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NO. 55256-2-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

KEVIN J. LOCKE and TORI LOCKE, a husband and wife and the marital  
community composed thereof,

Respondents,

vs.

THE CITY OF SEATTLE, a municipal corporation; and THE CITY OF  
SEATTLE FIRE DEPARTMENT,

Appellants,

and

JAMES SEWELL, MOLLY DOUCE, JOHN CAMERON and "JOHN DOES" 1-5  
in their individual capacities; THE STATE OF WASHINGTON, its subdivisions  
and agencies; and the WASHINGTON STATE PATROL,

Defendants.

APPEAL FROM KING COUNTY SUPERIOR COURT  
Honorable Michael Spearman, Judge

APPELLANTS' ANSWER TO BRIEF OF AMICUS CURIAE IAFF

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Amicus curiae International Association of Fire Fighters has filed a brief arguing that the trial court in this matter had jurisdiction. Amicus is wrong.

## I. ARGUMENT

### A. A RECRUIT IS NOT A “MEMBER”.

To bring this suit, plaintiff had to qualify, at the time he was injured, as a “member” within the meaning of RCW 41.26.281. Plaintiff was not a “member” for the following reasons—

1. RCW 41.26.030(8) defines “member” to mean a “fire fighter who is employed in that capacity. . . .”

2. RCW 41.26.030(4)(a) defines “fire fighter” to mean:

Any person . . . serving on a full time, fully compensated basis as a member of a fire department . . . and who is serving in a position which requires passing a civil service examination for fire fighter, and who is actively employed as such.

3. WAC 415-104-225(2) interprets this statutory definition of “fire fighter” to mean a person—

employed in a uniformed fire fighter position . . . and as a consequence [who has] *the legal authority and responsibility* to direct or perform fire protection activities that are required for and directly concerned with preventing, controlling and extinguishing fires.

(Emphasis added.)

4. Plaintiff—a recruit in recruit drill school—had no “legal authority and responsibility” to direct or perform fire protection activities required for and directly concerned with preventing, controlling, and extinguishing fires, as required by WAC 415-104-225(2).

5. The “member” requirement is jurisdictional, given that if plaintiff were not a “member”, his remedy would be limited to workers compensation benefits under RCW tit. 51. RCW 51.04.010, .08.180-.185.

*Amicus IAFF does not dispute any of this.* Yet amicus argues that plaintiff—a recruit in recruit school—nevertheless qualifies as a “member.” In so doing, amicus ignores not only the plain language of the applicable statutes,<sup>1</sup> but also the language of WAC 415-104-225(2), which provides:

You are a fire fighter if you are employed in a uniformed fire fighter position by an employer on a full-time, fully compensated basis, *and* as a consequence of your employment, *you have the legal authority and responsibility to direct or perform fire protection activities that are required for and directly concerned with preventing, controlling and extinguishing fires.*

....

(Emphasis added.)

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<sup>1</sup> For example, amicus emphasizes that RCW 41.26.030(4)(a) defines “fire fighter” to mean someone serving in a position requiring passing a civil service examination for fire fighter, while downplaying that the statute also requires the person to be actively employed as such. (Brief of Amicus 3-4)

Amicus IAFF appears to claim that plaintiff had the “authority *or* responsibility” to engage in fire protection activities (by being a recruit in training, not by engaging in actual fire fighting or training others to engage in actual fire fighting). (Brief of Amicus 4) This is insufficient. Plaintiff had to have “*legal* authority *and* responsibility” to perform fire protection activities.

“And” is conjunctive. “Legal” means “deriving authority from or founded on law.” WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 682 (1984). Thus, a fire fighter and a “member” must have *both* “authority *and* responsibility,” and that authority and responsibility must be derived from or founded on law, to engage in fire protection activities. *See Affordable Cabs, Inc. v. Department of Employment Services*, 124 Wn. App. 361, 370, 101 P.3d 440 (2004) (statute connecting requirements by “and” required showing of all requirements). Amicus IAFF does not claim that plaintiff had “*legal* authority *and* responsibility” to do anything.

Moreover, a “fire fighter” and thus a “member” must have the legal authority and responsibility to perform “fire protection activities.” WAC 415-104-225(2)(a) defines “fire protection activities” to include:

incidental functions such as housekeeping, equipment maintenance, grounds maintenance, fire safety inspections, lecturing, performing community fire drills and inspecting homes and schools for fire hazards. *These activities qualify as fire protection activities only if the primary duty*

*of your position is preventing, controlling and extinguishing fires.*

(Emphasis added.) Thus, even if training as a recruit were an incidental function, it would not qualify as “fire protection activities” since a recruit’s primary duty is *not* “preventing, controlling and extinguishing fires.”

Nonetheless, amicus IAFF claims the WAC 415-104-225(2)(a) definition is broad enough to not exclude fire academy training. (Brief of Amicus 4). Amicus further claims that if the definition did not include training, no one would qualify as a fire fighter since all fire fighters engage in training throughout their careers. (Brief of Amicus at 4-6)

Amicus misses the point. No one is claiming that persons who have graduated from recruit school, are employed by the fire department, and who have the legal authority and responsibility to fight fires somehow lose their “fire fighter” or “member” status because they keep their skills sharp by engaging in continuing professional training.<sup>2</sup> Such persons are actively employed as “fire fighters” as required by RCW 41.26.030(4)(a).

Training in recruit school is not the same as ongoing fire fighter

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<sup>2</sup> Similarly, no one would claim that lawyers who engage in continuing legal education are somehow no longer lawyers. However, law students still in law school are not lawyers.

training. Recruits in training are not brushing up or upgrading already existing skills that allow them to have the legal authority and responsibility to fight fires. Rather, they are learning basic skills so that sometime in the future they may be able to acquire the legal authority and responsibility to fight fires. Until that time, they do not have the *legal* authority *and* responsibility to do anything. Amicus IAFF makes no attempt to claim they do.

It is true that WAC 415-104-225(2)(d) provides:

You are a fire fighter *if you meet the requirements of this section* regardless of your rank or status as a probationary or permanent employee or your particular specialty or job title.

(Emphasis added.) As discussed in the City's prior briefing, plaintiff, as a recruit, was not a probationary employee, let alone a permanent one. But even if plaintiff had been a probationary employee, he still did not meet the requirements of WAC 415-104-225(2)(d) since he had no "legal authority [or] responsibility" to engage in fire protection activities. Under WAC 415-104-225(2)(d), the only probationary employees who qualify as fire fighters are those who have such legal authority and responsibility.

Thus, contrary to amicus IAFF's position, the legislative purpose of LEOFF will not be compromised by a ruling that plaintiff was not a "member." LEOFF exists to benefit fire fighters who have the legal

responsibility and authority to engage in fire protection activities—*i.e.*, firefighters actively employed in that capacity. RCW 41.26.030(4)(a). While appellants do not dispute that firefighting is a hazardous occupation,<sup>3</sup> the Legislature could properly determine that only workers' compensation benefits under RCW tit. 51, not the benefits of LEOFF, would be available to mere recruits who—if they did not graduate from recruit school—might never have the legal authority and responsibility to fight fires. If amicus IAFF and plaintiff believe that LEOFF benefits should extend to recruits, they should address their concerns to the Legislature, not to the judicial system.

*Schrom v. Board for Volunteer Fire Fighters*, 153 Wn.2d 19, 100 P.3d 814 (2004), does not involve LEOFF benefits, RCW tit. 41, or WAC 415-104-225(2). Yet, to the extent that decision may be helpful in determining what a “fire fighter” is, it supports appellants' position, not amicus IAFF's.

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<sup>3</sup> Appellants move to strike that portion of the amicus brief on pages 6-7 and footnote 4, which attempts to introduce new evidence in this matter. Not only has there been no compliance with RAP 9.11, amicus may not properly introduce new evidence. *See Mutual of Enumclaw Ins. Co. v. Wiscomb*, 97 Wn.2d 203, 210-11, 643 P.2d 441 (1982). Should this court be inclined to consider the new evidence, however, it should also consider that the Bureau of Labor Statistics rates agriculture, forestry, fishing and hunting, and mining as having the greatest rate of fatal occupational industries. *See* <http://www.bls.gov/news.release/pdf/cfoi.pdf>.

In *Schrom* two clerical/administrative employees of volunteer fire departments sought pension benefits under RCW ch. 41.24. To qualify, they had to be “fire fighters,” defined by statute to include “any fire fighter . . . who is a member of any fire department of any municipality” other than full time, paid fire fighters who were LEOFF members. RCW 41.24.010(3).

Noting that the dictionary defines “fire fighter” as “one who fights fires,” the court ruled that “it is clear a person asserting pension eligibility must, at minimum, ‘fight fires’ in order to be a ‘fire fighter.’” However, the court recognized that a “fire fighter” need not be fighting fires 24 hours a day, 7 days a week, since it would be illogical to deny pension benefits to a volunteer fire fighter who had never had the opportunity to actually fight a fire, despite training for such a contingency. *Id.* at 28. The court thus held, “[W]e conclude to be a ‘fire fighter’ under the Act . . . the person claiming eligibility must, at minimum, possess *some duties that include fighting fire if a fire were to ever occur.*” *Id.* at 28 (emphasis added).

Recruits do not yet have any duty to fight a fire if a fire were to occur. *Schrom* demonstrates that the training the court contemplated there was not recruit training, but the ongoing training that personnel who do

have the legal authority and responsibility to fight fires engage in to keep their skills fresh and updated.

*International Ass'n of Fire Fighters Local 3266 v. Department of Retirement Systems*, 97 Wn. App. 715, 987 P.2d 115 (1999), does not support amicus IAFF's position either. Unlike the instant case, the personnel involved here actually had the legal authority and responsibility to fight fires. Therefore, the training referred to was similar to the training in *Schrom*.

In sum, amicus IAFF has not demonstrated that recruits in recruit school, like plaintiff herein, qualify as "members" under RCW 41.26.281. Indeed, as a matter of law, they cannot so qualify. The trial court thus had no jurisdiction. This court should reverse.

If this court concludes that plaintiff was not a "member", it need go no further. However, if plaintiff is deemed to have been a "member", dismissal of plaintiff's claims is still required for the following reasons.

**B. THE CITY'S SOVEREIGN IMMUNITY HAS NOT BEEN WAIVED.**

Even if plaintiff were a "member" within the meaning of RCW 41.26.281, dismissal is necessary because there has been no waiver of the City's sovereign immunity.

RCW 4.96.010 waives the City's sovereign immunity but only for tortious conduct "to the same extent as if [it] were a private person or

corporation.” Because RCW 4.96.010 is in derogation of common law, it must be strictly construed. *See Bradshaw v. City of Seattle*, 43 Wn.2d 766, 778, 264 P.2d 265 (1953). Abrogation of sovereign immunity merely removes the immunity defense; it does not create any new municipal liability. *Georges v. Tudor*, 16 Wn. App. 407, 411 n.3, 556 P.2d 564 (1976).

*United States v. Olson*, \_\_\_ U.S. \_\_\_, 126 S. Ct. 510, 163 L. Ed. 2d 306 (2005), which construes a federal statute similar to RCW 4.96.010, provides a helpful comparison. There two miners sued two federal mine inspectors, claiming that their negligence resulted in a mine accident. Under the Federal Torts Claim Act, however, the suit could be brought only “under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” 28 U.S.C. § 1346(b)(1). The Court ruled that whether suit could be brought depended not on whether state law permitted similar suits against a municipality, but on whether state law permitted similar suits against private persons.

The Washington Supreme Court adopted similar reasoning in *Edgar v. State*, 92 Wn.2d 217, 595 P.2d 534 (1979). There the court was construing RCW 4.92.090, which waives the State’s sovereign immunity for tortious conduct, but allows liability only “to the same extent as if [the

State] were a private person or corporation.” The court held that this statute required a person suing the State “to show that the conduct complained of constitutes a tort which would be actionable if it were done by a private person in a private setting.” *Id.* at 226.

Here, the Industrial Insurance Act, RCW tit. 51, precludes employees injured in their employment from suing their employers for negligence. RCW 51.04.010. RCW 4.96.010, like the Federal Torts Claim Act, waives sovereign immunity only “to the same extent as if [the governmental unit] were a private person or corporation.” Because RCW 51.04.010 precludes a private corporation from being liable to its employee for workplace negligence, a municipality like the City cannot be liable either.

Amicus IAFF appears to claim that RCW 41.26.281 waives the City’s sovereign immunity. As will be discussed *infra*, if this were true, RCW 41.26.281 would be unconstitutional.

But even if the constitutional problems did not exist, the result would be the same. This is because RCW 41.26.281 provides that the injured member has a cause of action against the governmental employer only “as otherwise provided by law.” In other words, RCW 41.26.281 does not create municipal liability. The Washington Supreme Court has ruled:

As to the “cause of action against the governmental employer as otherwise provided by law,” contained in RCW 41.26.280, we look to RCW 4.96.010. Since under the common law the sovereign has traditionally enjoyed immunity from suits by its employees or subjects, there is no cause of action under the common law. . . .

*Taylor v. City of Redmond*, 89 Wn.2d 315, 320, 571 P.2d 1388 (1977).

As discussed *supra*, RCW 4.96.010 does not waive the City’s sovereign immunity in this case, let alone create municipal liability.

Amicus IAFF never explains what the phrase, “as otherwise provided by law”, means. It cannot refer to common law negligence principles because the beginning phrase of RCW 41.26.281 already refers to those principles:

If injury or death results to a member from the intentional or ***negligent act or omission*** of a member’s governmental employer, the member . . . shall have the privilege to benefit under this chapter and also have cause of action against the governmental employer as otherwise provided by law, for any excess of damages over the amount received or receivable under this chapter.

(Emphasis added.) In construing a statute, this court must give effect to every word, clause, and sentence. *Cox v. Helenius*, 103 Wn.2d 383, 387, 693 P.2d 683 (1985).

Amicus IAFF points out that in *Taylor*, the court ruled that plaintiff was entitled to pursue his governmental employer. But amicus ignores the fact that *Taylor* involved a Plan 1 LEOFF member, *i.e.*, one who became a member before October 1, 1977. RCW 41.26.030(28); 89 Wn.2d at 320.

In contrast, if plaintiff here is a LEOFF member at all, he is a Plan 2 member, *i.e.*, one who became a member on or after October 1, 1977. RCW 41.26.030(29). *Taylor* correctedly observed that Plan 2 members are included in the Industrial Insurance Act, RCW tit. 51. 89 Wn.2d at 320. Ruling that the RCW tit. 51 workers compensation immunity does not bar Plan 1 members from suing their employers under RCW 41.26.280, the court explained:

Laws of 1977, 1<sup>st</sup> Ex. Sess., ch. 294, §§ 1, 2 and 9, further buttress our conclusion. Section 9 of chapter 294 authorizing the eligibility of law enforcement officers and fire fighters for industrial insurance and including them on the municipal payroll for such purposes, is limited in its applicability by section 2 to those members who are employed on and after October 1, 1977 [*i.e.*, Plan 2 members]. Presumably, those persons employed before that date remain outside the coverage of RCW Title 51. That issue, however, is not before us and we make no determination thereon.

89 Wn.2d at 320. Thus, the fact that the Plan 1 member in *Taylor* was able to sue his governmental employer means nothing here, where plaintiff, if a member at all, is a Plan 2 member.

**C. RCW 41.26.281 IS UNCONSTITUTIONAL.**

Even if plaintiff is held to be a “member” and the City’s sovereign immunity is deemed to have been waived, the result should still be the same. This is because RCW 41.26.281 is unconstitutional, as it violates either WASH. CONST. art. I, § 12, or WASH. CONST. art. II, § 19, or both. A

finding of unconstitutionality will not affect the remainder of LEOFF. *See* 1971 WASH. LAWS, 1<sup>st</sup> Ex. Sess., ch. 257, § 22 (severability clause).

**1. Article II, § 19.**

WASH. CONST. art. II, § 19, provides that “[n]o bill shall embrace more than one subject, and that shall be expressed in the title.” A statute violates this constitutional provision if the bill enacting it embraces more than one subject or if the subject is not expressed in the title.

A bill embraces more than one subject if there is no rational unity amongst the matters contained therein. *See generally City of Burien v. Kiga*, 144 Wn.2d 819, 826, 31 P.3d 659 (2001); *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 209, 11 P.3d 762, 27 P.3d 608 (2000). The bill that enacted RCW 41.26.281 dealt with the law enforcement officers and fire fighters’ pension system. 1971 WASH. LAWS, 1<sup>st</sup> Ex. Sess., ch. 257. There is no rational unity between a pension system on the one hand, and an expansion of the waiver of cities’ sovereign immunity on the other. A reasonable reader would not expect an act purporting to relate to law enforcement officers and fire fighters to also extend waiver of municipal corporations’ sovereign immunity. *Cf. Washington Toll Bridge Authority v. State*, 49 Wn.2d 520, 304 P.2d 676 (1956) (act providing for establishment and financing of toll roads generally as well as for specific toll road unconstitutional); *Amalgamated Transit*,

142 Wn.2d at 216-17 (initiative providing for \$30 car tabs and requiring voter approval of tax increases unconstitutional); *City of Burien*, 144 Wn.2d at 827-28 (initiative providing for nullification and refund of 1999 tax increases and permanent changes in property tax assessments unconstitutional).

RCW 41.26.281 also violates WASH. CONST. art. II, § 19, because its second subject—expansion of the sovereign immunity waiver—is not set forth in the title. The purpose of the title requirement is to provide notice to lawmakers and to the public of what is in the proposed legislation. *Brower v. State*, 137 Wn.2d 44, 69, 969 P.2d 42 (1998). A title does not give the requisite notice if it would not lead to an inquiry into the body of the act or indicate the scope and purpose of the law to an inquiring mind. *Amalgamated Transit*, 142 Wn.2d at 217.

Washington courts have not hesitated to strike down those portions of an act whose subject matter is not reflected in its title. *See State v. Thomas*, 103 Wn. App. 800, 809, 14 P.3d 854 (2000), *rev. denied*, 143 Wn.2d 1022 (2001). Given the fact that a city’s sovereign immunity can be taken away “only by a legislative enactment specific in meaning,” *Bradshaw*, 43 Wn.2d at 778, it is particularly important that the title of a bill expanding the sovereign immunity waiver give the requisite notification.

The title of the bill containing RCW 41.26.281 is “An Act Relating to law enforcement officers and fire fighters.” 1971 WASH. LAWS, 1<sup>st</sup> Ex. Sess., ch. 257. This title gives an inquiring mind no hint that a city’s waiver of sovereign immunity is being expanded. *See, e.g., Patrice v. Murphy*, 136 Wn.2d 845, 966 P.2d 1271 (1998) (“act relating to court costs” insufficient to apprise reader that portions of bill dealt with interpreter requirements); *Petroleum Lease Properties Co. v. Huse*, 195 Wash. 254, 257-58, 80 P.2d 774 (1938) (“act providing for the regulation and supervision of the issuance and sale of securities to prevent fraud in the sale thereof” insufficient to apprise reader that definition of “security” was being expanded). For this reason as well, RCW 41.26.281 is unconstitutional.

**2. Art. I, § 12.**

The LEOFF Act, RCW 41.26.480, provides:

Notwithstanding any other provision of law, members shall be eligible for industrial insurance as provided by Title 51 RCW [the Industrial Insurance Act], as now or hereafter amended, and shall be included in the payroll of the employer for such purpose.

This statute is applicable only to Plan 2 LEOFF members. RCW 41.26.410. Thus, if plaintiff were a LEOFF “member” at the time of his injury, the City would have been required to have paid into the RCW tit.

51 workers compensation system so that plaintiff could get RCW tit. 51 workers compensation benefits under RCW 41.26.480.<sup>4</sup>

Thus, the City has no-fault liability to Plan 2 members for workers compensation benefits under the Industrial Insurance Act (IIA). The Washington Supreme Court has explained the basic premise of the IIA as follows:

Washington's [Industrial Insurance Act] was the product of a grand compromise in 1911. Injured workers were given a swift, no-fault compensation system for injuries on the job. Employers were given immunity from civil suits by workers.

*Birklid v. Boeing Co.*, 127 Wn.2d 853, 859, 904 P.2d 278 (1995). This “grand compromise” operates as a quid pro quo, where the employer and the employee exchange procedural and substantive rights to obtain an ordered system of certain compensation without regard to fault. *Brand v. Department of Labor & Industries*, 139 Wn.2d 659, 668, 989 P.2d 1111 (1999).

Amicus IAFF’s position, however, is that unlike most employers, LEOFF employers do not enjoy the “grand compromise.” Amicus’ theory

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<sup>4</sup> The record shows that the City elected to self-insure for its RCW tit. 51 obligations and that plaintiff was in fact paid benefits thereunder. (6/29/04 RP 99, 105-06, 115-16) As discussed in prior briefing, the City’s payment is not a waiver or estoppel with respect to its position that plaintiff was not a “member.”

is that in addition to workers compensation benefits, LEOFF employers can also be liable in negligence for damages exceeding those benefits, pursuant to RCW 41.26.281. In other words, a LEOFF employer is strictly liable under RCW tit. 51 for medical expenses and wage loss; if it was negligent, it is also liable for the balance of the employee's compensatory damages. In short, LEOFF employers, unlike other employers, received *nothing* in return for being strictly liable for workers compensation benefits.

This scheme raises constitutional issues. The Washington Supreme Court has declared:

Nor can state legislation impose upon an employer any obligation to contribute to a fund to pay awards under a workmen's compensation law, unless it affords protection to the employer as against claims of workmen or their dependents payable out of the fund to which the employer is compelled to contribute.

*Zahler v. Department of Labor & Industries*, 125 Wash. 410, 418, 217 P. 55 (1923).

Thus, even if RCW 41.26.281 did not violate WASH. CONST. art. II, § 19, it is unconstitutional because it violates WASH. CONST. art I, § 12.

That provision provides:

No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

Even the Legislature recognized that governmental employers of fire fighters should be treated no differently than private employers. The LEOFF statute, RCW 41.26.270, declares in part:

The legislature of the state of Washington hereby declares that the relationship between members of the law enforcement officers' and fire fighters' retirement system and their governmental employers ***is similar to that of workers to their employers*** and that the sure and certain ***relief granted by this chapter is desirable, and as beneficial*** to such law enforcement officers and fire fighters ***as workers' compensation coverage is to persons covered by Title 51 RCW***. . . .

(Emphasis added.) *See also* RCW 4.96.010 (waiving local government sovereign immunity “to the same extent as if they were a private person or corporation”); *Gillis v. City of Walla Walla*, 94 Wn.2d 193, 195, 616 P.2d 625 (1980). But by allowing LEOFF members to sue their governmental employers for negligence in excess of LEOFF benefits, the Legislature took away from the governmental employers the immunity available to virtually every other employer in the state. The courts of this state have long indicated that such a scheme fails to pass constitutional muster. *See generally* *Manor v. Nestle Food Co.*, 131 Wn.2d 439, 932 P.2d 628, 945 P.2d 1119 (1997); *Epperly v. City of Seattle*, 65 Wn.2d 777, 399 P.2d 591 (1965); *Shaughnessy v. Northland S.S. Co.*, 94 Wash. 325, 330, 162 P. 546 (1917); *State ex rel. Jarvis v. Daggett*, 87 Wash. 253, 258, 151 P. 648 (1915).

Amicus IAFF claims RCW 41.26.281 is constitutional because the Legislature could properly treat employers of firefighters and law enforcement officers differently than other employers because fire fighting and law enforcement are hazardous, physically demanding occupations. Significantly, amicus IAFF has failed to point to a single state where a scheme similar to the LEOFF scheme exists, let alone has been upheld against constitutional challenge.

In any event, appellants do not deny that fire fighting and law enforcement can be hazardous and physically demanding. But they are not the only hazardous, physically demanding occupations.

Amicus' argues that if the employer cannot be liable for negligence, maintaining the requisite quasi-military environment will be difficult. This borders on the frivolous. United States armed forces personnel cannot sue the U.S. Government for injuries arising out of or in the course of activities incident to service. *Feres v. United States*, 340 U.S. 135, 71 S. Ct. 153, 95 L.Ed. 152 (1950); *see also Miller v. United States*, 42 F.3d 297 (5th Cir. 1995); *Edgar*, 92 Wn.2d at 225. That does not seem to preclude the U.S. military from maintaining a military environment.

Moreover, as one court has noted—

[i]n a paramilitary organization nothing could be more detrimental to good order and discipline than the encouragement of civil actions by police, fire, and emergency personnel against their employers . . . arising out of perceived shortcomings in preparing them for dangerous circumstances that they must encounter on a daily basis.

*Kaya v. Partington*, 681 A.2d 256, 261 (R.I. 1996).

## II. CONCLUSION

Plaintiff was not a “member” entitled to sue. Even if he was, sovereign immunity and the Washington Constitution bar his claims.

The trial court had no jurisdiction in this matter as a matter of law. This court should reverse and remand for entry of judgment in appellants’ favor.

DATED this 25<sup>th</sup> day of February 2006.

REED McCLURE

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