Firehouse Lawyer

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Inside This Issue

FIREHOUSE LAWYER RESUMES PUBLICATION

After a hiatus of more than three years, the *Firehouse Lawyer* is resuming publication. At least for now, the newsletter will be published quarterly. Those wishing to subscribe should e-mail the Firehouse Lawyer--Joseph F. Quinn--at firelaw@comcast.net.

The impetus behind this re-start of the newsletter is actually my son, Eric Quinn, a third year law student at Seattle University Law School. Eric will be graduating in December and taking the Washington Bar Exam in February. He has expressed a desire to join me in my law practice, so that gives me a good reason to keep going. In the meantime, I plan to mentor him and delegate to him the primary duty of researching and writing articles for the *Firehouse Lawyer.*

In this edition of the newsletter, we will feature an article I wrote about the public duty doctrine, prompted largely by last year's *Munich* decision. We also include an article written by Eric Quinn on the updated HIPAA Privacy Rule regulations. I spoke on HIPAA at the May conference in Richland, sponsored by the Washington State Chiefs. We also try something new in this edition. I have summarized an informative article from a different law firm's newsletter. Sebris Busto James is a Bellevue labor and employment law firm, which I have referred work to in the past, with excellent results. Herein, with permission, we summarize a good article on the ADA, contained in their June newsletter. Finally, as in the past, we will let client inquiries spark ideas and articles. A client recently asked about the law pertaining to administering lie detector tests to employees or applicants for employment. So we cover that issue in this issue.

REVISITING THE PUBLIC DUTY DOCTRINE - *by Joseph F. Quinn, Attorney at Law*

This article discusses the implications of *Munich v. Skagit Emergency Communication Center,* 175 Wn. 2d 871, 288 P. 3d 328 (2012), with respect to potential liability of emergency communications centers in Washington. After reviewing the impact of this case and synthesizing the pertinent case law, in this article I will provide some recommended "do's" and "don'ts" so that liability exposure may be limited if not eliminated.

In *Munich,* the State Supreme Court held that Skagit County may have owed a duty to the plaintiff's deceased husband under the special relationship exception to the public duty doctrine. Under the doctrine, a duty owed to the general public is deemed to be a duty not necessarily owed to any particular person and so tort liability cannot be established. (In a civil case, or tort case, there are four basic elements: duty, breach of that duty (e.g. negligence), proximate cause, and damages.) Municipal agencies often avoid liability for what might appear to be negligent conduct, because the public duty doctrine provides a type of immunity. The plaintiff cannot establish the first of the four above elements.

The special relationship exception--one of four exceptions to the public duty doctrine--contains three elements, all of which must be present to avoid application of the doctrine: (1) direct contact or "privity" between the public official and the plaintiff that sets the plaintiff apart from the general public; (2) an express assurance given by the public official; and (3) the plaintiff's justifiable reliance on the assurance.

As you can see, in 911 cases, the direct contact or privity requisite is often satisfied, as the reporting party does have direct contact with the public official--the call receiver/dispatcher. Justifiable reliance is mostly a factual question, the *Munich* court noted, so that element has to be met on a case by case basis. Finally, the second prong regarding express assurances would be met in any case where the call receiver or dispatcher informs the caller that "help is on the way" or "we have dispatched a deputy [or a fire engine, as the case may be]". Thus, as you can see, the three-part test is not difficult to meet in most 911 calls.

The *Munich* Court held unequivocally that truth or falsity of the assurances is not the key question. If express assurances are in fact given, the problem that arises occurs *if and when the assurances are not fulfilled,* the Court said. (In layman's terms you might say, "Don't make promises you cannot keep.") The negligence or breach of duty, the Court said, could occur for example when the call receiver (as in the *Munich* case) incorrectly coded the call as a priority two weapons offense, instead of a priority one emergency, after being advised that the assailant had already fired one shot at the plaintiff's decedent, and missed. Although the call was later upgraded to a priority one call when Mr. Munich reported additional shots fired, as it turned out the deputy Sheriff arrived on scene two minutes after Munich was killed. By comparison, the evidence showed that he would have arrived earlier, in time possibly to prevent the killing, if the priority one code had been applied in the first instance. Thus, the coding error does appear arguably to have proximately caused damages.

Synthesizing the holding in this case with the prior decisions of the appellate courts in Washington, I would say there is ordinarily a duty of due care or reasonable care owed to a 911 caller who adequately communicates to the call receiver a clear and present danger or emergency to himself, herself or others, if the 911 employee expressly assures them that some action will be or is being taken, and the caller can ordinarily justifiably rely on same. This case, taken with other 911 cases, will shift the inquiry probably where it belongs: **Did the public agency reasonably look out for and protect the safety of the 911 caller, given the nature and quality of the information provided?** In other words, duty will no longer be a major issue and the question will be whether negligence occurred.

The case law makes a clear distinction between assurances involving *information* and assurances promising *action.* Those situations merely involving information-giving, such as permit or regulatory information, generally result in a finding of no duty. However, situations like the following involve promises of action and the court will find a duty under the special relationship exception to the public duty doctrine:

- delayed response to 911 caller killed by estranged husband ("we're going to send somebody there" and "we'll get the police over there" when

actually no police were dispatched prior to the shooting) [*Beal v. City of Seattle,* 134 Wn. 2d 769, 954 P.2d 237 (1998)]

- operator said, "We have the officers on their way out there right now" when actually no police had been dispatched yet and plaintiff was assaulted [*Chambers-Castanes v. King County,*100 Wn.2d 275, 279-80, 669 P.2d 451 (1983)]
- operator told caller if she or her family was threatened again that the police would be sent [*Bratton v. Welp,* 145 Wn. 2d 572, 576-77, 39 P.3d 959 (2002)]

The *Munich* Court stressed that whether the assurances were ultimately truthful or accurate might be relevant to the issue of breach, but the truth or falsity is irrelevant to the establishment of the duty element. The County in *Munich* argued that holding 911 centers accountable for the failure to fulfill assurances made by call receivers or dispatchers would undermine their effectiveness, for fear of liability. The Court answered: "911 centers provide vital services to the community, and we do not take lightly issues implicating their potential liability." Nevertheless, they were not persuaded by that argument.

Applying the rationale of the Court in *Harvey v. Snohomish County,* 157 Wn.2d 33, 134 P.3d 216 (2006), the Court stressed that 911 centers can still engage in truthful communication with callers without incurring legal liability **if they keep callers informed with timely and accurate information while correctly dispatching law enforcement.**

Now, applying the law as set forth in the various applicable cases, I would advise emergency dispatch centers that, while there may well be a duty of due care owed to 911 callers due to the special relationship exception to the public duty doctrine, if certain principles are kept in mind the risk of negligence findings may be minimized. Here are some suggested "do's" and "don'ts" consistent with the case law results:

- DO: Keep the caller informed to the extent possible of all information that might help minimize the risk or avoid making the situation worse.
- DO: Inform the caller when resources are dispatched, but not before.
- DO NOT: Make express assurances of a response arriving in any particular stated time, or exaggerate just to make the caller feel better.
- DO NOT: Ever tell the caller that a response is or will be forthcoming prior to an actual dispatch.

In effect, what I advise call centers to do is avoid making promises of future action, but do not be afraid to state *true facts* such as the fact that resources have been or are being dispatched. Since the response is basically a team effort, involving both 911 communications personnel and first responders, the danger may be in making assumptions as to what another team member intends to do. Since the 911 personnel are not on scene, they have to rely on the reporting party and arriving responders to inform them of what is happening. Assumptions as to what is happening are therefore dangerous.

It is worth mentioning that apparently the fact situation in *Munich* involved a call center or agency that was operated by the county and the responders-- Sheriff's officers--are also county officials. The situation might be more complex when the call center is not a legal entity, but rather a creation of several municipal corporations pursuant to an interlocal cooperation agreement. A legal action brought against such a call center would, in my opinion, only be properly brought if the plaintiff joined the participating agencies that formed the dispatch agency and provide its funding. Conceivably, fact situations could arise, for example, where the 911 agency was not negligent at all but the responding agency was negligent, for example, due to an inordinately slow response. By contrast, it could

also happen that the responding agency was not negligent at all, but the call center was negligent (in effect, this would probably have been the result in *Munich* if the deputy had not been a county Sheriff but a city policemen). The Court in *Munich* does not consider such factual scenarios, in which the *fulfillment* of the promises--as the Court called it--is carried out (or not) by a different government entity altogether. In such a case, joint and several liability may not be found if only one agency exhibited negligence.

In summary, I believe the primary impact of the *Munich* decision is that "no duty" and "no special relationship" will be more difficult to establish and therefore the public duty doctrine is not much of a liability shield. Public safety call centers and their call receivers and dispatchers will owe a duty to 911 callers whenever express assurances of action are made, so therefore unless they are reasonably certain that fulfillment of such assurances (promises) will take place, then they should not make such assurances.

(Joseph F. Quinn is general counsel to South Sound 911 (in Pierce County) and Jefferson County 911.)

HIPAA UPDATE - PRIVACY RULE AMENDMENTS ARE EFFECTIVE IN SEPTEMBER. *By Eric T. Quinn, Candidate for Juris Doctor, Seattle University Law School, December 2013.*

The 2013 HIPAA Omnibus Rule makes a few changes that are significant. The bulk of the changes concerning the ambulance industry center around regulations proposed under the Health Information Technology for Economic and Clinical (HITECH) Act of 2010. With these amendments, the Privacy Rule now applies to new categories of "business associates," who are those persons who perform services or activities involving protected health information (PHI) on behalf of a covered entity. This requires that covered entities enter into "business associate agreements," which are meant to provide some legal protection when another party is using or disclosing PHI. But the new Rule defines business associate broadly, and therefore, the absence of an Agreement between a covered entity and the third party does not mean that the third party is not a business associate. A Business Associate Agreement is not meant only as a shield from liability, but as a method of securing the PHI of protected individuals.

There are three types of business associates under the new Rule: (1) Any person who maintains or transmits PHI for the covered entity, (2) subcontractors of the business associate, and (3) an agency that "maintains" PHI on behalf of a covered entity. Here are some examples of a Business Associate:

(1) Third Party Administrators
(2) Pharmacy Benefit Managers for Health Plans
(3) Claims Processing or Billing Companies
(4) Transcription Companies
(5) Persons who perform legal, actuarial, accounting, managerial or administrative services for covered entities involving PHI
(6) Software Vendors
(7) Consultants.

Here are some non-examples:

Recipients of PHI.

The newly amended rule also changes the definition of "breach":

(a) "Breach" means that the use or disclosure of PHI would be considered so important to the individual to whom the PHI belongs, that they reasonably

should have been given notice of the "breach"

(b) Under the pre-2013 Rule, a breach in the use or disclosure of PHI occurred when this use or disclosure of PHI "poses a significant risk of financial, reputational, or other harm to the individual."

(c) Under the newly amended rule, use or disclosure of PHI is ***presumed*** to be a breach unless the covered entity or business associate "*demonstrates that there is a low probability that the protected health information has been compromised*."

This means that the covered entity or business associate has the initial burden to show that they complied with HIPAA notice requirements. This does not necessarily mean that the covered entity or business associate has a higher burden to demonstrate their compliance, but it seems to mean that a breach of the notice requirements has a lower threshold than the former "significant harm" requirement. Finally, the most important aspect of this change is that business associates may now be directly liable under HIPAA for: (1) Impermissible uses or disclosures of PHI under HIPAA; (2) failure to provide breach notification to a covered entity; (3)failure to provide access to a copy of e-PHI to a covered entity, individual, or individual's representative (whichever is specified in the business associate agreement); (4) failure to disclose PHI when required by HHS to investigate the business associate's compliance with HIPAA; (5) failure to provide an accounting of disclosures ; and (6) failure to comply with the applicable requirements of the Security Rule.

The new Rule went into effect on March 26, 2013, after which covered entities and business associates have 180 days to comply with the Rule, which means the compliance deadline is September 23, 2013.

LIE DETECTOR TESTS FOR PUBLIC EMPLOYEES IN WASHINGTON? BETTER NOT! - *By Joseph F. Quinn, Attorney at Law*

Again, some of my favorite articles I have ever written have evolved from client inquiries. Recently, a client asked if it is acceptable for them to administer polygraphs--lie detector tests--to their public employees. The short answer in Washington State is that unless the employer is a law enforcement agency, it cannot compel public employees to take a lie detector test, either in a pre-employment or hiring process or during employment, as might otherwise be desirable in a disciplinary investigation.

There are both federal and state statutes worth discussing. First, the federal Employee Polygraph Protection Act of 1988, 29 U.S.C. section 2001 et seq. generally prohibits the administration of polygraphs in the private sector. However, there is an exemption that provides that the federal law is not applicable to state or local governments, or any political subdivision of a state. Therefore, this federal law would be inapplicable to protect employees of a fire district or a city fire department from unwanted lie detector tests. But that statute goes on to provide that the federal law does not pre-empt any state or local law that is more restrictive, i.e. that provides more protection from polygraphs.

So what does state law provide in Washington? Well, RCW 49.44.120 makes it a closed question. It provides that it is unlawful, and in fact a misdemeanor to compel an employee or prospective employee of a political subdivision in Washington to take a lie detector test. The only exceptions apply to law

enforcement personnel and juvenile court personnel, so clearly a fire department cannot administer polygraphs at all. Emergency communications centers could not administer them to call receivers or dispatchers who are civilians, i.e. not uniformed law enforcement officers. RCW 49.44.135 reinforces the point by providing for up to a $500 penalty, plus actual damages, together with reasonable attorney fees and costs to any employee whose rights are violated. The bottom line is that lie detector tests are not available to public employers in Washington except if the employees are in the two limited categories set forth above.

GOOD SEBRIS BUSTO ARTICLE ON ADA GUIDANCE

In my practice, I make it a habit to read lawyers' newsletters touching upon my areas of interest, which include human relations or personnel issues. For many years, I have been a "subscriber" to the monthly Employment Notes published by Sebris Busto, a highly rated labor and employment law firm with offices in Bellevue. They often have articles that are helpful to me; this month's piece on the ADA regulations and EEOC guidance, or Q&A, was particularly good. It was written by attorneys Mark Busto and Nate Bailey. With permission, I summarize here briefly some of the main points of the article.

The Americans with Disabilities Act of 1990 was amended in 2008, to broaden the definition of disability, making it more like the Washington Law Against Discrimination. In 2011, the EEOC revised its regulations, implementing the law. The EEOC guidance, or Q&A, recently published, provides specific guidance on four common disabilities or conditions: diabetes, epilepsy, intellectual disabilities, and cancer. In virtually all cases, a person with one of these four conditions will be considered disabled. The guidance contains a list of conditions for which the existence of a disability will be presumed in virtually all cases.

The guidance makes it clear that an employer cannot directly inquire of an applicant for employment if the person has a disability, before making a job offer. With current employees, you cannot ask if the person has a disability unless (1) performance issues have been observed and (2) the employer "reasonably believes that the problems are related to a medical condition".

Perhaps the most helpful part of the guidance is the part about necessary accommodations for persons with the described disabilities. You have to not only accommodate for the condition itself, but also for the results of treatment, and for side effects. For example, with epileptics you not only need to accommodate for possible seizures at work, but also the side effects of the anti-seizure medications that epileptics have to take.

The Sebris Busto article concludes with some helpful tips for employers, such as:

- Thoroughly educate supervisors and HR personnel on what information they may request, and how to provide reasonable accommodation;
- Implement specific policies to protect confidential employee health information;
- Address complaints of discrimination or harassment promptly, take corrective action if necessary, and remind those accused of misconduct that retaliatory responses are unacceptable and will be grounds for discipline; and
- Ensure that supervisors consistently document performance problems of all employees, not just employees with disabilities, on an ongoing basis.

You can find other good HR articles on the Sebris Busto web site: www.sebrisbusto.com.

I would like to thank Jillian Barron, a shareholder at Sebris Busto, who obtained for me the permission to summarize this June 2013 Employment Law Note. Jillian has, on numerous occasions, performed personnel investigations for me and my clients faced

with difficult disciplinary issues, which we did not want to investigate ourselves, internally or through general counsel like me. She always does a thorough and professional job on those investigations, and is also available to advise on various personnel or human relations issues faced by public employers. If readers want to receive the Sebris Busto James Employment Law Notes, simply email Jillian whose address is: jbarron@SebrisBusto.com.

FIRE COMMISSIONER COMPENSATION ADJUSTED UPWARD TO $114 PER DAY

As many readers know, RCW 52.14.010 limits compensation for fire commissioners to $104 per day for services to their districts, with an annual limit now of $9,984.00. But the statute provides for periodic adjustment every five years by the Office of Financial Management due to inflation. That time has now come and the OFM has announced it is raising the daily rate effective July 1, 2013 to $114 per day. The annual cap is increased to $10,944 per year.

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