

NO. 79222-4
Consolidated With No. 79381-6
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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**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,**

Petitioners,

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**

ANSWER OF CITY OF SEATTLE TO IAFF AMICUS BRIEF

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I. ARGUMENT

A. RECRUITS ARE NOT “MEMBERS.”

Amicus International Association of Fire Fighters has filed an amicus brief. It is important to note what IAFF’s brief does *not* do. It does not dispute that to bring this suit, plaintiff had to qualify, at the time he was injured, as a “member” of the Law Enforcement Officers & Fire Fighters system within the meaning of RCW 41.26.281. Amicus also does not dispute the following—

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

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*

(Emphasis added.)

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).

Amicus IAFF does not dispute any of this. Yet amicus continues to claim that plaintiff—a recruit in recruit school—nevertheless qualified as a “fire fighter” and thus as a “member.” In so doing, amicus ignores not only the plain language of the applicable statutes, 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.) “[T]o be eligible for LEOFF benefits, a worker must be a full-time fire fighter under **both** RCW 41.26.030 **and** WAC 415-104-225.” *International Association of Fire Fighters Local 3266 v. Department of Retirement Systems*, 97 Wn. App. 715, 719, 987 P.2d 115 (1999) (emphasis added).

Significantly, **not once** in the two amicus briefs the IAFF has filed in this case has IAFF acknowledged that the language highlighted above

even exists, let alone tried to explain how plaintiff recruit here had the “legal authority and responsibility” to direct or perform fire protection activities required for and directly concerned with preventing, controlling, and extinguishing fires. Indeed, not only has IAFF failed to address the “legal authority and responsibility” requirement, neither has plaintiff or the panel. Plaintiff cannot have been a “fire fighter” or a “member” as required by RCW 41.26.281.

Indeed, plaintiff recruit had no legal authority or responsibility to fight fires or do anything else with respect to fire fighting. Neither he nor the IAFF has ever claimed he had. He had not yet graduated from recruit school. Unless and until he did, he was not a “fire fighter”—or even a probationary fire fighter—who could respond to fires. He thus could not have been a LEOFF member entitled to sue his employer, petitioner City of Seattle. The IAFF’s discussion regarding the membership issue thus sidesteps the critical point.

IAFF’s claim that relevant statutes and regulations focus on the position rather than on the skills or training required does not explain why plaintiff is a “fire fighter” and thus a “member.” While RCW 41.26.030(4)(a) and WAC 415-104-225(2) do use the word “position,” the statute also requires that the person claiming “fire fighter” status be “actively employed as such” and the regulation requires that the person

have the “legal authority and responsibility” to direct or perform fire protection activities required for and directly concerned with preventing, controlling, and extinguishing fires. A “fire fighter” cannot be “actively employed as such” unless he or she has legal authority and responsibility to direct or perform fire protection activities.¹ Plaintiff did not.

Thus, IAFF’s reliance on plaintiff having had a “position” allegedly concerned primarily with preventing, controlling, and extinguishing fires misses the point. Plaintiff’s “position” as a recruit did not give him the legal authority and responsibility to direct or perform fire protection activities and he was not actively employed in such a capacity, as required by RCW 41.26.030(4)(a) and WAC 415-104-225(2).

In fact, in discussing WAC 415-104-225(2)(a)’s requirement that certain incidental activities qualify as fire protection activities “only if the primary duty of your position is preventing, controlling and extinguishing fires”, IAFF makes the very point the City is making:

Here, as a trainee, Locke was employed *to become a fire fighter* for the City, a position that has a primary duty of fire suppression.

¹ IAFF’s argument that RCW 41.26.030(4)(a) does not require a “fire fighter” to have passed the civil service examination for fire fighter is frivolous. The statute requires a fire fighter to be (a) serving in a position that requires passing a civil service examination for fire fighter and (b) actively employed as such. A fire fighter could not be “actively employed as such” without passing the civil service exam for “fire fighter”.

(Brief of *Amicus Curiae* International Association of Fire Fighters 6) (emphasis added). In other words, plaintiff was *not yet* a “fire fighter.” Rather, he was training to become one.

That probationary and permanent fire fighters must also engage in regular training and refresher courses is irrelevant to whether plaintiff recruit qualifies as a “fire fighter.” Probationary and permanent fire fighters have the legal authority and responsibility to direct or perform fire protection activities. Plaintiff recruit did not.

IAFF’s reliance on *Schrom v. Board for Volunteer Fire Fighters*, 153 Wn.2d 19, 100 P.3d 814 (2004), is misplaced. There this Court wanted to ensure that a volunteer fire fighter who, by sheer luck, has never had the opportunity to fight a fire because one has not occurred while he or she was working, should not be denied benefits. Such a fire fighter, however, would have the legal responsibility and authority to fight a fire if one occurred. Plaintiff here did not.

IAFF’s discussion of LEOFF’s legislative purpose demonstrates that IAFF is focusing on what IAFF *wishes* the statutes and the regulations said, not what they *actually* say. This Court will not read into an unambiguous statute or regulation words or phrases that are not there. *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006); *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). Courts will not

legislate under the guise of interpreting a statute. *Cerrillo*, 158 Wn.2d at 201.

If the Legislature had intended to include fire fighter recruits as LEOFF “members”, it easily could have said so. For example, it could have enacted RCW 41.26.030(4)(a) to define “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 or is training to become actively employed as such.

It did not. Therefore, while IAFF’s “spirit and intent” argument may apply to people who actually become “fire fighters”, it does not apply to people like plaintiff who did not.

There is nothing illogical about this. The Legislature could properly conclude that until a recruit graduates from recruit school and becomes a “fire fighter”, his or her municipal employer should be liable to fund no-fault workers compensation benefits but should not bear exposure to additional damages unless the employer deliberately intended to injure. *See* RCW 51.04.010, 51.24.020. *Cf. Fann v. Smith*, 62 Wn. App. 239, 814 P.2d 214 (1991) (former police cadets contributed to LEOFF only after being sworn in as officers).

IAFF argues that recruits must be “members” because fire departments are quasi-military organizations that require immediate and

unquestioning obedience from their employees and that the requisite trust between employer and employee is best promoted when the fire fighter knows the employer will be held accountable. This last contention is sheer speculation. Trust is unlikely to develop when the employer knows the employee can sue it.

Indeed, IAFF's argument is belied by the fact that United States armed forces personnel cannot sue the federal government for injuries arising out of or in the course of activities incident to their 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 v. State*, 92 Wn.2d 217, 225, 595 P.2d 534 (1979). Clearly, the armed forces require immediate and unquestioning obedience from soldiers, sailors, and marines. Their inability to sue the government has not prevented the United States from having a top-notch military. 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).

B. WORKERS' COMPENSATION STATUTES MUST PROVIDE IMMUNITY.

IAFF's amicus brief argues a position no party has taken and which is contrary to established law.

IAFF argues that neither this Court nor the United States Supreme Court meant what it said in holding that equal protection and due process constitutional principles compel workers' compensation statutes to provide immunity from negligence. IAFF argues that any statements to that effect are mere *dicta*. IAFF is mistaken. A brief review of early and recent workers' compensation cases shows statements regarding the mandate of immunity are not mere *dicta*.

In *State v. Daggett*, 87 Wash. 253, 151 P. 648 (1915), plaintiff (an injured seaman) petitioned the court to compel the Industrial Insurance Commission to collect premiums from his employer, a steamboat company operating vessels in Puget Sound, pursuant to a statute that specifically included steamboats operations, with funding requirements on steamboat operators. The Court refused to enforce the workers' compensation statute and denied the petition, relying upon the equal protection clause in holding that funding obligations in the statute could not be enforced against employers who could not be provided with immunity. This holding was not mere *dicta* as argued by IAFF.

More recently, in *Manor v. Nestle Food Co.*, 131 Wn.2d 439, 932 P.2d 628, *as amended*, 945 P.2d 1119 (1997), the plaintiff was injured when a fellow worker ran over his foot with a forklift. Plaintiff received workers' compensation benefits but then filed suit against Nestlé, the parent corporation for the subsidiary employer. *Manor* applied a rational basis test to evaluate Nestlé's equal protection claim and discussed the "grave constitutional questions" that arise when a covered employer is deprived of immunity. *Id.* at 449-50 n.4. *Manor* held that the parent company of Manor's employer was the "true victim of an equal protection violation under the Court of Appeals holding" because Nestlé, being financially responsible for compensation to injured workers, was entitled to the quid pro quo of immunity from suit. *Id.* at 449. This holding was not mere *dicta*.

IAFF also contends that constitutional principles espoused in the early workers' compensation cases were "done away with" by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S. Ct. 578, 81 L. Ed. 703 (1937). (IAFF Amicus Brief 12) IAFF completely misstates *West Coast Hotel*, which was not even a workers' compensation case. *West Coast Hotel* upheld the constitutionality of a minimum wage law and cited to two workers' compensation cases as illustrations of the authority of legislatures to restrict freedom of contract. *West Coast Hotel* did not

overrule or even distinguish workers' compensation principles. Instead, *West Coast Hotel* relied on workers' compensation cases in support.

IAFF cites to *Hildahl v. Bringolf*, 101 Wn. App. 634, 5 P.3d 38 (2000), *rev. denied*, 142 Wn.2d 1020 (2001), in support of its argument that immunity is not required. *Hildahl* addressed who was entitled to immunity – not whether the employer was entitled to immunity. Thus, *Hildahl* is not relevant here.

IAFF's proffered argument that prior United States and Washington Supreme Court decisions on workers' compensation immunity requirements contain only *dicta* or are no longer good law suggests that IAFF realizes that LEOFF cannot withstand this constitutional and sovereign immunity challenge without turning the fundamental tenet of workers' compensation on its head. However, this effort is unavailing. Well-established constitutional principles compel workers' compensation statutes to provide immunity from suit.

C. LEOFF VIOLATES ARTICLE I, SECTION 12 OF WASHINGTON'S CONSTITUTION.

Article I, section 12 states:

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.

Article I, section 12 is analyzed under different tests depending on whether a statute creates positive favoritism for a person or class of persons. If no favoritism is created, article I, section 12 is analyzed under traditional equal protection principles (minimal scrutiny). If positive favoritism to a person or class is created, article I, section 12 requires an independent state analysis. *Andersen v. King County*, 158 Wn.2d 1, 16, 138 P.3d 963 (2006). LEOFF violates article I, section 12 under both tests.

1. LEOFF Cannot Satisfy a Traditional Minimal Scrutiny Analysis.

Under “minimal scrutiny” (also called “rational basis”) the court determines: (1) whether the classification applies alike to all members of the designated class; (2) whether there are reasonable grounds to distinguish between those within and without the class; and (3) whether the classification has any rational relation to the purpose of the legislation. *Philippides v. Bernard*, 151 Wn.2d 376, 391, 88 P.3d 939 (2004).

IAFF argues that if all persons *within* the favored subgroup are treated the same, special legislation favoring that subgroup meets the first part of the test. This argument is absurd. The subgroup of favored persons must be analyzed in comparison to similarly situated persons – not to themselves. Here, LEOFF employees and employers must be compared

to all employees and employers who come within workers' compensation statutes. *Shaughnessy v. Northland S.S. Co.*, 94 Wash. 325, 330, 162 P. 546 (1917) (all employers and employees who come within the act must enjoy the privileges and immunities equally "in harmony with the guarantee of [section] 12 of art[icle] 1 of our state constitution.") LEOFF cannot meet even this first element of minimal scrutiny. LEOFF employees are treated better than all other employees in the state and LEOFF employers are treated worse than all other employers in the state.

IAFF argues that LEOFF "easily survives" the second element—the existence of reasonable grounds for the distinction. However, IAFF fails to disclose that all prior United States and Washington Supreme Court cases that have addressed the issue have held that equal protection principles compel immunity for all employers subject to workers' compensation statutes. *See* Section I.B above and Section V.C. in Brief of Appellant, *Lindell v. City of Seattle*.

Manor v. Nestle, 131 Wn.2d 439, specifically applied the rational basis test and held that the decision by the lower court resulted in a violation of that test because Division I had deprived the parent corporation of immunity after it bore responsibility for workers' compensation benefits. Thus, this Court has previously applied the

rational basis test to a workers' compensation issue and concluded that the absence of immunity violates equal protection.

Early cases do not use the phrases "minimal scrutiny" or "rational basis." Nevertheless, they hold that equal protection is violated by a statute that fails to provide immunity. *See State v. Daggett*, 87 Wash. 253; *Shaughnessy v. Northland S.S. Co.*, 94 Wash. 325; *Mountain Timber Co. v. Washington*, 243 U.S. 219, 37 S. Ct. 260, 61 L. Ed. 685 (1917).

Ignoring precedent, IAFF argues here that a rational basis exists for special favoritism to fire fighters and police due to their alleged "higher risk of occupational hazards." (IAFF Amicus Brief 19) IAFF cites no authority. The only evidence in the record shows that numerous occupations are more hazardous than fire fighting and police work. The Bureau of Labor Statistics shows many occupations involve greater risk of injury and death than those of police or fire fighters, including logging, fishing, pilots and navigators, structural metalworkers, drivers-salesworkers, roofers, electrical power installers, farmworkers, construction laborers, and truck drivers. *See* <http://www.bls.gov/news.release.pdf/cfoi.pdf> (*Lindell v. City of Seattle*, CP 1305-22). IAFF also claims, again without support, that police and fire fighting is "more physically demanding than other occupations." (IAFF Amicus Brief 19) IAFF's theory denigrates the demanding nature

of the most hazardous occupations. Logging, fishing, roofing, construction work, electrical linework and farmwork all are extremely physically challenging. IAFF cannot suggest otherwise.

LEOFF cannot meet the third element of minimal scrutiny—whether the challenged classification has any rational relation to the purposes of the challenged statute. The right to sue section of LEOFF bears no rational relation to LEOFF’s purposes. In fact, it is contrary to the purposes. The purpose of LEOFF as a whole is expressed in the original legislation at RCW 41.26.020—to provide an actuarial reserve system for LEOFF benefits:

The purpose of this chapter is to provide for an actuarial reserve system for the payment of death, disability, and retirement benefits to law enforcement officers and fire fighters, and to beneficiaries of such employees, thereby enabling such employees to provide for themselves and their dependents in case of disability or death, and effecting a system of retirement from active duty.

The purpose of these 1971 amendments (which included the right to sue language of RCW 41.26.281) is found in RCW 41.26.270 where the legislature states its intention to provide sure and certain workers’ compensation benefits and provide protection to LEOFF employers from suit by abolishing civil actions. IAFF cannot argue that the right to sue is consistent with either the provision of sure and certain workers’

compensation benefits or with abolishing civil actions. The right to sue statute is completely contrary to the legislation's purposes.

LEOFF cannot meet any of the three parts of a minimal scrutiny analysis. It does not apply alike to all employees and employers subject to workers' compensation. There is no basis in reality for distinguishing between employees or employers within and without the class. The granting of a right to sue to LEOFF employees has no rational relation to the purposes of LEOFF. The right to sue provision does not match the legislation's purposes.

2. LEOFF Cannot Satisfy an Independent State Analysis.

This Court need not decide whether LEOFF creates positive favoritism if it concludes that LEOFF violates traditional equal protection principles under a minimal scrutiny analysis. However, assuming *arguendo* this Court holds that LEOFF does not violate a minimum scrutiny analysis, it must decide whether to engage in an independent state analysis under article I, section 12.

IAFF argues that a right to sue when others are barred from suit is not a "privilege or immunity" under article I, section 12. (IAFF Amicus Brief 17) IAFF relies heavily upon two cases cited in *Locke* for this contention. Neither case supports this conclusion. *Paulson v. Pierce County*, 99 Wn.2d 645, 664 P.2d 1202 (1983), held that counties could be

provided with immunities from suit that municipalities do not have; it did not address whether private entities could be provided with rights to sue or with immunities governmental entities do not have. *Campos v. Dep't. of Labor & Indus.*, 75 Wn. App. 379, 880 P.2d 543 (1994), *rev. denied*, 126 Wn.2d 1004 (1995), held no violation of equal protection existed where different limitations periods applied to reopening of workers' compensation claims based upon whether the closing date was before or after July 1, 1981. The court held no constitutional violation existed because the changes in the limitations period applied equally to all workers' compensation claimants.

IAFF cites to *Grant County Fire Protection Dist. v. City of Moses Lake*, 150 Wn.2d 791, 812, 83 P.3d 419 (2004) (*Grant Cy. II*) for the proposition that “not every statute authorizing a particular class to do or obtain something involves a ‘privilege’ subject to article I, section 12.” (IAFF Amicus Brief 17) However, IAFF relegates to a footnote (n.4, page 17) the language which follows in *Grant Cy. II* where this Court included the right “to protect and defend [one’s property] in the law.” *Grant Cy. II*, 150 Wn.2d at 813.

IAFF entirely ignores this Court’s recent extensive analysis of article I, section 12 in *Andersen v. King County*, 158 Wn.2d 1, 138 P.3d 963 (2006). *Andersen* explored the historical basis for privileges and

immunities clauses and the types of issues which are included in the prohibition. Justice J. M. Johnson, concurring in *Andersen*, cited Justice Bushrod Washington's "classic statement of the law on privileges and immunities under article IV of the United States Constitution" in *Corfield v. Coryell*, 6 F. Cas. 546, 551-52, 4 Wash. C.C. 371 (C.C.E.D. Pa 1823). *Corfield* included both "the right to acquire and possess property of every kind" and "to institute and maintain actions of any kind in the courts of the state" as within the privileges and immunities contemplated. *Andersen*, 158 Wn.2d at 60.

Neither *Andersen* nor *Grant Cy. II* involved special rights to sue or special affirmative defenses. However, this Court on at least three occasions has expressly referenced article I, section 12 in situations involving rights to sue and affirmative defenses.

Shaughnessy v. Northland S.S. Co., 94 Wash. 325, specifically relied upon article I, section 12 for the fundamental tenet that workers' compensation statutes must provide immunity from suit. *Alton V. Phillips Co. v. State*, 65 Wn.2d 199, 396 P.2d 537 (1964), held that a special bill granting a corporation relief from a statute of limitations was unconstitutional under article I, section 12. *DeYoung v. Providence Medical Center*, 136 Wn.2d 136, 960 P.2d 919 (1998), held that special legislation giving an affirmative defense to defendants in medical

malpractice claims violated article I, section 12 because it singled out a subgroup of defendants for special treatment.

Under the heightened scrutiny mandated by article I, section 12, the right to sue provision of LEOFF, RCW 41.26.281, is unconstitutional. While the federal constitution was concerned with “majoritarian threats of invidious discrimination against nonmajorities”, the state provision “protects as well against laws serving the interest of special classes of citizens to the detriment of the interests of all citizens.” *Andersen*, 138 Wn.2d at 14 (quoting from *Grant County II*, 150 Wn.2d at 806-07). Here, the interests of a special class of employees has obtained special treatment from the legislature. This special treatment operates to the detriment of the interests of all citizens whose tax dollars must fund such privileges. Article I, section 12 was adopted to prohibit exactly this type of positive favoritism.

D. SOVEREIGN IMMUNITY.

RCW 4.96.010(1) provides:

All local governmental entities, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortuous conduct, or the tortuous conduct of their past or present officers, employees, or volunteers while performing or in good faith purporting to perform their official duties, **to the same extent as if they were a private person or corporation . . .**

(Emphasis added.)

IAFF argues that RCW 41.26.281 can effectively eliminate the words “to the same extent as if they were a private person or corporation” from RCW 4.96.010(1). In support, IAFF contends “courts must not construe statutes so as to nullify, void or render meaningless or superfluous any section of words of same”, citing to *Taylor v. City of Redmond*, 89 Wn.2d 315, 319, 571 P.2d 1388 (1977). (IAFF Amicus Brief 24) That is a statutory *construction* principle not relevant here. The challenges here are based upon the authority of a legislature to enact special legislation favoring certain public employees and disfavoring taxpayers and other employees under constitutional and common law sovereign immunity principles.

Furthermore, IAFF’s argument defeats itself. IAFF’s argument has the effect of nullifying, voiding, and rendering meaningless and superfluous at least two statutory provisions: (1) the words “to the same extent as if they were a private person or corporation” in RCW 4.96.010(1); and (2) RCW 41.26.270, which states LEOFF employers are to be protected from actions at law and provides “all civil actions and civil causes of action . . . are hereby abolished”

IAFF cites no authority for the proposition that public entities such as municipalities can be liable in a situation where there is a comparable private analogy but no comparable liability. Instead IAFF claims that the

City's argument is based on abandoned cases from 1917. IAFF is wrong. Recent cases and commentators agree that public entities cannot be liable where there is no liability in an analogous situation. See Section III, Reply Brief of Appellant in *Lindell v. City of Seattle*, pages 20-24.

II. CONCLUSION

As IAFF candidly admits, “as a trainee Locke was employed *to become* a fire fighter for the City.” (Brief of *Amicus Curiae* International Association of Fire Fighters 6) (emphasis added). He was not yet a fire fighter. Consequently, he was not a LEOFF “member” entitled to sue the City under RCW 41.26.281.

Even if he had been, Locke's and Lindell's lawsuits must be dismissed because the legislation authorizing the suits (RCW 41.26.281) is unconstitutional and violates sovereign immunity. The City has not found any comparable statute in the country. If one existed, IAFF would be expected to bring it to the Court's attention. The *Locke* decision stands alone in rejecting the collective, considered wisdom of every jurisdiction in the country—including long-established precedent from this Court.

DATED this 4th day of May 2007.

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