

Top Legal Issues in the Fire Service, and Civil Rights in the Workplace

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**For the Washington State Fire Chiefs
Administrative Support Section**

What is a Civil Right?

- **Rights do not arise from words on a page**
- **Rights arise from the Constitution, and from conduct, custom and tradition**
- **The Constitution creates the “floor”**
- **The employer can *create rights* that otherwise did not exist**

***Thomson v. St. Regis*, 102 Wn.2d 219 (1984)**

Why Civil Rights Matter

- **Knowledge of civil rights preserves our liberty**
- **Knowledge of civil rights prevents us from violating the rights of others**
- **Public employers are subject to the Constitution**
- **Therefore, public employers can be sued for civil-rights violations**

See 42 U.S.C. § 1983

The First Amendment

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

The First Amendment was incorporated to the States via the 14th Amendment

Establishment v. Free Exercise

- **The Establishment Clause pertains to employer actions**
- **The Free Exercise Clause pertains to employee actions**



Establishment Clause

- **Government must remain neutral as to religion**
- **May not prefer one sect over another**
- **Employer must balance right of free exercise with preventing Establishment Clause violations**
- ***See Lemon v. Kurtzman, 403 U.S. 602 (1971)***

Establishment Clause Violations

- **A chief asking an employee if she has accepted Jesus Christ as her savior;**
- **An employer placing a crucifix in a break room;**
- **Providing aid to outside religious organizations**

Free Exercise

- **Employer may not single out employees based on their religious beliefs**
- **These beliefs need only be “sincerely held”**
- **To avoid Free Exercise problems, be sure your policies are even-handed**

See Sprague v. Spokane Valley Fire Department, No. 93800-8 (2018) (“of a religious nature”)

Freedom of Speech

- **Balancing Act**
- **The Right of Employee to speak out as private citizen on a matter of public concern**
- **Vs. Employer right to manage efficiency of the workplace**

See *Pickering v. Board of Education*, 391 U.S. 563 (1968)

Freedom of Speech

Washington expansion of Pickering

- a) Positions that require *loyalty*
- b) Amount of *disruption*
- c) The all-important *time, place and manner*
- d) Impacts on *morale*

See *White v. State*, 131 Wn.2d 1 (1997)

Freedom of Speech

Certain speech is *not protected*

- 1. Statements made pursuant to “official duties”**
- 2. Defamation**
- 3. “Fighting Words”**



“Official Duties”

- **Statement intended for an internal audience**
- **Statement not made as a private citizen but as a public employee expressing an opinion regarding official duties**
- **Tread lightly in this area**

See *Garcetti v. Ceballos*, 547 U.S. 410 (2006)

“Fighting Words”

- **Defined as “those which by their very utterance inflict *injury* or tend to incite an immediate breach of the peace.”**
- **Direct threats against an individual person**
- **Words which in close quarters could cause violence (use of the “N Word” in the presence of African American employee)**
- **Fighting words are not mere “hate speech”**

***United States v. Alvarez*, 617 F.3d 1198 (9th Cir. 2014).**



Defamation



- **Public employees have no right to tell bald-faced lies that hurt people**
- **Public employers do not have reputational interest recognized under defamation law**
- **Reputational interests belong to individuals**
- **Standard of proof much higher for “public figures” (chief, district secretary, commissioner)**

***New York Times v. Sullivan*, 376 U.S. 254 (1964)**

Defamation of a “Non-Public Figure”

The plaintiff must prove the following:

- 1. The statements were false;**
- 2. the statements were made to a third party;**
- 3. the statements were unprivileged;**
- 4. It was the defendant’s intentional or unreasonable actions that led to disclosure; and**
- 5. The defamed employee suffered damages to reputation or suffered emotional distress**

Tons of Guns: The Second Amendment

- **Supreme Court in *Heller* established the individual rights of citizens to bear arms for self-defense**
- ***Heller* court left open the potential for (and history of) regulation of guns in government buildings**
- **Ninth Circuit found no fundamental right of person to carry a concealed weapon**

***District of Columbia v. Heller*, 554 U.S. 570 (2008)**

***Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016)**

Regulation of Handguns

Public agency may:

- 1. Ban concealed weapons in the workplace altogether, loaded or unloaded**
- 2. Prohibit employees and members of the public from entering or remaining on employer facilities with a loaded handgun**

***Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016)**

The Fourth Amendment

- **Protects peoples’ “persons, houses, papers and effects” from “unreasonable” searches and seizures**
- **One must have a “reasonable expectation of privacy” in the place being searched—subjectively and objectively reasonable**

***Katz v. United States*, 389 U.S. 347 (1967)**

Searches by Government Employers

- **Searches by the government generally require a warrant**
- **If the government happens to be the employer (not the police), standard is lower**
- **Probable cause *not* needed**
- **Something closer to reasonable suspicion of workplace misconduct**

***O'Connor v. Ortega*, 480 U.S. 709 (1987)**

Washington's Fourth Amendment: Article I Section 7

- **Does not contain the word “unreasonable”**
- **More protective than Fourth Amendment due to lack of the word “reasonable”**
- **No balancing: either a warrant or a recognized exception**
- **But workplaces require “independent analysis”—reasonableness inquiry much like *Ortega***

***Robinson v. City of Seattle*, 102 Wn.App. 795, 811 (2000)**

***State v. Snapp*, 174 Wn.2d 177 (2012)**

Principles Applied to Social Media/Work Areas

- **Manage employee expectations in the workplace (you control the “ceiling”)**
- **Policies should articulate that employees enjoy diminished expectation of privacy**

Big Brother

- **Washington law highly restricts an employer's right to access an employee's personal social media account**
- **Employer may access accounts to make factual determinations in workplace investigations**
- **Prohibition does not apply to intra-net for workplace communications**

RCW 49.44.200

Marijuana

- **Legal for persons 21 and older to possess and consume (private consumption) marijuana in certain quantities**
- **Proof of “impairment” from marijuana requires blood test**
- **Law enforcement must have *probable cause* of drug use**
- **Person taking and testing blood must be certified by State toxicologist**

RCW 69.50.4013 (3); RCW 46.61.506 (3)

Marijuana

- **Why not unilaterally enact a “zero-tolerance” policy without employee input?**
- **This is simple: because of the constitution**

See the Fourth Amendment and Article I Section 7

What's the Solution to the Marijuana Problem?

- **Enact a “reasonable suspicion” drug policy that permits breathalyzers and blood tests to measure for a lower trace of alcohol or marijuana**
- **Ensure that you employ an officer authorized to take and test blood**
- **Or...have your employees *agree* to a zero-tolerance drug policy**

What Process is Due? The Fifth Amendment

- **Fifth Amendment protects the “liberty” and “property” interests from deprivation without “due process of law”**
- **The “liberty interest” is mainly the “privacy” interest**
- **In the workplace context, the “privacy” interest is Fourth Amendment territory**

The Due Process Balancing Test

- **The due process test comes down to giving the employee notice and an opportunity to be heard prior to taking their “property”**
- **An employee must have a “property” right to protect**
- **This “property right” stems from (1) statutes, (2) contracts, express or implied by conduct, and/or (3) policies**

***Danielson v. City of Seattle*, 108 Wn.2d 788, 795 (1987)**

***Matthews v. Eldridge*, 424 U.S. 319 (1976)**

Examples

- **No right of a teacher to a *pre-termination* hearing for non-renewal of a contract**
- **When collective bargaining agreement expires, “property right” becomes an “abstract need or benefit”**

***Schlosser v. Bethel School District*, 183 Wn.App. 280, 287 (2014)**

***Kitsap County Deputy Sheriff's Guild v. Kitsap County*, No. 89344-6 (2015)**

Property Rights and *Loudermill*

- **Public employee with “cause” protections entitled to a “*Loudermill* Conference” prior to being terminated**
- **This has been extended by federal courts and the NLRB to suspensions and demotions as well (loss in pay)**
- **Would not apply to oral or written warnings, or to administrative leave with pay (unless your policies are more generous)**

Loudermill v. Cleveland Board of Education, 470 U.S. 532 (1985)

Loudermill is not Arduous

- **Such a conference is only intended to let employee tell her “side of the story”**
- **Not an evidentiary hearing**
- **Need not occur in an open public meeting**
- **Ultimately, employee entitled to the following:**
 - 1. notice of the charges and intent to discipline;**
 - 2. presentation of employer’s evidence; and**
 - 3. A chance to tell her story**
- **But check your policies and contracts. Is the employee entitled to more than that?**



Brief Note on *Weingarten* Rights

- **Applies only in the *unionized* setting**
- **Union employee entitled to have union rep upon request during interviews that may lead to discipline**
- **If Union employee makes such a request, employer must:**
 - 1. Grant the request;**
 - 2. Terminate the interview; or**
 - 3. Offer the employee the ability to continue the interview unrepresented**

***NLRB v. Weingarten*, 420 U.S. 251 (1975)**

The Privilege Against Self-Incrimination

- **When disciplinary interview could arise out of criminal conduct, employee must be read their “*Garrity Rights*”**
- **Inform the employee that they do not have to answer questions, but if they do, their their answers can be used against them in a criminal proceeding**
- **Offer them immunity from use of the statements if they cooperate with disciplinary investigation**
- **If they still refuse that, the employee may be disciplined**
- **Applies to on and off-duty misconduct**

***Garrity v. New Jersey*, 385 US. 493 (1967)**

Double Jeopardy

- **No person may be subject to a second punishment that arises out of the same facts that led to disciplinary investigation**
- **Employer should not discipline employees until thorough investigation is complete**

***Gulf States Paper Corp., 97 LA 60
(Welch, 1991)***

Double Jeopardy

Factual Sequence:

- 1. Discipline A (Oral Warning)**
- 2. Investigation uncovers additional facts that could have been discovered earlier**
- 3. Discipline B (Written Warning)**

Under these facts, Discipline B will be invalidated

“Confronting” Your Accusers: The Sixth Amendment

- **The amendment grants the accused the right to “confront” the witnesses against him**
- **This “confrontation” right would be violated by allowing continued anonymity of complaining parties**
- **But this right only applies in the *criminal* context, not in workplace investigations**
- **We still counsel the employer not to investigate anonymous complaints (see the Fifth Amendment)**

The Fourteenth Amendment: Equal Protection Under the Laws

- **General Principle: Similarly situated people should be treated similarly**
- **Has led to the passage of innumerable civil rights laws**
- **Include but are not limited to:**
 - 1. Title VII of the Civil Rights Act**
 - 2. The Americans with Disabilities Act**

***City of Cleburne v. Cleburne Living Center,*
473 U.S. 432, 439 (1985)**

Harassment and Discrimination: Title VII and the Washington Law Against Discrimination



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Harassment and Discrimination

Is the Person in a Protected Class?

- 1. Race**
- 2. Gender/Sex**
- 3. National Origin/Color**
- 4. Creed (Religion)**
- 5. Military Status**
- 6. Marital Status**
- 7. Disability (or perceived disability)**
- 8. Sexual Orientation**
- 9. Age**

What if the person is not in a protected class?

Harassment and Discrimination

Causes of Action

**1. Failure to Accommodate
(disabilities)**

**2. Discrimination Based on Hostile
Work Environment (Title VII and
the WLAD)**

Harassment and Discrimination

Hostile Work Environment

1. Conduct must be unwelcome
2. Conduct must be *because of* protected class (use of the term b*tch)
3. Conduct must be pervasive (single instances?)
4. Harassment must be imputable to the employer (negligence theory)

Harassment and Discrimination

Failure to Accommodate

- 1. Person must have a disability or be in some other protected class**
- 2. Persons must be able to perform essential functions**
- 3. Person must have been denied reasonable accommodation (undue hardship?)**

Failure to Accommodate

- **The “reasonable accommodation” process is a “flexible, interactive process”**
- **The employer is not required to create a job for an employee or eliminate essential job functions**
- **Employer cannot discharge duty of reasonable accommodation by providing temporary accommodations**
- **Under the WLAD, the disability may be real or *perceived***

Special ADA considerations

- **Employer may conduct fit-for-duty assessments when employee with disability returns to work**
- **But these inquiries generally must be job-related and consistent with business necessity**

29 CFR § 1630.14 (c)

Title VII considerations

1. Conduct must create "an intimidating, hostile, or offensive working environment." 29 CFR § 1604.11(a).

2. Interpret this language liberally

3. Same-sex harassment can still be sexual harassment

4. Conduct does not have to lead to a nervous breakdown to be considered actionable harassment under Title VII

Harassment and Discrimination

Examples and Explanations

- 1. The “N” Word**
- 2. Bullying (the umbrella supervisor)**
- 3. Paramedic mishandles patient**
- 4. Fitness Programs**
- 5. The Hijab**

The “Ceiling”: The Ninth and Tenth Amendments

- **9th Am: Those civil rights not enumerated in the Constitution are reserved to the people**
- **10th Am: The powers not granted to the federal government are reserved in the States**
- **In other words, States have the power to create rights not enumerated in the Constitution, or strengthen pre-existing rights**

The Washington Fair Chance Act

- **Prohibits certain questions in employment applications and hiring announcements**
- **Prohibits questions about criminal history, despite findings of guilt (arrests and convictions)**
- **Exempts persons who would have unsupervised access to children or vulnerable adults (EMTs, firefighters and paramedics)**
- **This prohibition no longer applies once the person is deemed “otherwise qualified” to perform the job**
- **Consequently, the pre-employment inquiries may still be made (may ask about convictions that are job-related and which did not happen over ten years ago)**
- **RCW 49.94; See WAC 162-12-140.**

The Equal Pay Act: Federal Law Enforceable in Washington

- **Employers may not base salaries on past salaries**
- **Based on historic pay disparities between men and women**
- **Setting salary must be based on employee's credentials and previous job performance**

***Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018)**

Washington State Diversity, Equity, and Inclusion Act

- **Supersedes Initiative 200, which prohibited affirmative-action programs**
- **Adds following classes that may *not* be granted “preferential treatment” in the hiring process:**
 - 1. sexual orientation,**
 - 2. disability,**
 - 3. honorably discharged veteran or military status.**

See RCW 49.60.400.

Washington State Diversity, Equity, and Inclusion Act

- **However...Employers *may* enact affirmative actions programs without violating Initiative 200**
- **One's status in a protected class cannot be the “sole qualifying factor” in the hiring process**



Top Issues in the Fire Service



HIPAA Violations

- 1. A patient's HIPAA rights survive death;**
- 2. Patients have a HIPAA right of access (\$6.50 flat fee for copying medrecs)**
- 3. Health care providers must self-report breaches of unsecured protected health information (see Joe Chart)**
- 4. Washington law is more protective of patient privacy rights than HIPAA**

**45 C.F.R. § 164.400-414; 45 C.F.R. § 164.524 (c)(4);
45 C.F.R. § 160.103; RCW 70.02**

The Paid Family and Medical Leave Act (WPFMLA)

- **RCW 50A.15.020 Benefits kick in on January 1, 2020**
- **Qualified employees (820 hours in last four quarters) entitled to:**
 - 1. 12 weeks of paid family leave;**
 - 2. 12-14 weeks of paid medical leave (14 weeks is serious health condition from pregnancy);**
 - 3. Up to 18 weeks of combined paid family and medical leave;**
 - 4. A maximum weekly benefit of \$1,000.00 if the employee earns approximately \$1,500 per week;**
 - 5. A minimum weekly benefit being approximately \$534.60—if the employee earns approximately \$594.00 per week**

NOTE: The above weekly benefits are subject to adjustment in future years

Other WPFMLA Benefits and Notes

- 1. Employer obligated to restore employee to previous position or another position with equal or greater pay and benefits;**
- 2. WPFMLA leave must be taken *concurrently* with FMLA leave**

RCW 50A.35.010; Former RCW 50A.04.250

Public Records Act Issues

- **Uptick in requestors that are rude to administrative staff**
- **Pretend you have complied with the PRA by providing all responsive non-exempt records**
- **Ignore further requests for information**
- **Do not engage with “gadflies” that have no intention but to harass you**

Public Records Act Issues

- **Agency violates PRA by giving an estimate of when an estimate will be provided**
- **Agency must respond within 5 business days**
- **Must provide estimate of when first installment will be provided**
- **Agency not required to give an estimate of when the provision of records will be complete**

Health Pros Northwest, Inc. v. State of Washington and Department of Corrections, No. 52135-1-II (2019)

Contracts for Fire Protection Services

- **First ILA of its kind: A contract for fire protection services between all King County fire and EMS agencies with King County**
- **The rub: valuing the contract is a “moving target”**
- **Why? Tax-exempt public property is no longer assessed as of 2014**
- **Solution: Legislation**

RCW 84.40.175; RCW 52.30.020

Ambulance Up-Coding

- **EMS agencies may be fined thousands (and perhaps millions) of dollars for Medicaid fraud**
- **Why? Billing BLS services as ALS services**
- **Solution: Be sure your billing agency holds your agency harmless from its own intentional or negligent “up-coding”**

RCW 74.66.005 (Medical Fraud False Claims Act)

Janus, 138 S. Ct. 2448

- **Check your collective bargaining agreements**
- **Unions can no longer require new employees to join a union or pay agency fees in lieu of joining (because of the First Amendment)**
- **Opt-in/Opt Out**
- **Be sure the employer is held harmless from the deduction of dues**