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IMPORTANT HEALTH CARE INFORMATION DECISION

At long last, a Washington appellate court has provided us with a published opinion shedding great light upon how the courts in Washington view the Uniform Health Care Information Act, Chapter 70.02 of the Revised Code of Washington.

On April 8, 2019, Division I of the Court of Appeals issued its unanimous decision in *Volkert v. Fairbank Construction Co, Inc.* No. 77308-9-1. The Court ruled that a statutory process must be followed when attorneys request health care information of a particular person from health care providers, even if the person was not that provider's patient.

Eric Volkert was injured at work and sued Fairbank Construction Co., Inc., a general contractor. That defendant hired a neuropsychologist to analyze the medical records of the plaintiff, to give plaintiff some psychological tests, and to testify for the defense. The dispute centered around a subpoena served on the expert witness, demanding production of all of her medical reports and records of all of the other persons (not patients treated by her) she evaluated in her forensic practice. She estimated that she had issued 225-250 such reports, so the subpoena not only sought such reports but any information she reviewed to issue such reports and opinions in those other cases.

The trial court had ordered the defense expert to produce those records, ruling that the information sought did not include "health care information." The defendant filed in the Court of Appeals for an emergency stay and also filed a motion for discretionary review, which was granted. Ultimately, the Court of Appeals reversed the trial court, holding that the records sought did include "health care information."

The Court of Appeals agreed that such records cannot be disclosed by such an expert witness, who was a licensed clinical neuropsychologist, and therefore is a "health care professional" *whether she has a doctor-patient relationship with the plaintiff or not.* The Court of Appeals reversed because the Superior Court judge applied the wrong standard. This court held that the UHCIA applies to "health care information" and that the court was unable to say that none of the doctor's reports contained qualifying health care information. Therefore, absent notice and an opportunity to object by those other (225-250) "patients," the reports could not be released.

The Court of Appeals noted that RCW 70.02.060(1) applies and provides the procedure to follow when attorneys request health care information. Basically, this statute requires (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. *See* RCW 70.02.170.

By contrast, if the requestor does not follow the statutory procedure, the records should not be produced. This procedure is consistent with the legislative purpose pronouncements contained in the UHCIA at RCW 70.02.010, which are designed to protect patient privacy no matter what the context of the request might be.

In the Volkert case, the court recognized that the health care provider in question was not a treating physician of the plaintiff and was only hired by the defendant to testify about her findings after examining and testing the plaintiff. That context does not matter, the court said. Her reports, or some of them, might well include confidential medical information that is sensitive and very private.

The Volkert court distinguished a prior case interpreting RCW 70.02 in light of the Public Records Act (RCW 42.56), in which the Supreme Court held information contained within a special sex offender sentencing alternative (SSOSA) evaluation was not covered by the UHCIA or was not "health care information" at all, because the report was done for sentencing evaluation and not for medical evaluation. In other words, the SSOSA evaluation was done for forensic use and not for treatment. Volkert and his counsel must have argued that this prior case (John Doe G, 190 Wn.2d at 193) means that a doctor's forensic reports are not "health care information". Nonetheless, the Volkert court distinguished that case because this neuropsychologist had up to 250 reports, which must have health care information on those other 250 plaintiffs/patients contained within them.

The lesson of this court decision is that the medical privacy statute—the UHCIA—must be construed to protect the privacy of health care information regardless of *why* the information is being requested.

About the only alternative to the procedure contained in RCW 70.02.060 that we often approve of is one allowed in litigation, under the discovery rules. If the patient/plaintiff and the defendant(s) are in agreement, through their counsel, it is often possible to couple a patient authorization with a signed stipulation, thus allowing release of all or a described portion of the plaintiff's medical records. This procedure (only available in litigation of course) is almost identical to the RCW 70.02.060 procedure because it provides notice and an opportunity to object prior to the disclosure of health care information (or what is referred to in HIPAA—the parallel federal law—as "protected health information"). Therefore, we are fine with that alternative procedure, when applicable.

There are very few cases interpreting the UHCIA, so this opinion from the Court of Appeals is quite welcome. We doubt that the non-prevailing party would petition for review to the Supreme Court of Washington, but if they do, we will surely report it here. For now, though, we are thankful that Division I of the Court of Appeals has issued a thoughtful and well-reasoned opinion and decision on this important issue.

**WATCH WHAT YOU SAY-
DEFAMATION LAW AWAITS**

A recent decision issued by Division II of the Court of Appeals may be of interest to elected or appointed officials determined to protect their reputations…or those with loose lips. In *Seaquist v. Caldier*, No. 50816-8-II, Division II judges upheld a trial court decision granting a summary judgment of dismissal of a claim by Larry Seaquist that statements and other behaviors attributable to his political opponent—Michelle Caldier—were defamatory or placed him in a false light.

We summarize the facts as follows: After both candidates participated in a campaign function, Seaquist discovered that his vehicle was parked outside directly behind Caldier's Lexus convertible. Seaquist took some photos that depicted the back end of Caldier's vehicle. A photo may have shown Caldier's face reflected in a mirror, although she did have sunglasses on. In any event, Caldier started and/or approved a process of denigrating Seaquist and implying that he was stalking her. While the Division II Court said some of her statements about him were unquestionably misleading and ignoble, the Court did not find them defamatory.

The decision is not precedent-setting but does give us occasion to repeat and remind elected and appointed officials about defamation law and some of its most important concepts. First, a defamation claim has four elements: (1) falsity, (2) an unprivileged communication, (3) fault, and (4) damages. Second, when the plaintiff is a public figure, he/she must prove actual malice, i.e. knowledge of falsity or at least reckless disregard of truth or falsity. Third, the First Amendment to the U.S. Constitution protects an individual's right to express an opinion on a matter of public interest. Certainly, this First Amendment right applies fully in the

context of a political campaign, especially when many statements are opinions rather than facts, and government positions are clearly of interest to the public so the rule of "fair comment" most certainly applies.

Essentially, the record made it clear that Seaquist would not be able to prove all of the elements of defamation or the other tort alleged, which is known as a "false light" invasion of privacy. Probably the issues of opinion v. fact, and the actual malice requirement were outcome determinative.

But what if the facts of the case were different? What if one commissioner said publicly about a fellow commissioner, "She is an alcoholic and just voluntarily entered a rehabilitation facility for in-patient treatment." And what if this statement is demonstrably false? It has no basis at all in fact. Yes, the plaintiff has to prove actual malice. But what if the defendant did nothing to verify the accuracy of what he/she thought were the facts? The statement is clearly not a matter of opinion; it is purportedly a statement of facts (especially the part about entering the facility for in-patient treatment). It is probably not a matter of public concern. It may even be a comment about someone's qualified disability. It does not directly relate to how the commissioner is performing in her office. If it is false, it also certainly appears to be malicious.

While public-figure plaintiffs may not like the "actual malice" rule, and while defamation and "false light" claims are difficult to prove in general, public officials should still be aware of the law in this area. False statements of fact about other public officials (or about anyone for that matter) are still actionable and could lead to valid damage claims.

THE FMLA QUAGMIRE

We have seen public employer policies that purport to require employees to use their paid leave such as sick leave or annual leave concurrently with any claimed unpaid FMLA leave under state or federal FMLA statutes.

In *Escriba v. Foster Poultry Farms, Inc.* (9th Cir. 2014) the appeals court held the employer cannot require the employee to take unpaid leave concurrently with other (paid) leaves such as vacation, sick leave, etc. This would seem to preserve the right of the employee to use, for example, 12 weeks of paid leave and then follow that with 12 weeks of unpaid family or medical leave, which could preserve their employment status and provide the other protections of the FMLA regarding return to work.

Compare this with the guidance of the federal Department of Labor, issued on March 14, 2018. It seems to reject *Escriba*. The guidance states that if the employee qualifies for FMLA and elects to take leave for any qualifying reason it counts toward the 12 weeks, whether the employee meant to take FMLA or not!

So who is right? Or what is an employer within the 9th Circuit (such as Washington State) to do? Federal court decisions are entitled to more weight than DOL administrative guidance. At least until January 1, 2020, it would not be prudent to use a policy that sick leave be taken concurrently with FMLA leave. Of course, if the employee unknowingly requests FMLA

leave and then decides they'd like to be paid, maybe that would fall under the guidance, as employer could say, "We did not require it."

It seems to us that much of the above changes anyway with the advent of paid FMLA leave under Washington State Law starting in January 2020. If the employee qualifies for paid FMLA leave under state law and requests it, then the leave is paid and it counts toward the maximum weeks limit (usually 12 weeks per year, with some exceptions like pregnancy).

Take note that the Washington State Paid Family and Medical Leave Act (WPFMLA) *requires* that FMLA and WPFMLA leave be taken concurrently, i.e. there may be no stacking of family and medical leave, paid or unpaid, unless the employer permits otherwise. *See* RCW 50A.04.250.

Take *further* note that the WPFMLA's requirements will supersede the FMLA in certain areas. For example, the WPFMLA likely supersedes a provision of the FMLA which states that an employer may *require* an employee to take their sick leave first prior to taking FMLA leave, set forth at 29 U.S.C. § 2612 (d)(2):

> "An eligible employee may elect, or an employer *may require* the employee, to *substitute* any of the accrued paid vacation leave, personal leave, or family leave of the employee for leave provided under subparagraph (A), (B), (C), or (E) of subsection (a)(1) for any part of the 12-week period of such leave under such subsection."

(emphasis added). First, note the word *substitute* in § 2612. *Escriba* does not conflict with the permissive wording of § 2612 because *Escriba* applies to requiring the employee to take paid leave *at the same time* as FMLA leave, when § 2612 applies to *substituting* leave. But under no circumstances could an employer in the Ninth Circuit require an employee to take sick leave *and* FMLA leave at the same time.

Ultimately, if the WPFMLA did not exist, as of January 1, 2020, an employer could still require an employee to take paid sick leave prior to taking *FMLA* leave. But the WPFMLA, which the Washington Legislature has conferred by statute, and which must be taken concurrently with FMLA leave under RCW 50A.04.250, provides greater benefits.

On January 1, 2020, an employer may not *require* an employee to take paid sick leave prior to taking WFPMLA leave, for two reasons: (1) Under the *State*-administered program, the *State* pays the benefit upon a valid request—and an employer running a voluntary program is required to provide the same benefits as the State, or greater[1]; and (2) the Legislature specifically states that the paid sick leave enumerated under RCW 49.46.210[2] is *in addition* to WPFMLA benefits.

In other words, under *Escriba* and the WPFMLA, an employer administering a voluntary WPFMLA plan may not *require* an

[1] RCW 50A.04.600 (5)(a).

[2] We shall save the argument that the paid sick leave benefits set forth at RCW 49.46.210 do not even *apply* to shift firefighters or other employees required to sleep at their place of employment, due to the exemption of such persons from the definition of "employee" under RCW 49.46.010 (3)(j), for another day.

employee to take paid sick leave at the same time as WPFMLA leave—and why *would* the employer do that? And of course, Washington State cannot do this either, if the employer is operating under the State-run WPFMLA plan.

AN IMPORTANT LEGISLATIVE CHANGE?

We usually do not comment on pending legislative changes, at least until they have landed on the Governor's desk. But here is one that is rather significant and chances look good it might become law.

Engrossed Substitute Senate Bill 5418 would make significant changes to certain local government bid laws (at least for a while—see end of article).

Section 2 of the bill would amend RCW 39.04.155, the small works roster law. It would increase the applicable limit to $500,000 for "small" works from the current $300,000. It would also raise the limited public works process top of range from $35,000 to $50,000.

Section 7 of the bill would amend RCW 52.14.110, the main fire district bid law. For the purchase of materials, supplies and equipment it would raise the threshold as to when bids are required from the current $10,000 to $40,000. Then, it would change the vendor list range. Instead of being eligible to use vendor list between $10,000 and $50,000, that range would now be $40,000 to $75,000.

Section 8 would amend RCW 39.04.105, which applies to bid protests. Within two days after bid opening, there would be a new requirement: the local government would be required to provide copies of all bids if requested. Then, at least two full business days later after providing the copies, a contract may be executed with the successful bidder.

Of course, usually during those first few days after bid opening the government and the apparent best bidder are busy with getting a performance bond and an acceptable contract form anyway—*See* RCW 39.08.010. But this new requirement means the government cannot rush to give notice to proceed.

If a protest is received, there must be no contract executed for two full business days. A notice of intent to contract is needed, at least two full business days prior to contracting, **provided that** the protesting bidder must provide notice of its protest to the government. If no copies of bids were requested this notice is due within two business days after bid opening. If copies of bids were requested, then this notice is due within two business days after the copies were provided. Intermediate Saturdays, Sundays and holidays are not counted.

But there is a surprising caveat at the end of this bill: it "sunsets" on March 31, 2021. So unless it is recommended to the legislature that some or all of these changes shall become permanent, they appear to be temporary. Enjoy the experiment!

LABOR CONCEPTS

The Public Employment Relations Commission (PERC) recently reminded us that when a bargaining representative is alleging that an employer made a unilateral

change to a mandatory subject of bargaining, without bargaining, that party must assert a past practice or a relevant status quo. *IAFF Local 29 v. City of Spokane*, DECISION 12947 (PECB, 2018). To successfully assert a "past practice," two basic elements are required: "(1) a prior course of conduct; and (2) an understanding by the parties that such conduct is the proper response to the circumstances," and this must have been "known and mutually accepted by the parties." *Id.* In other words, to demonstrate a past practice, a party must show that there was an *explicit* understanding between the parties that a particular course of action was correct.

More importantly, the PERC pointed to its own precedent, *Whatcom County*, Decision 7288-A (2002), where the PERC found that an employer *had no knowledge* of a past practice and therefore had not implemented a unilateral change (employer implemented policy of not paying expenses to police-officer employees for travel to patrol zones from their homes, because the employer was not aware that prior deputies may have been so-compensated, which the union did not sufficiently prove).

So what does this "no knowledge" defense mean to the principle of "past practice?" Can the employer simply implement unilateral changes to mandatory subjects of bargaining, without bargaining, merely because the employer "did not know" about a particular past practice? Not really. The party asserting the past practice has the burden of proving the past practice, and if the party meets that burden, as a matter of common sense and fairness, the burden shifts to the other party to establish facts demonstrating that it truly did not know or could not have known about this alleged past practice. So why put yourself in that position, employer?

In other words, if your public agency intends to implement a unilateral change to a **mandatory** subject of bargaining, with or without having knowledge of a past practice,[3] do what the PERC requires you to do: (1) give notice to the union; (2) give the union the opportunity to bargain; (3) bargain in good faith, upon the union's request; and (4) bargain the subject to impasse if the subject is mandatory.[4] (Joe Quinn was a PERC Commissioner).

SAFETY BILL

A worker who voluntarily retires from employment is not entitled to time-loss compensation. *See* WAC 296-14-100. But if a worker's retirement is proximately caused by an industrial injury or occupational disease, that worker's retirement is *not* voluntary. *See Id.*

DISCLAIMER

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3 https://www.firehouselawyer.com/Newsletters/November2017FINAL.pdf

4 https://www.firehouselawyer.com/Newsletters/October2015_FINAL%20.pdf