Firehouse Lawyer

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CITY OF LAKEWOOD V. KOENIG--AN IMPORTANT PUBLIC RECORDS ACT CASE

On September 4, 2013, just after we wrapped up the third quarter *Firehouse Lawyer,* the Court of Appeals, Division II, decided a significant case involving the Public Records Act. The factual background was as follows: David Koenig filed with the City of Lakewood three Public Records Act requests for records related to the arrest and prosecution of a Lakewood Police detective, and similar records as to a Tacoma Police officer, and about an auto accident in the City of Fife. The City responded with a list of withheld documents and a list of redactions. Essentially, the city enumerated its redactions and then simply stated the statutory section or sections relied upon for each redaction. The City initiated a declaratory judgment action seeking a court order declaring that it had complied with the requests, and therefore the statute. The trial court granted the City a summary judgment and denied Koenig's request for costs and attorney's fees.

On appeal, however, Division II of the Court of Appeals held that the Public Records Act, at RCW 42.56.210(3) plainly requires a local government agency to give a "brief explanation" of how the exemption applies to the record withheld or redacted. It is not enough to do what the city did in this case, i.e. list the redactions made and the statutory exemption citation. When answering such PRA requests, agencies must show the connection between the statute cited and the facts. For example, if the request was for residential addresses and telephone numbers of your public employees or volunteers, you might withhold the records, citing RCW 42.56.250(3), but add a "brief explanation" stating that this statute provides a complete exemption from disclosure for such addresses and telephone numbers. This was a somewhat expensive lesson to learn, but hopefully other agencies will now always provide the brief explanation the PRA requires.

FLSA QUESTIONS CENTER AROUND "REGULAR RATE"

A client asked me this month if premium pay for shift differential and for serving as training officer (both required per union contract) need to be included when calculating overtime pay. I believe the answer to both is clearly affirmative. I have written about this before in the newsletter, but wanted to take this opportunity to expand the discussion about "regular rate". Determining the rate to use when calculating the rate for time-and-a-half can get tricky, as you do not just use base hourly rate.

Essentially, you start with base hourly rate and then add any special pays that must be included. But there is the rub: not all special pay is added in to derive regular rate. In the fire service, there are many types of extra pay. So here is a short list of those that you might have that **must** be included in the regular rate calculation:

- sick leave buyback
- premium pay for special duty
- shift differentials
- hazardous duty pay
- longevity pay
- on-call pay
- bonuses for obtaining college degrees
- non-discretionary bonuses

And here is a short list of payments that *need not* be included in regular rate:

- payment for infrequent absences, such as vacation or bereavement
- discretionary bonuses
- holiday pay, if same as regular pay
- severance pay
- call-back premium pay
- reasonable uniform allowances
- payment for using comp time
- tuition reimbursement
- automobile reimbursement

Sometimes it may not seem as if there is a clear rationale for these distinctions, so do not be afraid to contact legal counsel for clarification on these tricky "regular rate" determinations.

FIREFIGHTER'S CORONARY ARTERY DISEASE HELD NOT OCCUPATIONAL DISEASE

The case of *Raum v. City of Bellevue,* (Court of Appeals Division I, No. 67213-4-I, 2012*)* may not break new legal ground but is worth talking about here. A firefighter experienced chest pressure during a workout, so he lessened the intensity of the workout and continued. When he worked out again, the pressure recurred so he stopped exercising. Next, while on a call, he felt the pressure again. It was evident that he had a heart condition. In 2008, he applied to the Department of Labor & Industries for benefits. That department initially found that he was not suffering from an occupational disease and had not suffered any occupational injury. However, the Board of Industrial Appeals' Industrial Appeals Judge held that he did suffer from an occupational disease, and the employer appealed to Superior Court.

In the trial court, the employer submitted the declaration of an expert who had not performed an independent medical examination of the firefighter. This expert exhaustively reviewed in depth medical records, that revealed a plethora of evidence suggesting long term and gradual development of coronary artery disease. In that declaration, it was noted that the firefighter, since 2001, had suffered from high cholesterol and other health issues. In 2003, the declaration said, he had developed very high cholesterol. The expert concluded that the firefighter was a high cardiovascular risk, finding that 2008 records indicated the employee was at great risk of cardiovascular failure, but the heart problem was not an occupational disease. Another expert for the employer did examine plaintiff in 2008 and his conclusions were consistent with the first expert. The treating doctors did not refute this evidence or provide support for the proposition that firefighting proximately caused the disease. The jury ruled in favor of the employer, after being given a jury instruction by the judge, stating that an occupational disease must be proximately caused by the specific employment, for relief to be granted.

We start the analysis by pointing out that RCW 51.32.185 creates a rebuttable presumption that certain conditions are presumptively occupational diseases. The statute states, in pertinent part, that "(1) In the case of firefighters as defined in RCW 41.26.030...there shall exist a prima facie presumption that (a) Respiratory disease; (b) <u>any heart problems, experienced within seventy-two hours of exposure to smoke, fumes, or toxic substances, or experienced within twenty-four hours of strenuous physical exertion due to firefighting activities.</u>..are *occupational diseases* under RCW 51.08.140. This

presumption of occupational disease may be rebutted by a preponderance of the evidence. Such evidence may include, but is not limited to, use of tobacco products, physical fitness and weight, lifestyle, hereditary factors, and exposure from other employment or nonemployment activities."

Division I of the Court of Appeals affirmed the trial court decision, holding that the jury instructions were adequate to fairly articulate the statutory presumption, and the importance of proximate cause. This case merely illustrates how important it is to present persuasive evidence, whether it is to rebut or support a rebuttable presumption.

But this case is also interesting for what the court did not do. The firefighter argued that RCW 51.32.185 created a new and independent cause of action from the occupational disease statute--RCW 51.08.140. The Court of Appeals rejected that proposition categorically, ruling that there is only one claim, and it is based on the latter statute. All RCW 51.32.185 was intended to do by the legislature is to create a rebuttable presumption.

PROOF OF PRETEXT FOR EMPLOYER ACTION NOT EASY FOR PLAINTIFFS

The recent Division II, Court of Appeals, case of *Scrivener v. Clark College*, No. 43051-711 (September, 2013) shows us that it is not easy for a plaintiff alleging violation of the Washington Law Against Discrimination to prove that the employer's stated reason for the action it took was merely a pretext. A 42-year old teacher, who was a temporary employee who had enjoyed a series of annual contracts, applied for a tenured position, along with about 155 other applicants, some of whom were younger than age 40 and some who were older than 40. The employer gave various non-discriminatory reasons for not hiring plaintiff, who was among four finalists for the job. Age was not discussed, the college president declared, but rather, whether the applicant's qualifications comported with university goals. The employment application did not even ask for age.

To prove that the employer's alleged reasons for not hiring her were a mere pretext, the plaintiff would have to prove: (1) the given reasons had no basis in fact; (2) they were not really motivating factors for the decision; (3) they were not temporally connected to the adverse action **or** (4**)** those reasons were not motivating factors in employment decisions for other employees in similar circumstances. Although the college president in a speech had said the college needed "younger talent", he still tended to hire many people over age 40. Thus the evidence was just not sufficient to demonstrate pretext. The Court of Appeals also rejected the notion that all the plaintiff has to do when trying to show pretext, is to show that age (or other improper reason) was a "substantial factor" in the decision-making, as suggested by an earlier Court of Appeals decision. As we said, it is not easy.

We believe such discussions of the "burden" relate more to the burden to come forward with evidence than the burden of proof itself, which in our view remains always on the plaintiff to prove discrimination. The burden of proof does not shift back and forth.

ERIC QUINN UPDATE

As reported in an earlier edition, our son Eric is a budding lawyer. Now, in December he has graduated from Seattle University School of Law. He will be joining me in my fulfilling law practice, once he passes the bar examination. (Have confidence, Eric!)

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