Firehouse Lawyer

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Inside This Issue

Wrongful Discharge – Violation of Public Policy

A recent Washington Supreme Court case provides the vehicle for our discussion this month of the expanding importance of claims of wrongful discharge in violation of public policy. In *Danny v. Laidlaw Transit Services, Inc.,* the Court held that Washington does have a clear public policy against domestic violence.

In this case, the employee and her five children had long been the victims of domestic violence, so the employer granted her time off to move, escape the violent husband, and seek help in getting him prosecuted. But when she returned to work she was demoted and then terminated, allegedly for falsification of payroll records. She was an at-will employee, and as long-time readers already know, Washington still presumes employment is "at will" unless one of the many exceptions applies to the facts. Frankly, about 75% of my readers can move to the next article, as they have union contracts, personal service contracts, or other exceptions that mean they are terminable for good cause only! But perhaps not; one could argue that this wrongful discharge claim might still be asserted, even if the employee has "cause" protection. So read on anyway—you might learn something.

The case was filed in federal court, but the U.S. District Court hearing the case certified the issue to the Washington Supreme Court to answer the question whether Washington has a clear mandate of a public policy against domestic violence, as that is the first element in proving a "public policy violation" wrongful discharge case. After a thorough examination of legislative, judicial, constitutional and executive authorities, a slim majority (5-4) of the Court declared that our state has such a clear mandate of public policy and sent the case back to federal court for trial. But the way they reached that conclusion was interesting.

On April 1, 2008 Washington's new Domestic Violence Leave Law ("DVLL") took effect. However, the salient facts here—the leave requests and the discharge of the employee—took place before that law was in effect. So where did the majority Justices find the public policy against domestic violence? As noted, they looked at various sources, but as one dissenting Justice cleverly pointed out, the mandate must not be too clear, as there were four dissenting opinions!

One lesson to be learned for employers is that we must be ever mindful that at-will employment may still exist in Washington, but the exceptions are tending to swallow the rule. Public policy is an ever-expanding concept and we are discovering more policies all the time. Here are some existing examples of public policies recognized in Washington: whistle-blowing, refusing to violate a statute, safety violations, cooperating with law enforcement, and adhering to zoning and building codes and regulations. Other states list policies like: consulting an attorney regarding your rights, reporting elder abuse, and protecting pay from garnishment. My advice would be not to rely on the at-will doctrine until your attorney says he/she can find no exception or factual circumstances that might make the rule inapplicable. All employers, public and private, of any size, are subject to this doctrine. Fire chiefs and commissioners should insist that their managers and HR personnel be trained and educated so they understand public policy and the limitations on the "at will" doctrine.

Also, it goes without saying that employers need to be aware of the new statute, requiring employers to allow leave in the case of domestic violence. The new DVLL is codified at chapter 49.76 RCW. Among other things, it creates the right to take leave, paid or unpaid depending on what the employee has accrued, for various needs related to domestic violence, such as seeking legal help, participating in legal proceedings, seeking treatment, obtaining shelter, or counseling. It also provides certain guarantees or protections against loss of employment, pay and benefits, health insurance, etc. due to the absence or leave.

ANOTHER WASHINGTON PUBLIC POLICY DECISION

Apparently, when it rains it pours. Fluor Federal Services is a company that does business on the Hanford Nuclear Reservation, employing pipe fitters. In May 1997, the pipe fitters refused to install valves rated at 1,975 pounds per square inch in a nuclear facility that was to be tested at 2,235 psi. (That would seem like a safety issue to me!) When Fluor laid them off the next month, the pipe fitters filed a retaliation complaint with OSHA. Fluor settled before hearing and reinstated the whole group. But a year later the entire group was laid off again, so they filed suit, claiming wrongful termination in violation of public policy. After a month-long trial, the jury verdict came in at more than $4.8 million. It is not clear why the case took so long to make it through the court system.

In this Supreme Court appeal, the Court held that Fluor waived its right to claim on appeal that one of the elements was lacking, as it failed to argue that element at trial. So Fluor apparently lost ultimately on appeal.

Rather than dwell on this technical aspect of the case, that may be of interest only to lawyers, we prefer to look at the case from the standpoint of liability prevention. Based on the evidence adduced at trial, how can an employer avoid what happened to Fluor here? Evidence was admitted showing that Fluor previously retaliated against employees who made safety complaints. An industrial hygienist who complained about burning paint fumes was warned not to "put her ethics above her career." She testified she was treated disrespectfully and passed over for promotion by the same supervisors who were involved in the pipe fitters complaint. Predictably, the court found evidence like that probative of an intent to retaliate. So the lesson is: train your supervisors and managers to avoid retaliatory decision making. Also, when employees complain, even if it seems trivial to you, always investigate thoroughly and document your results of investigation. If I had a dollar for each instance of failure to document I have seen in the last twenty years or so, by employers and supervisors, I would be a rich man today!

INVESTIGATIONS... AND DEFAMATION CLAIMS

In a case involving Pacific Northwest National Laboratory-Battelle, the Court of Appeals recently held employee statements to investigators to be privileged. I was glad to see this recent decision of the Washington Court of Appeals, Division Three, because clients occasionally ask me about the reluctance of a coworker to cooperate in an internal investigation of, for example, sexual harassment, due to a fear of defamation suits. An employee claiming defamation must prove: (1) falsity, (2) unprivileged communication, (3) fault, and (4) damages. The important point, I think, is that the Court clearly held such communications to the employer or investigator are privileged communications. Thus, you can assure your employees who participate in such investigations that their good faith cooperation is privileged. Given the qualified privilege, a careful investigation supported by truthful or substantially truthful statements, and confidential treatment of those statements (to the extent allowed by law) will immunize those coworkers from threatened defamation actions.

ANOTHER COMP TIME "NEW WRINKLE"

Is it just me, or are these newsletter pages frequently visited by the comp time gremlins? Here is another recent case that delves into the details of a public employer's options in offering compensatory time instead of just paying overtime compensation. In *Scott v. City of New York,* the U.S. District Court for the Southern District of New York recently held that nothing in the FLSA prohibits an employer from *offering* overtime assignments upon the condition that employees who accept the offer may only receive compensatory time, and not overtime pay at time-and-one-half. (Of course the comp time must be given at 1 and ½ hours per hour worked.) This provides significant flexibility to public employers. Nonetheless, do not forget that comp time is permitted only if the agency and its employees are parties to a collective bargaining agreement or other formal agreement that authorizes use of comp time.

Q & A: IS THIS "LEGAL"?

A reader in another state asked this question. Suppose a combination fire department employs full-time paid firefighters, part-time paid firefighters, and volunteers as well. The volunteers (VFF) receive a small per-call stipend, such as $8.00 per call and are not considered employees of the municipal government that operates the fire department. The part-time firefighters (PTFF) are considered city employees but just do not work full time. They get paid an hourly wage when on duty and for training time. Here's the question. When the PTFFs respond to calls during their off-duty time, this municipality pays them as if they were VFFs, i.e. the $8.00 per call stipend. Is this legal? By the way the full-time firefighters who respond when off-duty get time and a half, i.e. overtime pay. And the PTFFs are expected to respond when off-duty and may be admonished when they do not. When they do so respond, their job duties are exactly the same as when on duty.

A. The FLSA does allow a municipal fire department to have both paid firefighters and bona fide volunteer firefighters. However, the Department of Labor frowns upon the practice of paid employees "volunteering" to perform work in the same occupational class as the work they perform for wages. The danger in such arrangements is that the employee may be "coerced" somehow into "volunteering", when the employer is actually just getting more hours worked for lesser pay. In my view, the scenario outlined above violates the spirit, intent, and the letter of the FLSA. We were not told how many hours the PTFFs regularly work, but let us suppose it is 25 hours per week. And let us suppose that "off duty" responses add up to more than 15 hours in a given week. Has the employer not circumvented the intent of the FLSA by getting the employee to work more than 40 hours per week without paying overtime? Moreover, the employer has not paid the minimum wage for some of the time. Suffice it to say that this example shows why an employer just cannot allow employees to volunteer in the same capacity for which they are paid. It is not lawful.

While the author is only licensed to practice law in Washington, this issue is primarily one of federal law. I disclaim any attorney-client relationship with anyone who reads this newsletter or asks questions of the author, as these articles do not constitute legal advice but are only educational in nature. All readers are urged to consult an attorney if they have specific legal questions.

DISCLAIMER