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Be sure to visit firehouselawyer.com to get a glimpse of our various practice areas pertaining to public agencies, which include labor and employment law, public disclosure law, mergers and consolidations, financing methods, risk management, and many other practice areas!!!

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UPCOMING MUNICIPAL ROUNDTABLE

We will be holding a Municipal Roundtable this Friday to discuss HIPAA breaches and how to avoid and/or respond to them.

Date and Time: August 2, 2019, 9:00 a.m-11:00 a.m.

Location:

West Pierce Fire and Rescue Headquarters Station 31
3631 Drexler Drive West University Place, WA 98466

Thank you to West Pierce Fire and Rescue for hosting us.

Be there!

COURT HOLDS OBESITY IS A DISABILITY

On July 11, 2019, the Washington State Supreme Court decided an important case interpreting the Washington Law Against Discrimination. The Court decided that obesity always qualifies as an impairment—and therefore a disability—under Washington's law even if it does not qualify under the federal law—the ADA.

This case could have significant implications for fire-service employers, and public agencies in general. The case is named *Taylor v. Burlington*

Northern Railroad Holdings, Inc. No. 96335-5. The plaintiff received a conditional offer of employment as an electronic technician from the defendant. However, there was a problem: at 5'6" tall and weighing 256, his BMI (body mass index) was determined to be 41.3.

A BMI over 40 is considered "morbidly obese" and Burlington Northern (BNSF) treats a BMI over 40 as a "trigger" for further testing. The defendant decided that without further testing they could not hire him, and said he would have to pay for the tests, which could cost thousands of dollars. The defendant informed Taylor that BNSF company policy was not to hire anyone with a BMI over 35 and if he could not afford the testing his only other option was to lose 10 percent of his weight and keep it off for six months. He then sued under the WLAD, alleging discrimination against a disabled person.

Thus the question was squarely presented: is obesity by itself a disability? Since the case was then before the Ninth Circuit (in federal court) and since the question was clearly one of state law, the federal court certified the question to the Washington Supreme Court.

After an extensive review of the medical questions surrounding the definition of obesity and whether it is, standing alone, a physiological disorder, the Court concluded that legally and medically, obesity certainly qualifies as an impairment or disability.

In the course of the decision, the Court pointed out some important facets of Washington disability law. Among those facets noted by the Court were (1) Washington law on disability is broader than federal law and therefore more favorable to plaintiffs; (2) in reasonable accommodation cases—applicable to existing employees who claim a disability—mere perception of being disabled is enough,[1] and it is not necessary to actually have the perceived disability; and (3) our legislature has adopted a very broad definition of disability to protect against discrimination.

The Court stressed that the medical community does recognize obesity as a primary disease, and not just the problem of being overweight. As we read the decision, the Court does not state that the medical community only uses BMI (or weight, certainly) as the sole criterion for saying a person is obese or morbidly obese. Instead, it appears to us that the determination must be made on a case-by-case basis for each individual.

As pointed out by the two dissenting justices, some people who are quite muscular (sometimes referred to as "mesomorphs") can register a BMI that some might label as obese, as the body mass index measurements do not distinguish between muscle and fat! It is not uncommon for muscular but fit men to have a BMI of about 35.

What are the implications of this decision in the fire service? Are we going to be facing discrimination cases due to not hiring applicants with high BMIs or obesity? Are existing firefighters who do not remain fit for duty, but

[1] https://www.firehouselawyer.com/Newsletters/September2015_ThidDraft.pdf

instead gradually become obese going to ask for "reasonable accommodations?"

Or, on the other hand, can fire service employers convince the courts that remaining fit for duty and not obese is a "bona fide occupational qualification" (BFOQ) in the occupation of firefighting? Questions abound! Given the WAC 296-305 safety standards, is it safe to be alone in a burning building with someone who is impaired by obesity, and therefore at enhanced risk of cardiac arrest? The employer is required by WAC 296-305 to ensure the workplace is safe for all firefighters.

We think that the two dissenting justices had a point in saying that they disagreed that obesity is *always* a disability. As they noted, the diagnostic line between "overweight" and "obese" is a function of an individual's weight in relation to their height. There is no bright line, and BMI is not the only determinant of obesity. Therefore, a muscular person might be obese if all you looked at was their BMI.

We feel rather strongly that being non-obese could be argued to be a BFOQ for firefighters and other public-safety employees, and therefore this whole question may not be a huge one with respect to firefighters. But our clients employ many more people than just firefighters so we still think this case is important even if the BFOQ defense applies to firefighters.

BONA FIDE VOLUNTEERS REVISITED

Over many years, we have issued legal opinions about the requirements of the federal Department of Labor (DOL) with respect to bona fide volunteers. If the DOL were to do an audit of your volunteer force, might they decide your volunteers are not bona fide volunteers and therefore must be deemed "employees" subject to the Fair Labor Standards Act, and specifically its minimum wage and overtime rules?

Recently, a client asked us if there were any legal implications of a long-time volunteer firefighter who recently began working basically the same 24-hour shift schedule as their paid, career firefighters. In a recent month, the "volunteer" was actually paid about 21% of what their lowest paid firefighter made in base compensation, because the volunteer amassed enough points under their system to earn about $1000.

This factual scenario presents us with this question: Does the number of hours or shifts worked by a volunteer play into the "bona fide volunteer" determination, or is only compensation relevant in the FLSA analysis?

Under FLSA regulations, a volunteer may only be paid expenses, reasonable benefits and a "nominal fee," or any combination thereof. Most of the Wage and Hour Opinions have dealt with that last measuring stick—compensation. Several years ago, a landmark opinion from the DOL advised that as long as the volunteer earned compensation of less than 20% of what a fully paid firefighter earned then the volunteer would be deemed bona fide.

The reasoning seems to be that no reasonable person would work for less than 20% of what a career firefighter is paid *unless* they were doing

it for the (required) civic or humanitarian reasons that motivate the bona fide volunteer. Some might argue that this begs the question of why someone would do that. Realistically, we know that some volunteers might just want to gain experience that might someday qualify them to be hired in a paid, career firefighter position. Whether that would allow sufficient time to balance gainful employment with the needed time to pull 7-8 shifts of 24 hours each month is an open question. However, we have known career firefighters who have maintained their full time firefighter status while at the same time running a small business.

Notwithstanding the foregoing observations, we have yet to read any recent regulations or opinions positing that *hours worked* or shifts worked in a month are a factor in the bona fide volunteer calculus. Therefore, it is our considered opinion that as long as the compensation is "minimal" (the less than 20% rule), the benefits are "reasonable," and the expenses are actual reimbursements for out-of-pocket expenses, it is difficult to disqualify a volunteer merely on the basis of too many hours worked or too many shifts "pulled" in a month or other period. Hours worked is simply not a statutory parameter.

The opinions of the Wage and Hour Division do state that compensation should not be based on "productivity" so compensation based on dollars per hour should be avoided (especially in relation to the state minimum wage). But points systems based on number of drills attended, number of calls responded to, and the like have been in place for years without challenge, so those could not be deemed to be based on "productivity."

SAFETY BILL

The Department of Labor and Industries may enter onto the premises of an employer, after displaying "appropriate credentials," to inspect the premises for potential violations of the Washington State Industrial Health and Safety Act. *See* RCW 49.17.070 (1). The director of L&I (or his/her designees) may also apply to a court of competent jurisdiction to obtain a search warrant to search the property of an employer to deem whether or not the safety standards have been violated. *See* RCW 49.17.075.

We know that four pages is a bit light for the *Firehouse Lawyer*, but we assume that many of our clients are out enjoying the sun.

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