.governor.wa.gov/sites/default/files/proclamations/20-28.7%20-%20COVID-19%20OpenGovtWaivers%20Ext%20%28tmp%29.pdf?utm_medium=email&utm_source=govdelivery

Under the Washington Industrial Safety and Health Act ("WISHA"), an employer must provide its employees with a work environment "free from recognized hazards that are causing or likely to cause serious injury or death." RCW 49.17.060. The above guidance constitutes a state-wide recognition of the potential dangers of Covid-19 and the necessary precautions to avoid its spread. Consequently, the above guidance may be applied as the "standard of care" if your Phase-3 agency is sued for negligence for a Covid-19-related injury in the workplace.[4] That is the reason to follow the guidance.

But that is not the only issue. Let us assume that your agency is in Phase 3. Assume further that you become aware of an employee with a generalized anxiety disorder, which has been diagnosed by a psychologist. This employee has sworn that she will *not* come to work until there is a vaccine for the coronavirus.

Assume further that she is the Health and Safety Officer (HSO) of your agency, and a regular responsibility of her position, as set forth in her job description, is daily in-person interaction with members of the public. She alleges that if your agency requires her to return to work, when there is not a vaccine in place, she will raise a claim for workplace discrimination. She asks that her position responsibilities be amended to eliminate the requirement of in-person interaction, and that she also be permitted to work remotely until there is a vaccine—even when the above Phase-3 guidelines have gone into effect which implement protective measures including but not limited to social distancing.

The question becomes, assuming for the sake of argument that this employee has a cognizable "disability" and refuses to come to work: What recourse would she have if your agency terminated her for dereliction of duty or took some other adverse employment action?

Under the Washington Law Against Discrimination, to establish a prima facie case of disability discrimination for failure to accommodate a disability, the plaintiff must show that (1) she has a disability; (2) she can perform the essential functions of the job with or without accommodation; and (3) she was not reasonably accommodated. *Easley v. Sea-Land Serv., Inc.*, 99 Wn.App. 459, 468 (2003).

The prohibition against disability discrimination does not apply if the disability prevents the employee from performing the "essential functions" of the job. *Dedman v. Wash. Personnel Appeals Bd.*, 98 Wn.App. 471, 483 (1999). To reasonably accommodate an individual with a disability, an employer is not obligated to reassign that individual to a position that is already occupied, create a new position, or eliminate or reassign "essential" job functions. *Frisino v. Seattle School District No. 1*, 160 Wn.App. 765, 778 (2011).

[4] For purposes of this article, we are not discussing how the public duty doctrine may impact your agency's liability. For further information on the public duty doctrine, go here: https://firehouselawyer.com/NewsletterResults.aspx?Topic=Civil+Actions&Subtopic=Public+Duty+Doctrine

In many respects, with the above guidance, Washington State has outlined a reasonable accommodation that Phase-3 employers may provide employees that are wary of returning to work and who incidentally happen to suffer from a cognizable disability. Consequently, it could be argued that your agency engaged in the necessary "interactive process" of reasonable accommodation by seeing that the above guidance is followed.

It could also be argued that in-person interaction of the HSO position above is an "essential function" of the position, and if the employee was not willing to fulfill that function even if your agency adopted and enforced the above guidelines, then she could not establish a prima facie case of disability discrimination.

Of course, the above guidelines may change due to the rapidly evolving nature of the pandemic—in addition to the potential for a *devolving* public response to the pandemic. Stay tuned.

Ultimately, under the circumstances above, we recommend that your agency contact its attorney to weed through these issues.

NEGLIGENCE SUITS BY LEOFF MEMBERS

Division I of the Washington State Court of Appeals filed an unpublished opinion on June 29, 2020 that may be of interest. While unpublished appellate decisions are considered not significant from a precedent standpoint, sometimes they serve to remind us of some principles we might overlook. In *Zieger v. City of Seattle*, No. 79394-2-1,[5] a Seattle police office sued the city—his public employer—for negligence. He was injured during a protest (this is timely!) on May Day 2016 when a thrown rock struck him in the forehead. He alleged that the city was negligent in not providing him with the most protective bike helmet, when the city seemed to be gradually upgrading to a better model than the standard bike helmet.

As every first year law student knows, there are four elements to the tort claim of negligence: (1) the defendant owed the plaintiff a duty of care; (2) the defendant breached that duty; (3) injury or damages to plaintiff resulted; and (4) the breach was the proximate cause of the injury.

What we wanted to point out to our readers is the point made by the court that municipal corporations like cities (and fire districts and RFA's) owe a statutory duty of due care to their police (and fire) employees because of RCW 41.26.281—a portion of the LEOFF statutes. This section of the law provides to all such LEOFF members the benefits of the statute and a cause of action in court for the intentional or negligent act or omission of the employer that causes injury or death to the member.

In this case, the plaintiff failed to show that he could prove elements of negligence, so a summary judgment of dismissal was affirmed by the appellate court. Another interesting aspect of the case was the point made by the

[5] http://www.courts.wa.gov/opinions/pdf/793942.pdf

court about the need for expert testimony. In this case there was *no NFPA standard or other standard of care* that was evident so an expert was needed to testify about what type of bike helmet would meet the standard of care. Without a recognized industry standard, it would be impossible for a lay person, such as a juror, to determine what standard of care to apply.

In summary, the case did not change established law, but it does serve to remind us about that LEOFF statute and the importance that *experts* play in establishing standards of care in negligence actions.

AN IMPORTANT *PUBLISHED* OPINION REGARDING THE PUBLIC RECORDS ACT – THIS ONE DEALS WITH PERSONNEL EVALUATIONS AND WHETHER THEY ARE EXEMPT FROM DISCLOSURE

Recently, Division II of the Washington State Court of Appeals decided *The Church of the Divine Earth v. City of Tacoma*, 53804-1-II (2020).[6] We find this case very pertinent to a question often asked of us about personnel performance evaluations and whether those are exempt documents under the Public Records Act. The salient facts in *Divine Earth* are these:

A church sought job performance evaluations under the PRA for two department directors of the City of Tacoma. The City responded, providing some parts of the evaluations but redacting the rest, giving a brief explanation of the reasons for non-disclosure. The City based its redactions on RCW 42.56.230, which provides an exemption for personal information in employee files, if disclosure would violate their right of privacy. RCW 42.56.050 defines the right of privacy, supplemented by the seminal case of *Dawson v. Daly*, 120 Wn. 2d 782, 797 (1993). Information is only private under RCW 42.56.050 if disclosure would be highly offensive to a reasonable person *and* the information is not of legitimate public concern.

Ultimately, the Court of Appeals decided that the redactions were appropriate because of the aforesaid exemption and therefore the trial court was correct in granting a summary judgment to the City. What we found interesting, however, is that the Court explained well that the advice we have given for years is correct. We have been advising since the year 2000 that performance evaluations of public employees are generally protected under these statutes and under *Dawson*, except for the evaluation of the chief executive officer of the agency.

The case of *Spokane Research & Defense Fund v. City of Spokane*, 99 Wn.App, 452, 453, 994 P.2d 267 (2000) made it clear to us that there is a legitimate public interest in the performance of the chief executive, who is in charge of the day to day service delivery of the agency. Since the City Manager of a city is analogous to the Fire Chief of a fire department (fire district or RFA) we believe that their performance evaluations done by their supervisors—the

[6] http://www.courts.wa.gov/opinions/pdf/D2%2053804-1-II%20Published%20Opinion.pdf

elected officials—are fair game and non-exempt under the PRA

In the instant case, the two employees were department directors of the City. While those are important positions, the Court of Appeals wisely held that disclosure would have the effect discussed in the *Dawson* case and other cases. When balancing the public's interest in disclosure against the public interest in efficient administration of government, this Court found that the latter was paramount. In the case of a city manager or fire chief, the opposite result occurs because the public has a stronger interest in disclosure of the performance of this high-ranking public figure whose performance is absolutely critical to municipal success.

With rank and file employees or those who are ranked below the Chief executive of the agency, disclosure might have a chilling effect on the candor of the evaluator, not to mention the impact on the morale of the employees.

We think the Court clearly made the right decision in the way it balanced the interests, and this is not just because the Court agreed with what we have been saying for the last 20 years. If I had time, I would consult the 2000 editions of the *Firehouse Lawyer*, because we probably said the same thing twenty years ago. Incidentally, the Court also said the City of Tacoma's "brief explanation" of the reasons for redaction or exemption were adequate, even though the City basically only cited the two statutes and the *Dawson* case.