Firehouse Lawyer

Volume 12, Number 1 ***March 2014***
First Quarter

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Inside This Issue

DUTY TO REPORT UNPROFESSIONAL CONDUCT BY EMT OR MEDIC TO DEPARTMENT OF HEALTH

Recently, I have been asked to explain when an employer of an emergency medical technician or a paramedic needs to report to the Department of Health any job-related misconduct or problems that have led to discipline. Since the statutes and regulations are detailed and somewhat complex, it seemed like a suitable and timely subject for a *Firehouse Lawyer* article.

RCW 18.130.080 is our starting point, as it addresses this question directly. The statute provides three situations, each of which requires a report to be made: (1) when the services of the certificated employee are terminated or restricted based upon a final determination of conduct that may constitute "unprofessional conduct" under the statute discussed below; (2) when, as a result of any physical or mental condition, the certificated employee may not be able to provide the emergency medical services with reasonable skill or safely; or (3) when the certificated employee is disciplined by the employer for "unprofessional conduct" as defined in RCW 18.130.180.

So what does "unprofessional conduct" mean and include under that latter statute? There are many, many examples on the list, so bear with me here. We will not discuss in depth the most obvious ones. First, the "commission of any act involving moral turpitude, dishonesty, or corruption relating to the practice of the person's profession, whether the act constitutes a crime or not." Second, "misrepresentation or concealment of a material fact in obtaining a license or in reinstatement thereof." Third, "all advertising which is false, fraudulent, or misleading." Fourth, "incompetence, negligence, or malpractice which results in injury to a patient or which creates an unreasonable risk that a patient may be harmed." Fifth, "suspension, revocation, or restriction of the individual's license to practice any health care profession by competent authority in any state [or other] jurisdiction."

Sixth, "Except when authorized by [statute], the possession, use, prescription for use, or distribution of controlled substances or legend drugs in any way other than for legitimate or therapeutic purposes..." Seventh, "violation of any state or federal statute or administrative rule regulating the profession in question, including any statute or rule defining or establishing standards of patient care or professional conduct or practice." Eighth, "failure to cooperate with the disciplinary authority by: [various listed acts or omissions]..." Ninth, "failure to comply with an

order issued by the disciplining authority or a stipulation for informal disposition entered into with the disciplining authority." Tenth, "aiding or abetting an unlicensed person to practice when a license is required."

Eleventh, "violation of rules established by any health agency." Twelfth, "practice beyond the scope of practice as defined by law or rule." Thirteenth, "misrepresentation or fraud in any aspect of the conduct of the business or profession." Fourteenth, "failure to adequately supervise auxiliary staff to the extent that the consumer's health or safety is at risk." Fifteenth, "engaging in a profession involving contact with the public while suffering from a contagious or infectious disease involving serious risk to public health."

Sixteenth, "promotion for personal gain of any unnecessary or inefficacious drug, device, treatment, procedure, or service." Seventeenth, "conviction of any gross misdemeanor or felony relating to the practice of the person's profession...." Eighteenth, "procuring, or aiding or abetting in procuring, a criminal abortion." Nineteenth, "offering, undertaking, or agreeing to cure or treat disease by a secret method, procedure, treatment, or medicine...." Twentieth, "willful betrayal of a practitioner-patent privilege...."

Twenty-first, "violation of chapter 19.68 RCW (which pertains to unlawful rebating or discounting). Twenty-second, "interference with an investigation or disciplinary proceeding by willful misrepresentation of facts...(and similar behaviors)." Twenty-third, "current misuse of (a) alcohol; (b) controlled substances; or (c) legend drugs." Twenty-fourth, "abuse of a client or patient or sexual contact with a client or patient." Twenty-fifth, "acceptance of more than a nominal gratuity, hospitality, or subsidy offered by a representative or vendor...."

As you can see, some of these subsections need no explanation or much discussion as the intent is rather obvious. But not all of them. Let us consider, for example, what RCW 18.130.180 (23) might mean in various situations, insofar as it requires reporting to DOH the "current misuse of alcohol". The word "current" is fairly unambiguous, and probably is meant to exclude stale issues or resolved past problems with alcohol. I would infer that recent and repeated instances of showing up for work under the influence of alcohol would constitute "current misuse" of alcohol. Indeed, when that situation has arisen in the past with firefighter/EMTs I have advised a fitness for duty evaluation, including an alcohol abuse evaluation with a recognized company. But would a recent charge, not yet proven, of driving under the influence while off duty, be enough to require reporting to the DOH under this statute? Apparently, one local attorney advises clients that this is necessary.

I have real doubts about that interpretation. First, there is in that scenario no "job relatedness" in my view to demonstrate a real concern about patient safety. Second, it has not even been proven yet. We do still believe in the "presumption of innocence". I would argue that this subsection implies some provable showing that alcohol is being habitually and frequently abused by the health care professional, so as to cause concern about their professionalism with regard to patient care. Otherwise, there is the risk of wasting DOH resources, which are probably stretched quite thin with more serious cases, on every firefighter or EMT who drinks a bit too much beer while off duty, in what might be an isolated instance or first offense.

My review of this entire section of the statute tells me that there is a requirement of some nexus--a connection--to the job of EMT or paramedic that is needed before we report, as this pertains to "unprofessional conduct", and not all conduct or behavior of an employee relates to their regulated profession.

While looking at that subsection, you might ask "what are legend drugs?" RCW 69.41.210 defines "legend drugs" as those required to be dispensed by prescription only and certain controlled substances.

The next subsection--RCW 18.130.180(24) is worthy of discussion. What does "sexual contact" with a

client or patient mean? Perhaps more importantly, how long is a patient considered a patient within the meaning of this statute?

I would assume that the DOH would look to WAC 246-16-100 for guidance in interpreting this particular subsection, because that implementing regulation defines "sexual misconduct" (rather similar to "sexual contact"). Similar to the unprofessional conduct statute--RCW 18.130.180 discussed above--this regulation includes more than twenty behaviors that fit within the meaning of sexual misconduct. Understandably, this definition includes more than physical touching and sexual intercourse, as it proscribes certain ways of talking to the patient, that in a workplace setting we would probably label as sexual harassment.

But please note that behaviors that are not so obviously "sexual misconduct" really are such under this regulation, including "soliciting a date with a patient" or even "suggesting or discussing the possibility of a dating, sexual or romantic relationship after the professional relationship ends" (emphasis added). So this regulation deals with that temporal aspect I alluded to above. Even assuming that the relationship to the EMS patient ends at the conclusion of the emergency response, to solicit a date or even suggest that, during the response itself is clearly sexual misconduct. But what if the attempted contact or solicitation arises after the response is over? What if it does not occur for a week or month? When does the professional-patient relationship end exactly?

Before addressing these difficult issues, we must mention also that this WAC further provides that a health care professional shall not..."use health care information to contact the patient...for the purpose of engaging in sexual misconduct." Therefore, we can infer that using any information gleaned from the professional contact in order to solicit a date or even discuss the possibility, is a violation of this prohibition.

Finally, the third subsection of this WAC provides a bit more certainty, although some may not like it. It states that a health care provider shall not engage in any of the sexual misconduct activities, or even attempt to, **within two years after the relationship ends.** So, that pretty definitively answers the temporal question I asked above! Thus, even after the professional interaction between EMT or paramedic and the patient is clearly over, these practitioners have to be careful to avoid social contact with past patients...for up to two years.

TRADEMARK CASE MAY BE RELEVANT

About once every year or two, a fire service client will ask me about a concern regarding misuse or "misappropriation" of their logo or patch. Recently, a fire district learned that an advertising company was selling ads to local businesses. These ads were in the form of large refrigerator magnets, that included space for the homeowner to list emergency numbers and other safety information. The ads stated or implied that the ad agency was sponsored, supported or endorsed by the local fire department, but the department did not recall giving any permission to use their logo or patch on the large refrigerator magnet.

Almost the same day, another client asked for advice about a proposed T-shirt plan by a "Firefighter Mom." Apparently "Mom" wanted to add to the official district T-shirt (with logo and name thereon) the words "Firefighter Mom". They were not enthused about granting permission and wondered if they could prohibit use of their logo.

Whenever I have thought about this issue before, I have had a nagging suspicion that there was something odd about a government agency seeking a patent or trademark for a patch, logo, or similar seal.

A little research revealed some interesting aspects to this issue. First, there is a web site called www.patches.com, which had a disclaimer about the legal issues. Upon checking with the owner of that web site, we learned that FDNY, the Fire Department of the City of New York, had written to him (actually the City of New York lawyers) advising him that FDNY is protected by a trademark so they did not permit its

use on his site. Specifically, they advised the owner that: "The unauthorized use of the FDNY trademarks in connection with the sale of commercial goods or services violates federal and state law, is confusing and misleading to the ...public and constitutes a misappropriation of the goodwill developed by the City."

But further research revealed, interestingly, that the Federal Circuit Court of Appeals ruled late last year that the City of Houston and the municipality of Washington, D.C. were not eligible to apply for federal patent or trademark protection for their seal or logo under the Lanham Act, the federal patent law. See *In re City of Houston and In re the Government of the District of Columbia,* (Fed. Cir. October 1, 2013). In this combined opinion in two cases on appeal from the Director of the U.S. Patent and Trademark Office, the court interpreted the Lanham Act, which is the commonly used name for the Trademark Act of 1946, as amended, which is codified at 15 U.S.C. Section 1051 et seq.

Both governments wanted to obtain registration for their official seal. However, section 2 of the Act allows an applicant to register its mark but only if it complies with the Act. That section essentially provides that no trademark "shall be refused... unless... and then five specific exceptions are listed. The exception at 15 U.S.C. Section 1052(b) is what this suit was about.

That exception provides for refusal if the trademark:

> Consists of or comprises the flag or coat of arms or other insignia of the United States, or of any State or municipality, or of any foreign nation, or any simulation thereof.

A literal interpretation of that relatively plain and clear language leads to the conclusion that Houston and Washington, D.C.--both municipalities--could be refused a trademark under the federal statute. The Circuit Court said this was an issue of first impression, which probably means there was no binding U.S. Supreme Court or Circuit Court of Appeals opinion on this subject. (Of course, New York could have gotten its federal trademarks without the issue having been raised.)

The legal and policy arguments of both Houston and Washington, D.C. were fascinating and creative. The latter relied heavily on historical arguments stemming from the treaty rights established originally in the Paris Convention of 1883. But the federal court steadfastly adhered to the plain meaning rule and found no way around the literal reading of the statute.

Unless a ruling of the U.S. Supreme Court holds otherwise, it appears that the governing law on this subject now is that a municipality such as a city or county cannot apply to register its seal or insignia as a federal trademark. Since fire districts and regional fire authorities are municipal corporations in Washington, I infer that they too are "municipalities" within the meaning of the Lanham Act.

Review has been requested at the U.S. Supreme Court, but at press time we have not ascertained whether certiorari was granted. Stay tuned.

Well, you might ask, if my jurisdiction cannot get a federal trademark can we get a state trademark? Also, as pointed out by the federal circuit judges in their opinion above, a municipality could pass an ordinance proscribing use of its seal or insignia, using its own state constitutional powers. I imagine that such an ordinance would only be enforceable within the boundaries of the municipality. Moreover, I doubt that fire districts or RFA's could so legislate, as they are not Article 11, Section 11 "police power" municipal corporations (such as a county or city) and therefore do not enact ordinances.

Further research by my office indicates that a similar restriction is contained within the state trademark statute. Until advised to the contrary by a specialist in patent and trademark law, I am going to tell my clients that trying to register a state or federal trademark for your insignia, logo or patch looks rather questionable. But there may be other avenues of attack.

The Ninth Circuit has held that a party may be enjoined from appropriating the name of another business which possesses no trademark. *New West Corp. v. NYM Corp. of California*, *Inc.,* 595 F.2d 1194, 1198 (9th Cir. 1979). Furthermore, the United States Supreme Court—in precedent which has remained the law for 22 years—has held that the Lanham Act protects "qualifying unregistered trademarks." *Two Pesos, Inc. v. Taco Cabana, Inc.,* 505 U.S. 763, 768 (1992). Additionally, the Federal Circuit noted that although a municipal corporation may not apply for a trademark under federal law, the Lanham Act provides "other protections" to those claiming infringement. *In re Houston,* 2013 WL 5826450 (2013).

Also, Washington has long recognized the tort of "unfair competition," which exists to prevent both monopolistic business practices and the appropriation of one's name for commercial gain. In an action for unfair competition, it appears that the relevant inquiry is "whether the public is likely to be deceived." *Money Savers Pharmacy v. Koppler Stores*, 37 Wn.App. 602 (1984). Federal district courts in Washington have found that an unfair competition claim may be brought independently from a claim under the Washington Consumer Protection Act. *See Witham v. Clallam County Public Hospital District 2*, 2009 WL 5205962 (W.D. Wash. 2009) (denying motion to dismiss complaint for unfair competition).

Because the goal of trademark law is to prevent confusion to the public, this kind of issue goes deeper than the nuts-and-bolts of obtaining a trademark. In sum, a municipal corporation—as of this moment—may not register a federal trademark, but may prevent the use of its name for commercial gain.

(Special Disclaimer: Joseph F. Quinn is not and does not claim to be a patent or trademark lawyer, which is a recognized specialty within the law. Discussion of these matters is limited to what we have written here as interested observers on this issue. Legal advice on patent or trademark issues, such as obtaining a state trademark, should be sought from specialists in this field of law, of which there are many in the greater Seattle area.)

Credit for much of the basic research for this article should be given to Pat Riley, the Chief Financial Officer --and IT expert-- for Gig Harbor and Medic One, where our offices are located.

"CONCERTED ACTIVITIES" NOT PROTECTED BY PERC

Under Section 7 of the National Labor Relations Act (NLRA), employees have the right to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C.A. § 157. The federal courts, in interpreting the meaning of "concerted activities," often consider whether the employee's actions were "individual activity for personal ends or collective activity for mutual aid or protection." *E.I. Dupont De Nemours and Co. v. NLRB*, 707 F.2d 1076-77 (1983). Recently, the Washington Court of Appeals, Division 2, decided (in January) the case of *Teamsters Local Union No. 117 v. Washington Dep't of Corrections, No. 43604-3-II*. This case presented a question of first impression (the first time the court has decided such an issue): Whether public employees have a right to engage in "concerted activities" under Washington law. The case may not be of great importance, due to unusual facts, but perhaps exploring its contours will shed some light on this issue.

Understanding this holding requires us to distinguish RCW 41.80.050, Washington's collective bargaining law, from Section 7 of the NLRA. RCW 41.80 grants public union employees "the right to self-organization, to form, join, or assist employee organizations, and to bargain collectively through representatives of their own choosing for the purpose of collective bargaining free from interference, restraint, or coercion." The statute does not reference the "concerted activities" espoused in the NLRA.

The complainant-employee in *Teamsters* was a union shop steward who worked for the Washington Corrections Center for Women (WCCW). She was

employed as a Department of Corrections (DOC) Officer. After searching the DOC intranet, she found out that a former Washington senator had been employed to be a victim advocate at the WCCW. She sent an email to the WCCW staff, stating her negative opinion of the new advocate's salary. Her superintendent began an investigation into what he considered to be an "unprofessional email." Interestingly enough, the steward said in the email that it was not "union business," and that she did not send the email in her capacity as a shop steward. Although the investigation resulted in no discipline, the steward sent another email pertaining to the "IF Project" and its implications for the WCCW. This was again determined to be an unprofessional email, the steward's email privileges were suspended and she was reprimanded. She filed an unfair labor practice complaint (ULP) with PERC. A PERC hearing examiner found for the steward. Upon review by the three-member PERC commissioners, however, PERC ultimately found that to be protected by the ULP statute, such activity must have "some nexus to union negotiation or administration," and reversed the decision of the hearing examiner. The Court of Appeals affirmed PERC's reversal of the hearing examiner in this reported opinion.

The court held that, based upon a reading of the plain language of the statute, RCW 41.80 does not protect a public employee's rights to engage in "concerted activities." The court reasoned that the Washington legislature has not afforded Washington's public employees as extensive protections as those provided to private sector employees.

So what are the implications for a union member and public employee in Washington state? Perhaps the lesson to be learned from *Teamsters* is that "concerted activity" requires a nexus to union business or bargaining, and not just an individual's expression of a personal observation or opinion. Personal concerted activities are not protected under Washington state law, but only federal law. Washington public employees are not subject to the NLRA, but only the laws administered by PERC in Title 41 of the RCW. Thus, the court held that in Washington, a public employee is not afforded protection for concerted activities by Section 7 of the NLRA, and RCW 41.80 has no parallel statute to Section 7 of the NLRA.

SOME BILLS OF INTEREST PASSED, ON GOVERNOR'S DESK

Now that this year's legislative session is over, it is worth mentioning that these three bills passed, and are currently on the Governor's desk for signature. First, Engrossed Senate Bill 5964, which requires training or education for all elected officials on the Open Public Meetings Act, and also training for other staff on the Public Records Act and record retention guidelines, has been enacted. The law provides for involvement in the education process of the Attorney General. Stay tuned for clarification as to who will offer the training, cost, etc. The Firehouse Lawyer and my firm are thinking of offering a cost-effective alternative aimed particularly at the smaller districts.

Second, Substitute House Bill 2105 passed. It requires posting of all meeting agendas on the district web site, but allows for modifications and then approval of the modified agenda at the meeting. The law exempts public agencies with fewer than ten (10) full time employees. We would assume that agendas for regular meetings, posted on the web site, could remain as they often are today, with generic categories something like this:

- Call to order
- Pledge of Allegiance
- Presentations/Announcements
- Correspondence
- Public Comment
- Administration Reports (Chief)
- Executive Session (if any)
- Consent Agenda
- Unfinished Business
- New Business
- Good of the Order
- Adjournment

The foregoing is a typical agenda for a regular meeting (not a special meeting), at which it is lawful to take action on any district business. The law does not require you to adopt any specific agenda or be any more specific than as shown above.

Third, and last, the partial merger bill--House Bill 1264--passed this time around. This law would require both district boards to concur in any partial merger. Remember, under this statute, which is contained in the fire district merger statute (Chapter 52.06 RCW) territory in one fire district is essentially transferred to an adjacent district. We have noticed that this new statute basically provides "veto power" to the board of the "merging district" (the one losing the territory and therefore the tax base) over any partial merger. There may be a potential for abuse here, in a situation where the citizens affected really want to switch districts to get better or faster service, but the merging district board still does not want to lose the tax base. We are not saying it is a bad law, just that there is a potential for harm if misused.

ERIC QUINN UPDATE

As reported in an earlier edition, our son Eric is a budding lawyer. In December he graduated from Seattle University School of Law and in February he took the Washington State Bar Examination. So now we wait with bated breath for results. He will be joining me in my fulfilling law practice, once he passes the bar examination. (Have confidence, Eric!)

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