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Inside this Issue

WHO IS A "VETERAN" UNDER THE WASHINGTON VETERANS' PREFERENCE STATUTE?

Veterans are provided substantial benefits when applying for a job in Washington State. Under RCW 41.04.010, "veterans" are entitled to have either five or ten percentage points added to their final score on all competitive examinations (not including promotional examinations).[1] Under RCW 41.04.007 (1), the general definition of a "veteran" is "a member in any branch of the armed forces of the United States, including the national guard and armed forces reserves, [who] *has fulfilled his or her initial military service obligation*." (emphasis added). The question becomes: What is the "initial military service obligation" (hereinafter "IMSO") of a particular applicant?

Federal laws are much more specific about how long an individual must serve in the military prior to being eligible for certain federally guaranteed benefits. For example, under 38 CFR (Code of Federal Regulations) § 21.7042 (a)(2), if a person is obligated to serve in the Armed Forces for less than three years, he or she generally must serve

[1] Herein, we will not be discussing the definition of a "period of war" or the calculation of benefits under RCW 41.04.010. For more on that, see the following: https://www.firehouselawyer.com/NewsletterResults.aspx?Topic=Veterans+

24 months of active duty in the Armed Forces to be eligible for GI-Bill benefits.

But that does not end the inquiry as to whether the applicant is a "veteran" entitled to benefits under RCW 41.04.010. To be considered a "veteran" entitled to veterans' preference points ("VPP") under RCW 41.04.010, the applicant generally must prove, through a Form DD214, that (1) he[2] was honorably discharged and (2) he met his IMSO. *See* 41.04.007 (1).

The Department of Enterprise Services ("DES"), in the attached,[3] seems to define the IMSO as that set forth in Block 6 of the DD214: "block 6 *Reserve Obligation Termination Date*, DD 214 should be reviewed to identify when an applicant fulfills their initial military service obligation." *See* Note 6 in the attached. In Note 6 to the DES veterans' guidance handout (link attached below), the DES defines the IMSO as "the discharge or release of service member from National Guard/Armed Forces Reserves upon completion of the obligated term of service for which they enlisted or termination of their appointment as an officer of the National Guard/Armed Forces Reserve."

But that does not provide absolute guidance, nor does any law or regulation promulgated by the DES indicate how long a particular person, in a particular branch of the Armed Forces, must serve prior to being deemed a qualifying "veteran" under RCW 41.04.010. In fact, all the WACs say is that if an employer is administering an examination (which does not include a promotional examination), the employer must grant preference to veterans "in accordance with the veterans scoring criteria provisions of RCW 41.04.010." WAC 357-16-110 (1).

But other Washington authorities have referenced federal law to decide on this question. Under 10 U.S.C. (United States Code) § 651 (a) and (c)(2), as a general rule, the "total initial period" of service in the armed forces shall be not less than six years nor more than eight years, unless the serviceperson obtains a waiver from that requirement, in which case the "total initial period" of service may be no less than two years.[4] In 1975 AGLO No. 14,[5] the AG found that "it is necessary to refer to those federal statutes which define the nature of the service performed by the veteran" seeking veterans' preference points.[6] In that

[2] "He" shall be used to refer to the masculine and the feminine.

[3] https://des.wa.gov/services/hr-finance-lean/recruitment/recruitment-and-outreach/attracting-and-finding-talent/veterans-outreach
(under the link for "Applying Veterans' Preference" and "Veterans' Preference Guidance with Examples.")

[4] *But See Also* 10 USC § 12311 (active duty agreements) (the Secretary of Defense may make an agreement with a member of a reserve component to serve for a period of "at least 12 months longer than any period of active duty that the member is otherwise required to perform.")

[5] https://www.atg.wa.gov/ago-opinions/veterans-preference

[6] Take note that this AG opinion was issued long before RCW 41.04.007, enacted in 2002, which further defined who constitutes a "veteran"; today, as opposed to 1975, a person qualified for VA benefits must now be either subject to "full and

opinion, the AG referred to federal statutes *and* another Washington law, RCW 73.04.090 (applicable to Veterans' Affairs benefits), for the proposition that a person must be subject to "full and continuous military control and discipline," at some point, to be deemed qualified for benefits. Ultimately, the AG found that "something more than a limited period of active duty (in that case it was four months) for training is required for eligibility for [RCW 41.04.010] benefits."

Ultimately, therefore, the inquiry must be whether the applicant was ever subject to "full and continuous military control and discipline" to be deemed a "veteran." In other words, in the event that a human-resources person is uncertain as to whether an applicant qualifies as a "veteran" entitled to preference points, we recommend that legal counsel be contacted.

UPDATE ON DISCRIMINATION LAW

The Federal Court of Appeals for the Sixth Circuit recently found that a funeral director unlawfully discriminated against an employee because of sex after that employee, who was born biologically male, informed the employer that he intended to transition to being female. *EEOC v. R.G.*, 884 F.3d 560 (6th Cir. 2018). Furthermore, the Sixth Circuit found that although the termination of the employee implicated the funeral director's religious beliefs, that Title VII (the federal law on sex discrimination) provided the "least restrictive means" to "infringe" upon those religious beliefs.[7]

The Federal Court of Appeals for the Tenth Circuit, in *Lincoln v. BNSF Railway*, 17-3120 (10th Cir. 2018), reminded us that a job description serves as compelling evidence for whether an employee meets the "essential functions" of a particular position. *See* 42 USC § 12111(8).[8] Ultimately, the *Lincoln* court found that to make an "essential functions" defense to an Americans with Disabilities Act claim, the employer must demonstrate that the job-related requirement (essential function) was applied evenhandedly to all similarly situated employees.

According to the Federal Court of Appeals for the First Circuit, the courts look to a series of factors to determine whether a particular course of action is harassment, mostly because determining whether a certain type of conduct is harassment "is by no means a black-and-white determination." *Franchina v. City of Providence*, 881 F.3d 82 (1st Cir. 2018). Under *Franchina*, the courts will consider "[the] severity of the discriminatory conduct, its frequency, the extent to which the behavior is physically threatening or humiliating as opposed to a mere offensive utterance, and the extent to which it unreasonably interferes with an employee's work performance." (female employee found to have sufficiently alleged Title VII sex discrimination on the basis of being called a "lesbo" and other unspeakable

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continuous military control and discipline" *or* a "veteran" as defined under RCW 41.04.007.

[7] The employer was arguing that Title VII's bar against gender-identity (sex) discrimination violated his rights to exercise his bona fide religious beliefs under the Religious Freedom Restoration Act.

[8] "consideration shall be given to the employer's judgment . . . and if an employer has prepared a written description before . . . interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job."

epithets on repeated occasions). The *Franchina* court outlined a series of factors that are otherwise enshrined in Washington law, including but not limited to the requirement that the harassment at issue must be pervasive to be deemed actionable.

The Federal Court of Appeals for the Ninth Circuit (Washington is in the Ninth Circuit) found that "past salary" cannot be relied on when the employer is setting an **initial** wage, even "in conjunction with less invidious factors," such as performance-related issues. *Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018). The *Rizo* court found that prior salary "is not a legitimate measure of work experience, ability, performance, or any other job-related quality," insofar as that relates to setting an initial wage. The court presumably ruled this way because historic pay disparities between men and women should not define the parameters of future employment, but instead, the court found, the setting of an initial wage should solely relate to past performance—not past salary—and present ability.

The Sixth Circuit ruled that to succeed in an action under the federal Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, the plaintiff must prove that "age was the 'but-for' cause of the employer's adverse action." In other words, the *Alberty* court found, the plaintiff must prove that they would not have been treated adversely if they were under 40 years of age. (76-year-old employee could not prove her age was the but-for cause of an adverse employment action).

SAFETY BILL: IMPORTANT CASE INVOLVING MEAL PERIODS

Recently, in *Hill v. Garda*, No. 94593-4 (2018), the Washington Supreme Court awarded various employees (in a class action lawsuit) 8.4 million dollars for violation of the Washington Minimum Wage Act, chapter 49.46 RCW. The 8.4 million dollars included (1) double damages that may be awarded under RCW 49.46; (2) prejudgment interest that may be awarded under RCW 19.52.010; and (3) 1.2 million in attorney fees and costs. What is important about this case is that the Court weaved a minimum-wage claim into a claim that meal periods were not properly provided in accordance with WAC 296-126-092.

Ultimately, the *Garda* Court found that employees are entitled to a 30-minute "vigilance-free" meal period, even when the employee is on duty.

To paraphrase the facts, employees for an armored truck company had a collective bargaining agreement which stated that the employees could be provided with a *paid* meal-period in which they were "constantly vigilant," or could *opt out* of that and take an unpaid 30-minute meal period in which they were *not* required to be "constantly vigilant." The employees argued that this violated regulatory guarantees for “vigilance-free” meal periods.

For legal background, WAC § 296-126-092[9] guarantees to all employees rest

[9] Take note: The Title of WAC 296-126 is "[S]tandards of labor for the protection of the safety, health and welfare of employees for all occupations subject to chapter 49.12 RCW," the

breaks and 30-minute on-duty unpaid (or paid if provided for in employer policy) "meal periods" in certain prescribed time frames. Under WAC § 296-126-092 (2), "[N]o employee shall be required to work more than *five consecutive hours* without a meal period." (emphasis added).

To be clear, the above law does not obligate the employer to *provide* the actual meal or require the employer to provide a *paid* 30-minute meal break. Instead, the above law, and the *Garda* opinion, require that an employee be provided at least one 30-minute "vigilance-free" meal period, whether paid or unpaid.

The other lesson from *Garda* is that an employer may be subject to substantial damages in the event of not providing that "vigilance-free" 30-minute meal period to all employees. And that is true even if those employees have the *option* of taking an unpaid "vigilance-free" meal period that may be waived in exchange for a "constantly vigilant" *paid* meal period.[10] In other words, employees can't merely be given the *option* to take the unpaid "vigilance-free" meal period. The employees must be provided such a meal period.

We recommend that if employers want employees to waive their statutorily granted right to a 30-minute "vigilance-free" meal period, that the employees must sign paperwork that explicitly indicates their waiver (and not merely sign an agreement that "opts out" of a *paid* "constantly vigilant" meal period).

However, to avoid legal arguments over whether such a waiver is explicit enough, the employer could simply *require* all employees to take a 30-minute "vigilance-free" and unpaid meal period per work day. Or the employer could confer a greater benefit and provide a "vigilance-free" 30-minute *paid* meal period. This last option would not constitute a gift of public funds because the paid meal period would have presumably been bargained for in some fashion.

DISCLAIMER

Washington Industrial Safety and Health Act; because this regulation relates to safety, it could be used to argue that a change in employer policy regarding meal periods, without bargaining, impacts safety and therefore is a mandatory subject of bargaining. *See* the *Firehouse Lawyer* on this issue: https://www.firehouselawyer.com/Newsletters/November2017FINAL.pdf

[10] Also important is that the *Garda* court found that the mandatory arbitration provision in the applicable CBA did not bar the class-action lawsuit because the claims of the subject employees were based on a right conferred by a *state statute*, not a right conferred by the CBA.