FIREHOUSE LAWYER

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NO SUIT FOR WRONGFUL TRANSFER

The Supreme Court of Washington has declined to recognize a tort of wrongful transfer in the public employment setting. A Washington secretary/clerk typist at a state operated nursing home reported an incident of alleged patient abuse, which later turned out not to have occurred. Management transferred her to another office pursuant to a reorganization plan discussed prior to the report. However, she still believed the transfer was retaliatory. While she did not lose any benefits, salary or employment classification, she considered the new job undesirable. She filed a union grievance which ended in a settlement. However, she then filed suit in state court seeking damages for violation of her First Amendment rights and the tort of "wrongful transfer in violation of public policy." The Superior Court dismissed all claims and the Court of Appeals affirmed the dismissal of the wrongful transfer claim, but reversed and remanded the dismissal of the First Amendment claim. Both parties appealed to the Supreme Court.

State courts disagree as to whether an employee has a cause of action based on public policy for disciplinary decisions. No jurisdiction has granted a public policy cause of action to a person involved in a lateral job transfer resulting in no loss of pay, rank, job classification or benefits. The Supreme Court of Washington stated that allowing a cause of action for wrongful disciplinary actions less than discharge, based on public policy, would open a floodgate of litigation and substantially interfere with an employer's discretion to make personnel decisions. Therefore the court affirmed the Court of Appeals' decision rejecting the tort of wrongful transfer under these circumstances. Thus, in Washington, a wrongful discharge action may be based upon public policy violations, but no lesser personnel action leads to a public policy cause of action. See *White v. State of Washington*, 929 P.2d 396 (1997).

RATIONAL BASIS REQUIRED FOR NEPOTISM IN HIRING

A Minnesota firefighter applicant was ranked first on the eligibility list but passed over twice and never offered employment. Finally, he learned that the Fire Dept. had hired four firefighters, three of whom were related to present or former department employees. He filed suit in federal district court claiming a violation of his rights to equal protection. Although the trial court granted summary judgment to the city, the U.S. Court of Appeals, 8th

Circuit,

NEPOTISM IN HIRING (continued)

reversed. Based on a 1947 U.S. Supreme Court case, the court held that nepotism in hiring must have a rational basis. In other words, some measure of justification connecting the challenged hiring criterion to the capacity of the applicant to perform the duties must exist before the action is constitutional. In the case, the record contained nothing about the history or culture of fire fighting and firefighters or the unique requirements of the job. Therefore, the nepotism was not shown to have even a rational basis. See *Backlund v. Hessen*, 104 F.3d 1031 (8th Cir. 1997).

WASHINGTON LEGISLATURE AMENDS DEATH BENEFITS LAW FOR FIREFIGHTERS

By Chapter 226 of the laws of 1996, the legislature amended RCW 41.26 and 43.43. The death benefits awards statute for law enforcement officers, firefighters, and commissioned employees of the Washington State Patrol who die in the line of duty was changed. It now allows for a $150,000.00 death benefit to be paid to the member's estate or to the person(s) or organization nominated by the member by written designation duly executed and filed with the department. If no such designee is still living at the time of the member's death, the benefit is paid to the surviving spouse. If there is none, then the payment goes to the Personal Representative. The benefit under this law will be paid only where death occurs as a result of injuries sustained in the course of employment with the appropriate determination of eligibility by the Dept. of Labor & Industries.

LEOFF II EMPLOYEES CAN SUE EMPLOYERS

Police and firefighters hired after September 30, 1977 are LEOFF II employees eligible for worker's compensation for on-the-job injuries. In this case, a LEOFF II deputy sheriff collected "worker's comp" and then sued his employer, Spokane County, for negligence for the same injury. The county defended based upon the provision of the statute that bars employees from suing their employers over covered injuries. Surprisingly, the Washington Court of Appeals disagreed. There was a right to sue provision included in LEOFF II when it was added in 1977. The county claimed this provision was never intended to apply to LEOFF II and pointed out that in 1992 the legislature passed a technical corrections law. However, the court invalidated that statute because the ballot title did not give fair notice that the law would divest LEOFF II participants of their right to sue. Even if the legislature were to again correct this problem, using a proper title on the bill, it's unclear whether such a correction would be applied retroactively to officers injured during the interim period. See *Fray v. Spokane County*, 931 P.2d 918 (Feb. 20, 1997).

FIREFIGHTER PHYSICAL FITNESS REQUIREMENTS ARE SUBJECT TO BARGAINING

Due to rising health care costs, and an increase in awareness of the benefits of physical fitness with respect to firefighter health and efficiency, physical fitness has become an important bargaining subject. At the National Public Employer Labor Relations Association's annual conference, on March 17th in San Francisco, a Chicago lawyer argued that some fitness issues fall within manage-

ment rights, but noted that most state labor boards and commissions

PHYSICAL FITNESS (continued)

have held such issues to be bargainable. In fact, many public employers have succeeded in getting favorable contract language on physical fitness.

For example, the two following contract clauses have been negotiated:

1. "The employer possesses the sole right and authority to establish mental and physical fitness standards, to establish specialty positions and to select personnel to fill them, to schedule and assign work, to establish work, performance, and productivity standards, and from time to time to change those standards."

2. "All employees are expected to be physically fit to perform the requirements of their job. In order to maintain efficiency in the… department, to protect the public, and to reduce insurance costs and risks, the department may establish specific physical fitness standards for all employees hired after _____. Employees hired after _____ who fail to meet department physical fitness standards shall be subject to progressive discipline."

The Chicago attorney, Jill Leka, also cited numerous cases in which physical fitness testing has been challenged (sometimes successfully) on the basis of various federal and state discrimination laws, the Americans with Disabilities Act and the Age Discrimination in Employment Act.

Suffice it to say that physical fitness language not only needs to be bargained (for represented employees), but needs to be carefully reviewed by counsel to try to avoid liability on the basis of the various discrimination statutes and the ADA.

ADEA AMENDED

On September 30, 1996, President Clinton signed an amendment to the Age Discrimination in Employment Act, retroactive to December 31, 1993. This legislation restored an exemption to state and local governments which gave them the option of setting mandatory retirement ages for public safety officials including police and firefighters. While not a factor in Washington, New Jersey apparently has a mandatory retirement age for police and firefighters. On February 25th, the New Jersey Attorney General issued a formal opinion determining that all police and fire-fighters 65 years of age or older must retire in the State of New Jersey due to this new legislation at the federal level.

FREE SPEECH RIGHTS VS. DISCIPLINE

In a federal case in New York, the trial court held that a police officer's free speech right is outweighed by the need for discipline. The police officer claimed his First Amendment rights were violated when officials disciplined him after he filed an unfair labor practice charge that included a copy of a confidential management memo on labor strategy. Although the police officer's "speech" could arguably be considered a matter of public concern, the department's interest in enforcing its rules on confidentiality outweighed the officer's interest in bringing the labor practice charge. The police officer brought suit under the Civil Rights Act of 1871 (42 U.S.C. Section 1983) alleging that the officials disciplined him in retaliation for filing the improper labor practice charge and had thereby violated his First Amendment rights to free speech. The District Court judge ruled otherwise. He found the publication likely to disrupt the police operations and the

department's strong interest in maintaining discipline and espirit de corps among the employees. Police officials

FREE SPEECH (continued)

were justifiably concerned when they saw a sensitive memo they understood to be confidential appended to a public filing relating to an ongoing labor dispute. The police officer's case was dismissed. See *Heil v. Santoro*, D.C. S.N.Y. (cause number 94CIV.9109, February 28, 1997.)

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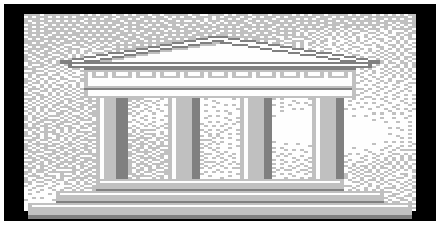

Mr. Quinn is general counsel to nine Pierce County fire districts under a Professional Services Contract. His office is located in the headquarters of Pierce County FPD 2 (Lakewood) and FPD 3 (University Place) at the above address.

NOTA BENE:

Since January 1, 1997, Mr. Quinn has developed a fire department safety checklist and a set of forms for safety officers. Designed to help fire departments comply with the new WAC 296-305 safety standards, these materials will be available soon to non-Pierce County departments.

Mr. Quinn has also been developing numerous policy Resolutions and SOPs on various department topics such as open meetings, open records, patient records, etc.

Please call for information.