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Inside this Issue

Legal Uses of Marijuana, and Civil Litigation

Does your fire department have policies with respect to the recreational use of marijuana, in light of RCW 69.50.4013, the statute codifying Initiative 502? That statute reads that "[T]he possession, by a person twenty-one years of age or older, of useable marijuana or marijuana-infused products in amounts that do not exceed those set forth in RCW 69.50.360(3) is not a violation of this section, this chapter, or any other provision of Washington state law." RCW 69.50.4013 (3). I-502 has become important in the context of civil litigation, particularly with respect to drivers of fire engines suspected of impairment. But in the same way that a driver cannot be charged with DUI just for having a hangover, a driver that smoked marijuana the night before cannot be charged with DUI, or any crime, for that matter. A prosecutor must prove that the driver was impaired.[1] Is this same principle—that a hangover is not a crime—applicable in a non-criminal, disciplinary context, and in civil litigation? The quick answer to this question is no, but with a caveat.[2]

[1] A person is guilty of driving under the influence (DUI) of marijuana if that person, as demonstrated by an analysis of their blood, has, "within two hours after driving, a THC (tetrahydrocannabinol) concentration of 5.00 or higher." *See* RCW 46.61.502 (1)(b).

[2] *See* our December 2014 Firehouse Lawyer article, pertaining to policies on drugs in the workplace: http://www.firehouselawyer.com/Newsletters/v12n04dec2014.pdf

In the context of civil litigation, government entities may be found liable for their tortious (negligent) conduct, to the same extent as a private person. *See* RCW 4.96.010. In a negligence action, the first thing the courts will consider is whether the defendant owes a duty of care to the plaintiff. *Munich v. Skagit Emergency Communications Center*, 175 Wn.2d 871, 877 (2012). But a government entity may not be found liable for negligence unless it owes a duty to an individual person, rather than a duty to the public at large. *Babcock v. Mason County Fire Dist. No. 6*, 144 Wn.2d 774, 785 (2001). This is known as the public duty doctrine. However, there are four exceptions to this doctrine, which include (1) the "rescue doctrine"; (2) the "special relationship" exception[3]; (3) the "failure to enforce" exception; and (4) the "legislative intent" exception.[4]

The latter exception applies when a statute imposes a particular duty of care upon a particular individual. For example, the Washington Supreme Court has found that the police owe a duty of care to serve anti-harassment orders, imposed by RCW 10.14.010. *See City of Washburn v. Federal Way*, 178 Wn.2d 732, 754 (2013) (finding that the statute's statement of purpose was sufficient to create a legal duty).

For purposes of this article, however, we will only focus on the "failure to enforce" exception. We do so because firefighters reporting to work under the influence of marijuana may be an indirect result of a failure to enforce drug-use policies. But importantly, no Washington court has found that a governmental entity's failure to enforce its own policies may impose a duty of care under the "failure to enforce" exception to the public duty doctrine. This exception applies when (1) government agents who are responsible for enforcing statutory requirements know of (or reasonably should know of) a statutory violation; (2) those agents have a statutory duty to take corrective action, but fail to do so; and (3) the plaintiff is in a class the statute was meant to protect. *See Gorman v. Pierce County*, 176 Wn.App. 63, 77 (2013). With that, we wonder whether a fire department may be found liable, under this exception, under this set of facts: A firefighter crashed a fire engine into a citizen's vehicle, and the citizen was severely injured. Subsequent to the crash, an analysis of the firefighter's blood revealed high traces of THC, the chemical component of marijuana which causes impairment—as measured under Washington DUI laws. *See* RCW 46.61.502 (1)(b).[5]

[3]See Firehouse Lawyer article on this exception: http://www.firehouselawyer.com/Newsletters/v11n01jun2013.pdf

[4] Also, be mindful that the public duty doctrine does not protect a public agency from being found to have a duty during the performance of a proprietary, non-governmental function. *See Fabre v. Town of Ruston*, 180 Wn.App. 150, 159 (2014) (finding that "governmental functions are those generally performed exclusively by Governmental entities."); *See Also Loger v. Washington Timber Products, Inc.*, 8 Wn.App. 921, 931 (safety inspections a governmental function); *Taylor v. Stevens County*, 111 Wn.2d 159, 170, (1988); (building inspections a governmental function); *Sunshine Heifers v. Washington Dep't of Agriculture*, No. 46322 -9 –II (2015) (cattle inspections a governmental function).

[5] *See Also* the link to the Firehouse Lawyer article In Footnote 2 above, discussing Model Policies on marijuana use in the fire service.

Setting aside our discussion of the individual firefighter's liability[6], may the department be found liable under the "failure to enforce" exception to the public duty doctrine? Recall the three-part test for this exception, cited in *Gorman,* above. This exception would most likely not apply to the set of acts above, for three reasons: First, there is no statute—pertaining to the general public—which states that a fire department must have policies on drug use in the workplace (government agents, under the first element of this exception, must be responsible for enforcing *statutory* requirements).[7] Recall as well that the public agency must know (or reasonably should have known) that a statutory violation is occurring, to meet this first element.

Second, there is no statutory requirement—pertaining to the general public (*See* RCW 49.17.060)—that a fire department enforce such policies, or take corrective action in the event such a statute is violated.[8] And third, the only statute that could conceivably impose a particularized standard of conduct for (substantially career) fire departments—as it pertains to non-employees, and the general public—would be RCW 52.33.040, which sets forth performance measures, i.e. turnout and response times.

Consequently, the "failure to enforce" exception would not generally apply to the factual circumstance we discussed above. Note: we are not stating herein that a fire department may never be subject to the "failure to enforce" exception, but state only that it more than likely would not apply here. And remember the other four exceptions to the public duty doctrine: This doctrine does not automatically absolve your fire department from a finding of negligence. With that in mind, what is the best practice? As we stated before, every public agency should have a policy on drug use in the workplace, which adequately addresses the use of marijuana, and vigorously enforce such policies.

"Substitution" under the FLSA: Are You Doing it Right?

Fire departments across the country have policies on shift trades and fill-ins. The Fair Labor Standards Act (FLSA), in conjunction with federal regulations and authorities interpreting it, speaks to how overtime is calculated in the event of a shift trade or fill-in, or, as FLSA terms it, a "substitution."

Under 29 U.S.C. § 207 (p)(3), the hours worked by the employee filling in for a shift—which we will call "Employee B"—do not count towards the overtime calculation for that employee. Instead, as the statute may be read, the employee substituted-for—which we will call "Employee A"—shall be paid his (for purposes

[6] An individual generally owes a duty of reasonable care under the circumstances, in the context of negligence, and in the context of paramedics and EMT's, has specific standards of conduct set forth under RCW 18.130.180, the Uniform Disciplinary Act, that he or she must abide by.

[7] *But See* RCW 49.17.060, which more than likely imposes a duty of care on an employer to provide a safe and healthful work environment *to its employees; See Also* WAC 296-305-0151 (7) (mandating that "[F]irefighters who are under the influence of alcohol or drugs shall not participate in any fire department operations or other functions.").

[8] We are only discussing our interpretation of the "failure to enforce" exception, and are not discussing best practices: Of course, we recommend that every government entity enact policies on drug use and vigorously enforce them.

of this article, we will use the term "he" to mean "he or she") normal rate of pay for that shift. Furthermore, Employee B shall be paid overtime measured by the shift he otherwise would have worked, not the traded shift. We draw this from our research of federal authorities, and the language of § 207 (p)(3) itself:

> "If an individual who is employed in any capacity by a public agency which is a…political subdivision of a State…agrees, with the approval of the public agency and solely at the option of such individual, to substitute during scheduled work hours for another individual who is employed by such agency in the same capacity, the hours such employee worked as a substitute shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section."[9]

Surprisingly, there has not been much federal case law—or Wage and Hour Opinions—interpreting § 207 (p) (3). But one case is very important. In *Senger v. City of Aberdeen, South Dakota*, 466 F.3d 670 (8th Cir. 2006), firefighters—who happened to be Employee A's—successfully argued that the hours they otherwise would have worked, in lieu of a shift trade, should count toward their overtime calculation. The City argued that hours not actually worked by the firefighters should not count toward their overtime calculation. But the *Senger* court looked to the language of 207 (p)(3) and found that it reflected a compromise: The hours worked by Employee B during the trade do not count toward his overtime; instead, Employee A is paid as though he worked the shift, and Employee B is paid as though he worked the shift he otherwise would have worked.[10] Whatever overtime was worked would thus be calculated as though the trade did not occur.

Reflecting on this compromise, the *Senger* court began by recognizing that shift trade arrangements are quite common in the fire service. The court noted that when a trade occurs, "the employer pays the scheduled employee and not the substitute; the amount the substitute receives is fixed by private agreement between the two employees." *Id.* at 672. We found this idea of private agreements between employees interesting, but we will not discuss that here. In lieu of this compromise, the court found, the employer would be unable to control overtime, and Employee B's would "accrue massive amounts of overtime." *Id.* at 673.

We assume that the vast majority—if not all—of the fire departments with shift trade policies reflect this compromise. If not, perhaps the time has come to review your shift trade and fill-in policies, in order to control your overtime expenses. For purposes of illustration, we will use an example given to us by the *Senger* court to articulate the policy of § 207 (p)(3). This

[9] The regulation enacting § 207 (p)(3) is 29 C.F.R. § 553.31, which states that where one employee substitutes for another, "each employee will be credited as if he or she had worked his or her normal work schedule for that shift."

[10] As a side note, a Wage and Hour Opinion letter, FLSA2004-23, interpreting § 207 (p)(3), noted that a collective bargaining agreement for the fire department requesting the opinion reflected that compromise. This CBA stated that employees "may exchange shifts if advance approval is obtained from the Fire Chief, and there shall be no liability for overtime pay as a result of the shift exchange."

hypothetical does not address special circumstances for firefighters and paramedics—under the § 207 (k) exemption. Instead, we will simplify the math:

Employee A and Employee B both work 44 hours a week—thus entitling each to four hours of overtime apiece. Employee A works 36 hours that week, and asks Employee B to work his last eight-hour shift, which Employee B does. Consequently, Employee A worked 36 hours during the week, and Employee B worked 52. Because of § 207 (p)(3), both employees are paid overtime as though they worked 44 hours. Policies on shift trades and fill-ins should reflect this scenario.

What is a "Respiratory Disease" under the Industrial Insurance Act?

Recently, the Washington Supreme Court found that a "respiratory disease" is only one that has been diagnosed by doctors as such, and the dictionary definition may not be used by an injured worker to argue that they have a respiratory disease. *Gorre v. City of Tacoma*, No. 90620-3 (2015). The *Gorre* case involved an injured firefighter, and the Court was called upon to decide the meaning of "respiratory disease" under RCW 51.32.185 (4), which states that "in the case of firefighters…there shall exist a prima facie presumption that…respiratory diseases…are occupational diseases." But the term "respiratory disease," unlike the term "infectious disease," is not defined within RCW 51.32.185. Consequently, the Court engrafted its own definition into the statute, and interpreted the term a bit more narrowly than the firefighter in *Gorre*, who suffered from valley fever. In this case, the Court of Appeals (COA) adopted the dictionary definition of "respiratory disease." In combining the dictionary definitions of "respiration" and "disease," the COA found that a "respiratory disease" was "discomfort or condition of an organism or part that impairs normal physiological functioning relating, affecting, or used in the physical act of breathing." *See Gorre*, 180 Wn. App. at 762-63.

The Supreme Court reversed the COA, and found that the term "respiratory disease" may only be that diagnosed as such by doctors.[11] Because the medical experts in the firefighter's case testified that valley fever is an infectious disease, not a respiratory one, the *Gorre* Court found that valley fever was not a respiratory disease. Consequently, the burden of proof did not shift to the employer—the City—or L&I, to demonstrate that the firefighter's respiratory disease was non work-related.

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[11] Note as well that the Court further reversed the COA's interpretation of the term "infectious disease," (applying the dictionary definition of the term) because the COA did not limit the term to those diseases that are specifically defined in the statute as being infectious diseases, and further held that valley fever is not an infectious disease.