

NO. 83428-8

SUPREME COURT OF THE STATE OF WASHINGTON

RIZWANA RAHMAN,

Plaintiff-Respondent,

v.

STATE OF WASHINGTON,

Defendant-Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER STATE OF
WASHINGTON

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I. STATEMENT OF THE CASE

Mohammad Rahman was prohibited by agency policy, state policy, and state statute from carrying unauthorized passengers in a state vehicle. Nonetheless, without authorization, he took his wife with him in a state vehicle on an official state business trip. CP at 166. She was injured on that trip and sued the state. CP at 7.

Mr. Rahman was employed by the Department of Ecology (Ecology). CP at 164. When he began his employment, he was given a new employee orientation that covered use of state vehicles. CP at 147-48, 151, 167. Included in the orientation materials was information about the prohibitions. CP at 155

Department of Ecology Policy 11-10 provides: "Ecology vehicles are not to be used for personal trips unrelated to the state business for which they were assigned, nor to transport passengers that are not on official state business." CP at 155. In addition to Ecology's policy, the state of Washington has a policy covering all state employees that expressly prohibits unauthorized passengers in state vehicles. CP at 176.

That policy provides:

When a state-owned or leased passenger motor vehicle is being operated, any person exercising control over and/or operating the vehicle is expressly prohibited from engaging in the transportation of unauthorized passengers. Unauthorized passengers are those passengers not engaged

in performing official state business and/or not specifically authorized by the agency head or authorized designee.

State Administrative and Accounting Manual, Ch. 12.30.20.a¹; CP at 139.

The Office of Financial Management has also adopted a policy prohibiting state employees from transporting unauthorized passengers.

Office of Financial Management Policy 12.30.20.a, 12.30.30.a-b., Appendix (App.) 1, attached.

These policies are consistent with RCW 42.52.160(1), a section of the Ethics in Public Service Act, which explicitly prohibits an employee from using any state property in his or her official custody for the “private benefit or gain” of the employee or another. The Executive Ethics Board, the body charged with interpreting the Ethics in Public Service Act, has specifically concluded that state vehicles are within the category of state resources that cannot be used for private benefit. *See* App. 2, Washington State Ethics Board Advisory Opinion 02-02A. The Ethics in Public Service Act was enacted in 1994 and applies to all state employees.

Mr. Rahman did not ask his supervisor for authorization to transport his wife and, under state law, he could not have been given authorization if he had asked. CP at 187. Following the accident, he

¹ Available electronically at <http://www.ofm.wa.gov/policy/default.asp>.

received a letter of reprimand from his supervisor for taking an unauthorized passenger in a state vehicle. CP at 174.

The parties filed cross motions for summary judgment in the superior court. CP at 99, 137. The trial court granted the State's motion. CP at 217. The court of appeals reversed and remanded for summary judgment on liability to be entered in favor of Ms. Rahman. The State's motion to reconsider was denied on June 25, 2009. This Court granted the State's Petition for Review on December 1, 2009.

II. ARGUMENT SUMMARY

The long standing rule in Washington is that an employer is not vicariously liable for unauthorized actions of its employees that do not benefit the employer and are performed solely for the benefit of the employee. Public policy does not support subjecting an employer to liability based on actions that have been expressly prohibited by the employer. There is a distinct and important difference between performing an act that benefits an employer in a manner contrary to the employer's instructions, on one hand, and performing an act that is expressly prohibited by an employer and in no way furthers the employer's business, on the other. This case illustrates that difference.

Washington courts have determined that an employer is not vicariously liable to an unauthorized passenger who was invited into the employer's automobile solely for the employee's own purpose or pleasure, without in any

way furthering the employer's business. That rule should apply even more clearly where, as here, unauthorized passengers were expressly prohibited by the employer. The court of appeals erred by abandoning this rule.

The rule applies to both private and public employers. The application of that rule is further strengthened where, as here, the prohibition on carrying passengers is imposed by affirmative state law. The court of appeals circumvented the plain language of RCW 42.52.160(1) by erroneously limiting it to situations where an employee wastes "public resources." The plain language of the statute prohibits use of state property "for private benefit." It does not refer to "waste" of state resources. *See also* App. 2 (Executive Ethics Board Opinion interpreting RCW 42.52.160). This misinterpretation of the Ethics in Public Service Act has broad ramifications for state government and must be corrected.

For these reasons the court of appeals should be reversed.

III. ISSUES PRESENTED FOR REVIEW

1. Should this Court abandon its long-standing rule that an employer is not vicariously liable for injuries to an unauthorized passenger invited by an employee to serve only the employee's purpose and pleasure and not furthering the employer's business in any way?

2. Does RCW 42.52.160 prohibit the use of state resources for personal benefit even if they are not "wasted" ?

IV. ARGUMENT

A. This Court Previously Determined That Unauthorized Passengers Have No Action Against an Employer

1. This Court Has Held That An Employer Is Not Vicariously Liable For Injuries To Unauthorized Passengers

An employee who, without authority and without any benefit to the employer, invites a passenger to ride in his employer's vehicle is not acting within the scope of his or her employment and the employer is not liable to the passenger for the employee's negligence. This has been the law in Washington since at least 1917.

In *McQueen v. People's Store Co.*, 97 Wash. 387, 166 P. 626 (1917), a delivery driver offered to give some "young ladies" a ride on the running board of his employer's vehicle. One of the women was injured when she either fell or jumped off the vehicle as it was moving. *Id.* at 388. This Court held that the employee was not within the scope of his employment and his employer was not liable. "In inviting the girls to ride upon the truck [the driver] was engaged in furthering his own pleasure, and, not in furthering his master's business." *Id.* at 390.

In *Gruber v. Cater Transfer Co.*, 96 Wash. 544, 165 P. 491 (1917), the employer, Cater Transfer, was a business engaged in the transport of goods. *Id.* at 545. Mr. Gruber hired Cater Transfer to move his household goods. Without authority, Cater's driver allowed Mr. Gruber to ride with

the cargo. When the truck hit a bump in the road, Mr. Gruber was ejected and injured. *Id.* at 545-46. This Court held Cater Transfer was not liable to Mr. Gruber because the driver did not have his employer's authority to allow Mr. Gruber to ride as a passenger. *Id.* at 549-50.

The applicable rule was stated in *McQueen*:

While no decisive test can be given for determining whether or not a given act is within the scope of a servant's employment, it is apparent from all the authorities that the act complained of must have been done while the servant was engaged in doing some act under authority from his master, not that while engaged in the act he is employed in the master's business, but *the act must have been in the furtherance of the master's business*, and such as may be fairly said to have been either expressly or impliedly authorized by the master.

McQueen, 97 Wash. at 388-89, 166 P. at 627² (emphasis added).

Accordingly, the proper test for determining whether an employee was within the scope of his employment for purposes of imposing *respondeat superior* liability in the context of passengers depends on (1) whether the act

² There is no question of express or implied authority in this case. Implied authority was never argued by Ms. Rahman. Even had it been, "apparent or ostensible authority of an agent can be inferred only from acts and conduct of the principal." *Lamb v. General Assocs., Inc.*, 60 Wn.2d 623, 627, 374 P.2d 677 (1962). "The extent of an agent's authority cannot be established by his own acts and declarations." *Id.* Ms. Rahman was under constructive notice pursuant to RCW 42.52.160 that her ride was unauthorized. In addition, she was a member of a marital community that derived the benefit of her husband's employment by the state of Washington. As such, she was bound by the terms of the employment agreement, which prohibited her from riding in a state vehicle. "Notice to one spouse is notice to the other." *810 Properties v. Jump*, 141 Wn. App. 688, 699, 170 P.3d 1209 (2007), citing *Chase v. Beard*, 55 Wn.2d 58, 346 P.2d 315 (1960), *overruled in part on other grounds, In re Marriage of Brown*, 100 Wn.2d 729, 675 P.2d 1207 (1984) (husband acted for wife in executing property agreement for benefit of marital community).

had been expressly or impliedly authorized by the employer (**authorization**), or (2) whether the act indirectly contributed to the furtherance of the business of the employer (**benefit**). *Id.*

The court of appeals sought to avoid this rule by distinguishing *McQueen* and *Gruber*. The court distinguished *McQueen* on the ground that the truck driver was not engaged in his employer's business because he was not in route to another delivery. *Rahman v. State*, 150 Wn. App. 345, 354 n.4, 208 P.3d 566 (2009). To the contrary, the *McQueen* decision explicitly assumed that the driver of the truck invited the women to "ride with him while delivering merchandise for [the employer]." *McQueen*, 97 Wash. at 389-90. It was the unauthorized *invitation* that took the driver out of the course of employment:

In inviting these girls to ride with him he was neither doing it as a means nor for the purpose of performing that work. It had no connection with his work either directly or indirectly. In extending this invitation [the driver] was acting without any reference to the business in which he was employed. It was an independent and private purpose of his own contributing to his pleasure, but not to his service.

Id. at 390.

The court of appeals distinguished *Gruber* because it did not use the term "*respondeat superior*" or "scope of employment." *Rahman*, 150 Wn. App. at 352-53. However, the *Gruber* court clearly was

presented with an issue requiring an analysis of *respondeat superior* and scope of employment, “the principal argument being that respondent was not upon the truck with the knowledge or consent of appellant, and that the driver had no real or apparent authority from appellant to consent to respondent being upon the truck as he was.” *Gruber*, 96 Wash. at 546. Moreover, in *McQueen*, decided only six weeks after the *Gruber* decision, this court described the *Gruber* decision as having determined that the driver had no authority to permit the passenger and “was not acting within the scope of his employment.” *McQueen*, 97 Wash. at 389. The court of appeals rejected this court’s contemporaneous construction of its own decision. *Rahman*, 150 Wn. App. at 352 n.3.

The court of appeals also distinguished *Gruber* on its facts, noting that Mr. Gruber was riding on a part of the truck not meant for passengers and the parties had contracted to carry cargo; not passengers. *Rahman*, 150 Wn. App. at 352-53. These facts recited by the *Gruber* court are not material to the issue of liability for an unauthorized passenger. If the employer is in the business of (i.e., contracts for) carrying passengers, the agent’s authority to carry passengers is apparent. The character of the Cater Transfer truck was merely additional evidence that the Gruber driver lacked authority to carry passengers. *Gruber*, 96 Wash. at 547-48. A

truck with a larger passenger compartment would not have conferred authority to transport passengers, where none existed.

Both *McQueen* and *Gruber* held that a driver's invitation to transport an unauthorized passenger is outside the scope of employment, absent some benefit to the employer.³ The court of appeals reached its erroneous conclusion by improperly focusing on Mr. Rahman's act of driving a state car to Spokane, which was authorized and was of benefit to his employer. However, this focus on the decisions made by the driver while driving the car, rather than the act of inviting a passenger, is directly contrary to, and irreconcilable with, the holdings in *Gruber* and *McQueen*. *See also Fisher v. Columbia & P.S.R. Co.*, 52 Wash. 462, 100 P. 1005 (1909) (railroad not liable as a matter of law when person riding on railroad engine was invited by agent who has no authority to invite him to ride there).

³ In *Gruber*, this Court rejected a claim of authority even though the passenger in the truck was accompanying the movers in order to show the driver where to deliver the goods, an action at least arguably serving the benefit of the employer. *Gruber*, 96 Wash. at 545.

2. Subsequent Decisions By This Court Have Not Altered The Rule That An Employer Is Not Liable To Unauthorized Passengers

The court of appeals examined subsequent decisions of this Court involving liability claims by non-passengers and determined they somehow altered the holdings of *McQueen* and *Gruber* with respect to liability for unauthorized passengers. *Rahman*, 150 Wn. App. at 354-58. None of the cited cases changed those holdings. In each case, the determinative question was whether the conduct of the employee was authorized by the employer or of benefit to the employer's business.

Poundstone v. Whitney, 189 Wash. 494, 65 P.2d 1261 (1937), involved a car dealership owned by Whitney. All employees were directed to be on the lookout for prospective customers, but the salesmen were the only persons with authority to sell cars. *Id.* at 496. Lynch normally was employed at the dealership as a helper and car washer, but was authorized on the day of the accident to drive a car to the fairgrounds for exhibition, display, and a parade in the hopes of soliciting customers. *Id.* On his way to the fairgrounds, Lynch attempted to solicit a potential customer. Later, while driving to pick her up for the parade, he injured several passengers in another vehicle. *Id.* at 497-98.

The court cited *McQueen* for the rule that an employer may be liable if the act "indirectly contributed to the furtherance of the business of

the employer.” *Id.* at 499. It then concluded that on the day of the accident, Lynch was not merely a car washer. “In returning for [the potential customer], Lynch was doing an act which was merely incidental to the acts he was authorized to perform and which would indirectly contribute to the furtherance of the business.” *Id.* at 500. The court did not abridge or alter the rule in *McQueen*; it applied that rule, concluding that the conduct at issue was both authorized by and of benefit to the employer.

In *Smith v. Leber*, 34 Wn.2d 611, 209 P.2d 297 (1949), the court focused on the authorization component of the test for whether the employee was acting within the scope of employment. In *Leber*, an employee negligently collided with another car, causing injuries to its occupants. There was a factual dispute as to whether the employee had been authorized to drive his employer’s truck on the evening of the accident. His supervisor testified that the driver, Mr. Reise, had been admonished not to touch or drive the truck because he had been drinking. In contrast, Mr. Reise testified that his supervisor, Mr. Holsteine, had directed him about 10:30 p.m. on the evening of the accident to take the truck into Kent. *Id.* at 618. Given the factual dispute on the authorization issue, the jury was instructed that if it found Reise was operating the truck contrary to the orders of his employer and that he was wholly

unauthorized at the time of the accident to do so, it should find for his employer. The jury found against the employer and this Court affirmed because that finding was supported by substantial evidence. *Leber* is clearly distinguishable because in this case there is no dispute that Ms. Rahman's presence in a state vehicle had been expressly prohibited by agency policy and state statute and could not have been authorized.

In the other case relied on by the court of appeals, *McNew v. Puget Sound Pulp & Timber Co.*, 37 Wn.2d 495, 498, 224 P.2d 627 (1950), this Court found that an employee's trip home for the purpose of visiting his family did not further his employer's business, even though the employee had obtained supplies for the employer and was driving back to the worksite with the supplies at the time the accident occurred. This Court ruled, as a matter of law, that the employer was not liable to the occupants of the other car because the purpose of his actions was to spend time with his family. *Id.* at 499-500.

It is undisputed that Ms. Rahman's presence in the state car was for the purpose of being with her husband. She has never argued, nor could she, that it was of any benefit to the state. Under the holding in *McNew*, the trial court properly concluded that Ms. Rahman's presence in the state car was of no benefit to the State and therefore, there was no

respondeat superior liability to her for her injuries. The decision of the court of appeals to the contrary should be reversed.

B. California Enterprise Liability Theory Is Contrary To Washington Law

The court of appeals decision relied on *Perez v. Van Groningen & Sons, Inc.*, 41 Cal. 3d 962, 719 P.2d 676 (1986). The *Perez* decision falls within a line of California cases applying “enterprise liability” to the acts of employees. *See Perez* at 41 Cal. 3d 967-70.⁴ *Perez* was not cited or argued to the court by either of the parties in this case.

The rule in *Perez* is not the law in Washington. This Court has held that “the act complained of must have been done while the servant was engaged in doing some act under authority from his master; *not that, while engaged in the act, he is employed in the master’s business*, but the act must have been in furtherance of the master’s business” *McQueen*, 97 Wash. at 388 (emphasis added). In contrast, in California, “[v]icarious liability may also be proper where the tortious conduct results or arises from a dispute over the performance of an employee’s duties,

⁴ Enterprise liability is based on a public policy decision that the business should bear all the risk created by the operation of the enterprise, whether or not the activities benefit the enterprise. California, unlike Washington, has expressed that policy in a statutory provision covering agent liability: “Unless required by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business, and for his willful omission to fulfill the obligations of the principal.” Cal. Civ. Code § 2338 (enacted 1872).

even though the conduct is not intended to benefit the employer or to further the employer's interests." *Farmer's Ins. Group v. Cy of Santa Clara*, 11 Cal. 4th 992, 1006, 906 P.2d 440 (1995) (emphasis added).

California enterprise liability theory has led to results that would be completely inconsistent with Washington law. For example, in *Pritchard v. Gilbert*, 107 Cal. App. 2d 1, 236 P.2d 412 (1951), a traveling salesman, while on business, in a state of road rage, severely beat a fellow motorist. This conduct was deemed to be within the scope of his employment subjecting his employer to liability. *See also Fields v. Sanders*, 29 Cal.2d 834, 180 P.2d 684 (1947) (employer liable to motorist beaten by employee truck driver). Applying Washington law, Division One of the Court of Appeals has explicitly rejected enterprise liability in this context. *Kuehn v. White*, 24 Wn. App. 274, 280, 600 P.2d 679 (1979) (truck driver who assaulted another motorist not within the scope of his employment).⁵ *See also Thompson v. Everett Clinic*, 71 Wn. App. 548, 553-34, 860 P.2d 1054, *review denied*, 123 Wn.2d 1027, 877 P.2d 694 (1994) (1993) (court declined to adopt an enterprise liability approach that

⁵ The California cases are also inconsistent with the *Restatement (Third) of Agency* § 7.07(2) (2006), which provides: "An employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control. An employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer."

would make clinic liable for doctor's misconduct that was motivated by desire for sexual gratification).⁶

Enterprise liability is not, and should not be, the law in Washington. When applied to unauthorized passengers, enterprise liability is bad public policy because it undermines the ability of employers to control the scope of their agents' employment and thereby evaluate and manage their risk through insurance. This is not limited only to public employers. The court of appeals decision creates vicarious liability that cannot be avoided, short of forbidding any employee from traveling on official business or removing all passenger seats from company vehicles. The purposes generally served by imposing vicarious liability on an employer are not served where, as here, the employer can take no additional steps to mitigate or avoid liability.

In this case, the state employer took reasonable and sufficient steps to manage risk. Employees who are injured have recourse to workers compensation, which is a form of mandatory insurance funded by employers. Employers can anticipate liability for their employee's

⁶ See also *Hayes v. Far West Servs., Inc.*, 50 Wn. App. 505, 506, 749 P.2d 178, review denied, 110 Wn.2d 1031 (1988); *LaValley v. Ritchie*, 95 Wn. App.1052, 1999 WL 359098 (May 24, 1999), review denied, 139 Wn.2d 1016, 994 P.2d 844 (2000) (an unpublished decision cited because the conflict between the divisions of the Washington court of appeals forms the basis for the petition for review). These decisions are in direct conflict with the court of appeals' decision in this case to import enterprise liability into Washington law.

automobile accidents that injure other motorists or third parties and purchase insurance to cover those events. The State would cover such accidents through its self-insurance. Employers cannot reasonably anticipate automobile accident liability to their employees' families and friends because employers explicitly prohibit the employee from giving rides to non-employees.⁷ The state of Washington is self-insured, but, like other employers, has chosen to limit its risk by prohibiting state employees from transporting unauthorized passengers in state cars.

The arguments against such an expansion of employer liability are especially compelling in the context of public employment because of the principles of public accountability reflected in RCW 42.52.160 and the prohibition on gifts of public funds found in Article VIII, § 7 of the Washington State Constitution. A state employee who chooses to take family members along on state business may do so, but must use his own vehicle and pay for the insurance. The State does not provide excess liability coverage to passengers in those family owned vehicles. *See* App. 1. These limitations are consistent with the overarching prohibition on personal use of public resources found at RCW 42.52.160 and with the principle of public accountability. Neither public employees

⁷ This is good policy because employees will be more focused on safe driving practices without the distraction of passengers along for a pleasure ride. *See e.g.*, 49 CFR 392.60 (federal motor carrier safety regulations prohibiting passengers in commercial motor vehicles).

nor their families or acquaintances should be encouraged to ignore the law and use public resources for private benefit. Taxpayers should not bear the cost of such misuse. *Cf., Clawson v. Grays Harbor Coll. Dist. No. 2*, 148 Wn.2d 528, 61 P.3d 1130 (2003) (recognizing that principles of public accountability would preclude paying public employees for time that was not actually worked, even if the law required such payments for private employees).

C. Washington Law Precluding Vicarious Liability For Unauthorized Passengers is Consistent with Authority From Other Jurisdictions

Outside of California, the great weight of authority is that an employer is not liable to an unauthorized passenger whose presence was not furthering the work of the employer. *Clark v. Harnischfeger Sales Corp.*, 238 A. D. 493, 499, 264 N.Y.S. 873 (1936), provides an example of the reasoning of these cases:

The test is not that, when the invitation was given, he was engaged in the course of his employment in his master's business, but was the invitation or its consequences in furtherance of the master's business, so that it might be said to be impliedly within his authority? The master is bound by the acts of his servant in the course of his employment, but he is not bound by those outside of such employment. The servant (a truck driver) *has no right to impose upon his master's onerous liability by holding him responsible for the safe carriage of any person he may see fit to accept as a passenger.*

(emphasis added). Cases from other jurisdictions are in accord.⁸

The linchpin of Ms. Rahman's argument and the court of appeal's decision is that Mr. Rahman was within the scope of employment simply because the vehicle he was driving was headed toward the destination directed by his employer. As demonstrated above, this is contrary to case

⁸ See e.g. *Beardsley v. Farmland Co-Op, Inc.*, 530 F.3d 1309 (10th Cir. 2008) (applying Wyoming law to deny recovery to driver's wife who rode along regular route for companionship); *Reisch v. M&D Terminals, Inc.*, 180 Ariz. 356, 884 P. 2d 242, 244 (1994) (wife of truck driver who accepted ride from her husband had no claim against her husband's employer, who prohibited the carrying of unauthorized passengers); *Hall v. Atchison, T. & S.F. Ry. Co.*, 349 F. Supp. 326 (D. Kan. 1972) (applying Kansas law to deny recovery to passenger in long haul truck who accompanied driver on his regular route for companionship); *Klatt v. Commonwealth Edison Co.*, 33 Ill. 2d 481, 211 N.E.2d 720, 728-29 (1965) (employer not liable to employee's daughter injured while riding as unauthorized and prohibited passenger; citing *Restatement (Second) of Agency* § 242); *Searle v. Great Northern Ry Co.*, 189 F. Supp. 423 (D. Mont. 1960) (no employer liability for passenger injured in truck operated by off-duty employee); *Magenau v. Aetna Freight Lines, Inc.*, 257 F.2d 445 (3rd Cir. 1958) (applying Pennsylvania law to deny a claim by plaintiff who was asked by truck's operator to join him to help out if there was mechanical trouble); *Gunn v. Coca-Cola Bottling Co. of Lincoln*, 154 Neb. 150, 47 N.W.2d 397 (1951) (denying recovery to an injured guest of the driver); *Ruiz v. Clancy*, 182 La. 935, 162 So. 734 (1935) (denying recovery to spouse killed while riding as unauthorized passenger with her husband, a sheriff's deputy); *Braselton v. Brazell*, 49 Ga. App. 269, 175 S.E. 254 (1934) (denying recovery to child who assisted in unloading coal and then was hurt when allowed to ride on truck); *Wigginton Studio v. Reuter's Adm'r*, 254 Ky. 128, 71 S.W.2d 14 (1934) (employer not liable to passenger invited to ride by vice president of employing company); *Dempsey v. Test*, 98 Ind. App. 533, 184 N.E. 909 (1933) (employer not liable for passenger on running board, as distinguished from injury to pedestrian or another driver); *Mayhew v. De Coursey*, 135 Kan. 184, 10 P.2d 10 (1932) (denying recovery to passenger on ice cream truck); *White v. Brainerd Serv. Motor Co.*, 181 Minn. 366, 370, 232 N.W. 626 (1930) (citing *McQueen* and holding "[T]here is no good reason apparent to us for holding that a jury may be allowed to infer that a servant or chauffeur driving an automobile has ostensible or implied authority to invite or permit others to ride. It is not in the interest of the ordinary automobile owner to give free rides to others and incur the risk incident to so doing"); *Berry v. City of Springfield*, 13 S.W.2d 552 (Mo. 1929) (city not liable to plaintiff injured after accepting unauthorized ride on truck involved in street repair.); *Thomas v. Magnolia Petroleum Co.*, 177 Ark. 963, 9 S.W.2d 1 (1928) (no employer liability for child injured while riding as passenger of truck driven by delivery driver on return from making deliveries although the employer would have been liable if driver hit pedestrian); *Christie v. Mitchell*, 93 W. Va. 200, 116 S.E. 715 (1923) (employer not liable to child who fell off truck).

law. It also is inconsistent with the *Restatements (Second) and (Third) of Law*. The *Restatement (Third) of Agency* § 7.07(2) (2006) provides: “An employee’s act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer.” Comment c to § 7.07 states:

An employee may engage in conduct, part of which is within the scope of employment and part of which is not. For example, if the irate driver . . . while continuing driving down the highway, leans out of the truck cab and shoots the driver of a car who has enraged the truck’s driver, the shooting is not within the scope of employment although driving the truck is within the scope of employment.

While this example involves an intentional tort, carrying an unauthorized passenger, while not a tort, is an intentional action on the part of the employee that in no way benefits the employer.

The *Restatement (Third) of Agency* (2006) did not alter the underlying principles of the *Restatement (Second)* which provides:

A master is not subject to liability for the conduct of a servant towards a person harmed as the result of accepting or soliciting from the servant an invitation, not binding upon the master, to enter or remain upon the master's premises or vehicle, although the conduct which immediately causes the harm is within the scope of the servant's employment.

Restatement (Second) of Agency § 242 (1958).⁹ While the *Restatement (Second)* has been superseded by the *Restatement (Third) of Agency*, this section still provides strong secondary authority consistent with the holdings of this Court.¹⁰

D. The Court Of Appeals Decision Misinterprets the Ethics in Public Service Act, RCW 42.52.160, And Ignores The Policy Behind It

The court of appeals refused to consider RCW 42.52.160¹¹ as authority in this case, but proceeded nonetheless to interpret the statute. The court relied upon language from *Clawson*, 148 Wn.2d at 545, which appears to be the only reported case that has cited RCW 42.52.160. *Clawson* concerned the state's Minimum Wage Act. The court cited RCW 42.52.160, along with

⁹ The drafters simply consolidated the more specific sections, including § 242, under the broadly stated principles of the new § 7.07. The drafters' notes and the reporter's notes for the final version indicate this change was a change in structure, not substance. "Chapter 7 - in general. This Chapter differs in structure from *Restatement (Second) of Agency*, because it consolidates treatment of some topics into single sections. Moreover, this Chapter does not follow the practice adopted in *Restatement Second* of structuring black-letter coverage on a tort-specific basis." *Restatement (Third) of Agency Reps. Mem.* (T.D. No. 5, 2004). "This section is a consolidated treatment of topics covered in several separate sections of *Restatement (Second) of Agency*, including §§ 219, 220, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, and 267." Reporter's Notes to *Restatement (Third) of Agency* § 7.07 (2006).

¹⁰ This Court has repeatedly cited to and relied on the *Restatement (Second) of Agency*. *Dickinson v. Edwards*, 105 Wn.2d 457, 470, 716 P.2d 814, 821 (1986), relied upon *Restatement (Second) of Agency* § 230 (1958), part of the same chapter as § 242, in discussing liability for an intoxicated employee. See also *Rho Co., Inc. v. Dep't of Rev.*, 113 Wn.2d 561, 782 P.2d 986 (1989) (citing *Restatement (Second) of Agency* § 328 (1958); *Fardig v. Reynolds*, 55 Wn.2d 540, 544, 348 P.2d 661 (1960) (*Restatement (Second) of Agency* §§ 2, 220, 250-51; *Aungst v. Roberts Const. Co., Inc.*, 95 Wn.2d 439, 625 P.2d 167 (1981) (*Restatement (Second) of Agency* § 320 (1958)). These cases are still valid law.

¹¹ This was error. See *Ellis v. City of Seattle*, 142 Wn.2d 450, 460 n.3, 13 P.3d 1065 (2000) ("any court is entitled to consult the law in its review of an issue, whether or not a party has cited that law").

other statutes and the constitution, as illustrations of the requirement of public accountability imposed on state agencies. “These laws focus on paying employees only for time worked and ensuring that employees do not waste official resources on personal business.” *Clawson*, 148 Wn.2d at 545.

Clawson did not discuss what the court meant by the term “waste” (which does not appear in RCW 42.52.160) because it was not an issue in the case. RCW 42.52.160(1) provides that “No state officer or state employee may employ or *use* any person, money, or property under the officer’s or employee’s official control or direction, or in his or her official custody, for the private benefit or gain of the officer, employee, or another.” (Emphasis added.) It appears, at best, to be a misnomer that the *Clawson* court used the term “waste” instead of “use.” *Clawson* cannot properly be considered as authority for interpreting RCW 42.52.160 in a manner that is contrary to its plain language.

The court of appeals’ implication that carrying an unauthorized passenger is not a violation of RCW 42.52.160 because it is not “waste”¹² leads to misapplication of RCW 42.52.160. The court’s interpretation would allow a state employee to manage a personal business on a state-

¹² The additional risk exposure with its added costs of liability for unauthorized passengers and the significant liability payment contemplated in this case would appear to qualify as a “waste” of public resources.

owned computer and state-owned telephone over the lunch hour and breaks or to invite family members to make full use of the public equipment and office space for their own purposes, because this use is not “waste.” An employee’s children could be driven to school everyday in a state car if their school was on the same route that led to the worksite because this is not a “waste” of resources. This interpretation of the meaning and purpose of the statute is inconsistent with the plain language of RCW 42.52.160. It also conflicts with the interpretation given that provision by the Executive Ethics Board, the agency charged with enforcing the Ethics in Public Service Act and issuing advisory opinions about employee conduct. RCW 42.52.360(1), (3)(a), (c), and (d), App. 2.

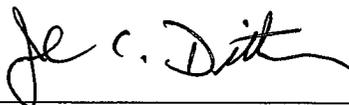
The Executive Ethics Board’s interpretation should be accorded deference unless contrary to the plain language of the statute, which it is not. *Cnty Ass’n. for Restoration of the Env’t. v. Dep’t of Ecology*, 149 Wn. App. 830, 840, 205 P.3d 950 (2009). The court of appeals’ erroneous interpretation of the Ethics in Public Service Act must be corrected by this Court.

V. CONCLUSION

The state of Washington respectfully requests that this Court reverse the court of appeals and affirm the trial court's dismissal of Ms. Rahman's lawsuit.

RESPECTFULLY SUBMITTED this 1st day of February 2010.

ROBERT M. MCKENNA
Attorney General

A handwritten signature in black ink, appearing to read "John C. Dittman", written over a horizontal line.

JOHN C. DITTMAN, WSBA #32094
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PROOF OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

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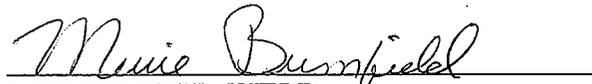
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 1st day of February 2010.


MICHAEL P. LYNCH


MERRIE BRUMFIELD

Appendix 1

Return to [Superseded Policies](#)



12.30 State Motor Vehicle Driver Requirements

12.30.10
April 15, 2004

State drivers must have valid driver's license

When driving on **official state business**, all **state drivers** are to have a driver's license recognized as valid under Washington state law. **This license must be in the driver's possession while operating any passenger motor vehicle used for official state business purposes.** (The Department of Licensing website provides information on valid licensing requirements at <http://www.dol.wa.gov/drivers.htm>.)

Refer to **Subsection 12.30.20.e** regarding reporting requirements if license is suspended, revoked, or otherwise determined to be invalid.

12.30.20
April 15, 2004

State driver responsibilities - state-owned or leased passenger motor vehicles

12.30.20.a

Except as otherwise provided by law or by regulations of the Office of Financial Management, state-owned or leased passenger motor vehicles are to be used only for **official state business**. When a state-owned or leased passenger motor vehicle is being operated, any person exercising control over and/or operating the vehicle is expressly prohibited from engaging in the transportation of unauthorized passengers. Unauthorized passengers are those passengers not engaged in performing official state business and/or not specifically authorized by the agency head or authorized designee. Unauthorized passengers can include, but are not limited to, family members, relatives, friends, and pets. Refer to Subsection 12.10.30 for a definition of authorized passengers.

12.30.20.b

The driver is to:

1. Operate the vehicle at all times in a professional and safe manner, and comply with Washington traffic laws and regulations.
2. Promptly pay fines to the appropriate jurisdiction for all parking tickets, citations or infractions received while operating a state vehicle. Payment of fines and citations under these circumstances is the **sole obligation and responsibility of the driver** and is NOT to be reimbursed or paid by the state. Refer to Subsection 10.20.20.
3. Present a valid driver's license when requested by the manager/supervisor.

4. Notify the manager/supervisor by the end of the next business day upon notification by the applicable licensing agency that his/her driver's license has been suspended, revoked, or otherwise determined to be invalid.
5. Adjust driving speed and vehicle equipment (i.e., use of lights, tire pressure, etc.) to changing weather conditions. Additionally, the driver is to alter travel plans as needed for personal safety due to inclement weather or sudden illness (refer to Subsection 10.10.35 for per diem travel expense allowances for these situations).
6. Purchase gas, oil, and other items with a state credit card and acquire emergency repairs to passenger motor vehicles in accordance with applicable Department of General Administration motor vehicle regulations. For more information, visit <http://www.ga.wa.gov/mp/services.html>.
7. Follow agency policies for reporting vehicle mechanical problems and arranging for service repairs or maintenance.
8. Be responsible for maintaining good appearance of the passenger motor vehicle.
9. Complete the State of Washington Vehicle Accident Report (SF 137) when an accident results in either, or both, of the following:
 - o Injuries to a state driver, authorized passenger(s) and/or others.
 - o Damages to a state vehicle, POV and/or other vehicles.

The SF 137 may be found in the glove compartment of the passenger motor vehicle and/or is available on the Office of Financial Management Risk Management Division website at <http://www.ofm.wa.gov/rmd/index.htm>.

12.30.20.c

Safety is a priority when driving a state vehicle on official state business. To promote safety, all **state drivers** shall:

- Comply with state policies that prohibit smoking in state vehicles and facilities absent a specific agency waiver. (Executive Order 88-06)
- Not drive while under the influence of intoxicating beverages or drugs (including prescription drugs) that may affect the driver's ability to operate motorized equipment.
- Not transport alcohol/intoxicating substances in the passenger compartment of a vehicle unless transporting such substances is within the driver's official state duties. Alcohol containers should be stored in the trunk or otherwise contained in accordance with state law regarding open containers as referenced in RCW 46.61.519.
- Not transport firearms, weapons, or explosives (concealed or otherwise) unless the transportation of such devices is in accordance with performance of official state business.

- Not use radar or speed detecting devices in state vehicles.
- Properly wear and require passengers to wear provided safety belts at all times the vehicle is in operation. Also, ensure that authorized passengers under the age of 16 years of age are properly restrained in safety belts or car seats. Refer to Washington Traffic Safety website at <http://www.wa.gov/wtsc/law.htm> for guidance.
- Avoid cell phone use while driving as much as possible - preferably making calls while the vehicle is safely stopped.
- Avoid the use of ear phones/buds to minimize distraction and inability to hear emergency warnings.
- Safely organize and store equipment/supplies in the vehicle so they are secure in the event of a sudden stop.
- Select well-lit, safe areas, for parking state vehicles, if possible. Place valuable equipment out of view and lock the vehicle when unattended.

12.30.30
April 15, 2004

What are the restrictions and responsibilities for using privately owned motor vehicles for official state business?

- 12.30.30.a When driving **privately owned vehicles (POVs)** on **official state business**, **state drivers** are to comply with the state of Washington's liability insurance laws, chapters 46.29 and 46.30 RCW. If an accident occurs when the state driver is operating a POV, the state driver's personal automobile insurance is primary and will be utilized prior to any possible provision of the state's excess liability protection. Insurance deductibles are the **responsibility of the POV driver and are not reimbursable by the state**. In the event the driver's personal insurance coverage is exhausted, the state of Washington can provide excess insurance for the benefit of the employee.
- 12.30.30.b Transporting of unauthorized passengers as described in **Subsection 12.30.20.a** in a POV while driving on official state business is considered a personal decision. The state of Washington will not provide excess liability protection to any unauthorized passengers in the event of an accident.
- 12.30.30.c The driver is to operate a POV at all times in a professional and safe manner, and comply with Washington traffic laws and regulations.
- 12.30.30.d A POV driver involved in an accident is to complete a State of Washington Vehicle Accident Report (SF137) as outlined in **Subsection 12.30.20.j** and follow the procedures in **Subsection 12.30.40**.
- 12.30.30.e The driver is to comply with **Subsection 12.30.20.k** related to making safety a priority when driving a POV on official state business.
- 12.30.30.f Reimbursement for the use of a POV is not to exceed the private vehicle mileage reimbursement rate specified in Subsection 10.90.20 as authorized by RCW 43.03.060.

12.30.40
April 15, 2004

Procedures for reporting accidents

For all accidents resulting in property damage or injuries involving any **passenger motor vehicle** in use for **official state business**, **state drivers** are to follow the procedures below, as applicable.

- Take whatever steps are necessary to protect yourself from further injury.
- Assist any injured party, giving only the first aid you are qualified to provide.
- Call 911 for medical assistance if needed.
- Cooperate with local law enforcement. Provide factual information, limiting responses to questions asked.
- Provide factual information about yourself and the state vehicle to the other driver(s), e.g., name, agency, phone number, vehicle identification number (VIN), etc.
- Obtain needed information from other driver(s). Identify witnesses and obtain addresses and phone numbers.
- Do not discuss your actions with parties other than law enforcement. **Do not admit fault** to other parties or make any statements about the State's response to the accident, financial or otherwise.
- Collect all required information necessary to complete the State of Washington Vehicle Accident Report (SF137) located in the vehicle's glove box or other information needed for agency accident reporting purposes.
- Contact the Accident Management Service, CEI, if your agency has contracted for their vehicle repair services. Report accidents or state vehicle damage to CEI (consult pamphlet in the vehicle's glove box for CEI phone number.) Contact your agency's transportation officer if unsure whether CEI is a contracted service.
- Contact GA Motor Pool if you have a State Motor Pool vehicle. Report accidents to them at (360) 459-6378 (reporting information is in the vehicle glove box.) Motor Pool staff will report the accident to the CEI if appropriate.
- Report the accident to your manager/supervisor.
- Have the state vehicle towed from the scene if not drivable.
- Complete the State of Washington Vehicle Accident Report (SF137) and any other *agency*-required accident report forms or procedures.

- Complete a Vehicle Collision Report if any injuries are sustained as a result of the accident or if damages to vehicles/property exceed \$700. This form is available from local law enforcement offices.

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Appendix 2

ADVISORY OPINION 02-02 A
Use of State Resources Questions and Answers
(As revised on April 13, 2007)

These questions and answers are intended to provide examples of how the Board would interpret and apply RCW 42.52.160, RCW 42.52.180 and WAC 292-110-010 to common occurrences in the state workplace. The Board encourages state agencies to adopt policies applying these principles to their unique circumstances. In some instances state agencies have adopted policies that are more restrictive than the Board's rules. In addition to reviewing the Board's rules, state officers and employees should consult applicable agency policies.

A. Use of State Resources

Question 1: Are there general guidelines for the use of state resources?

Answer: Yes. All state officers and employees have a duty to ensure the proper stewardship of state resources, including funds, facilities, tools, property, employees and their time. Accordingly, the Ethics in Public Service Act states that resources under your official control may not be used for the private benefit or gain of a state officer, state employee, or another person. (See and RCW 42.52.160(1))

Question 2: What types of state resources are covered under the ethics law?

Answer: The guidelines on use of state resources apply to all resources **under an employee's control** including, but not limited to, facilities of an agency, state employees, computers, equipment, vehicles, and consumable resources. State resources also include state information, e.g., databases, employee lists. (See RCW 42.52.160(1) and RCW 42.52.180(1))

Question 3: What exactly is a "private benefit or gain"?

Answer: A private benefit or gain can range from avoiding a cost or expense by the use to using resources to support your outside business or paying a discounted government rate for a personal phone call. There are some uses that do not appear to have a cost but may result in private benefit or gain. For example, it may not cost a significant amount of money to use a state computer to access the Internet. Nevertheless, by making a personal use of a resource available to you only because you are a state employee, you are receiving a private benefit or gain.

Question 4: I've heard that de minimis use is allowed. What is a *de minimis* use anyway?

Answer: A de minimis use is an infrequent or occasional use that results in little or no actual cost to the state. An occasional brief local phone call to make a medical or dental appointment is an allowable de minimis use of state resources. The cost of a brief phone call is negligible and is not likely to interfere with your job. The following examples address "de minimis" use: (See WAC 292-110-010(3))

Example A: An employee makes a telephone call or sends an e-mail message to his/her children to make sure that they have arrived home safely from school. This is not an ethical violation. So long as the call or e-mail is brief in duration, there is little or no cost to the state, i.e., your SCAN code is not used, and sending a brief message does not interfere with the performance of official duties.

Example B: An employee uses his/her agency computer to send electronic mail to another employee wishing them a happy birthday. This is not an ethical violation. The personal message is brief and does not interfere with the performance of official duties.

Example C: Every spring a group of employees meets during lunch to organize an agency softball team. The meeting is held in a conference room that is not needed for agency business during the lunch hour. This is not an ethical violation. There is little or no cost to the state, the meeting does

not interfere with the performance of official duties, and off site recreational activities such as softball teams can improve organizational effectiveness.

Question 5: What does “promoting organizational effectiveness” really mean?

Answer: Organizational effectiveness relates to an agency’s mission and encompasses activities that enhance or augment the agency’s ability to perform its mission. The Board recognizes that state agencies may allow employees to participate in activities that are not official state duties but promote organizational effectiveness by supporting a collegial work environment. The Board believes that so long as the employees who participate in the activity limit their use of state resources, then these activities would not undermine public confidence in state government. In addition, the Ethics Act normally prohibits the use of state resources to support outside organizations or groups, including charities, unless the support is part of the agency’s official duties. The Board’s rule allows agency heads to nevertheless approve a de minimis use of state resources for activity that promotes organizational effectiveness even if that activity may incidentally support a private organization. Agency heads are cautioned, however, that activity allowed under this rule may not involve a state agency’s endorsement or promotion of a commercial activity such as advertising or selling products. The following examples address “promoting organizational effectiveness.” (See WAC 292-110-010(3) and (6))

Example A: An agency determines that an agency wide retirement lunch will enhance organizational effectiveness. The retirement lunch will last a half hour longer than the normal one hour lunch break. An employee uses his or her office computer to compose a flyer about the lunch, send a few reminder e-mails, and collect for a retirement present. This is not an ethical violation. The use supports organizational effectiveness and was approved by the agency. Since most of the activity takes place outside of normal working hours, it will not interfere with the performance of each employee’s official duties. In addition, the employee’s use of the office computer and printer will result in little or no cost to the state.

Example B: An agency decides that attending a specific sporting event or going to a local amusement park as a group will promote organizational effectiveness. In order to organize the event the agency uses a very limited amount of state paid time and agency resources to send one email notifying employees of the event and to post flyers and discount coupons in a break room so that employees who attend can take advantage of the discounts available. The flyers and coupons promote a commercial organization, such as a local amusement park, or promote a specific event, such as a state employee appreciation day at a sporting event. This is not an ethical violation. Attending the sporting event or going to an amusement park may improve employee morale, which supports organizational effectiveness. The agency approved this very limited use of resources and the activity falls within the de minimis use guidelines.

Example C: An agency decides that attending a specific sporting event or going to a local amusement park as a group will promote organizational effectiveness. The agency uses state paid time and agency resources to distribute multiple flyers or multiple discount coupons to all agency employees. The flyers and coupons promote a commercial organization, such as a local amusement park, or promote a specific event, such as a state employee appreciation day at a sporting event. This is an ethical violation. While attending the sporting event or going to the amusement park may improve employee morale, the use of state resources exceeds the de minimis use guidelines. When there is no statutory authority for the use of state resources to support a private commercial product or organization, the extensive use of state resources for that activity undermines public confidence in state government.

Question 6: Are there any uses of state resources that are prohibited?

Answer: Yes. The allowance for de minimis use does not apply to the following uses: conducting an outside business; political or campaign activities; commercial uses like advertising or selling products;

lobbying that is unrelated to official duties; solicitation on behalf of other persons unless approved by the agency head; and illegal or inappropriate activities. The following examples address prohibited uses. (See WAC 292-110-010(6))

Example A: An employee operates an outside business. She makes an outside business call on her state telephone. The call is local. This is an ethical violation. The employee is conducting a private business on state time using state resources, which is prohibited under WAC 292-110-010(6).

Example B: An employee puts a state telephone number or work address on business cards or letterhead for his/her outside business. Several customers contact the employee at the office number to conduct the outside business. This is an ethical violation. Although the use of the telephone may result in a negligible cost to the state, conducting a private business is an illegal use of state resources.

Example C: After working hours, an employee uses the office computer and printer to prepare client billings for a private business using his/her own paper. This is an ethical violation. Although use of the office computer and printer may result in a negligible cost to the state, conducting a private business is an illegal use of state resources.

Example D: One night an employee takes an agency owned video player home to watch videos of his/her family vacation. This is an ethical violation. Although there is little or no cost to the state, an employee may not make private use of state equipment removed from state facilities or other official duty station.

Example E: An employee is assigned to do temporary work in another city away from his/her usual duty station. To perform official duties the employee takes an agency laptop computer. While away, the employee uses the computer to do tax work for a private client. This is an ethical violation. Although use of the laptop may result in a negligible cost to the state, conducting a private business is an inappropriate use of state resources.

Question 7: Can I play games on my computer during lunch and break times?

Answer: Generally No. When employees download games or load interactive games onto state owned computers, the game play often involves several state employees or can undermine the security of state information and databases. In addition, the computer at your workstation remains a state resource regardless of whether you are working or on a break. Nevertheless, subject to your agency's prior approval a brief and occasional personal use, during lunch or break times, of a game that was preloaded by the manufacturer on your state computer would be allowed under the de minimis rule. (See WAC 292-110-010(3))

Question 8: If I use a state resource, can't I just reimburse my agency for the use?

Answer: No. Reimbursing for a personal use may result in a personal benefit and may impose significant administrative burdens on the state. For example, the price of a SCAN call is less than you would pay using your local telephone company. Reimbursing also creates the misperception that personal use is ok as long as we pay for it. Personal use should be the exception not the rule. (See WAC 292-110-010(7))

Question 9: Does Advisory Opinion 03-03, covering the use of frequent flyer miles, also apply to other types of travel incentive programs?

Answer: Yes, this advisory opinion also applies to motel/hotel point rewards, rental car rewards, and any other travel benefit of a similar nature.

Question 10: Can an employee use, for personal reasons, software purchased by the agency if the software is required to be installed on the employee's home computer so that he/she may work at home?

Answer: Yes. While it is preferable that the employee pay for the software license, he or she may use the agency-purchased software for personal reasons so long as the use is de minimis (that is, short in duration, infrequent and of little or no cost to the state.) An employee may not use the software for outside business reasons or to assist either a campaign for public office or a ballot issue.

Question 11: Can a state employee use the electricity from a power outlet at a state owned or leased facility to charge a personal electric vehicle that is used to commute to work?

Answer: The Ethics in Public Service Act would not be violated if an employee were to use state resources to plug in a personal vehicle, so long as the agency included and approved such usage in its policy consistent with RCW 43.01.230 and the purposes of RCW 70.94.521.

B. E-Mail and Internet Use

Question 1: Can I send a personal e-mail message without violating the ethics law?

Answer: Yes. The general ethics standard is that any use of a state resource other than for official state business purposes needs to be brief in duration and frequency to ensure there is little or no cost to the state and the use does not interfere with the performance of official duties. Extensive personal use of state provided e-mail is not permitted. (See WAC 292-110-010(4))

Question 2: Are my e-mail or voice messages private?

Answer: No, if you use state equipment do not expect a right to privacy for any of your e-mail or voicemail communications. E-mail and voicemail communications may be considered public records and could be subject to disclosure. Aside from disclosure, employees should consider that e-mail communications are subject to alteration and may be forwarded to unintended recipients. Avoid these potential problems by treating e-mail communications as another form of business correspondence. (See WAC 292-110-010(5))

Question 3: Are there any restrictions on e-mail communications?

Answer: Yes. E-mail messages cannot be for any of the following uses: conducting an outside business; political or campaign activities; commercial uses like advertising or selling products; solicitation on behalf of other persons unless approved by the agency head; and illegal or inappropriate activities, such as harassment. In addition, broadly distributing or chain-mailing an e-mail that is not related to official business is prohibited because it disrupts other state employees and obligates them to make a personal use of state resources. (See WAC 292-110-010(6))

Question 4: What are the guidelines on Internet use?

Answer: Just like the guidelines for e-mail discussed above, any personal use of state provided Internet access must be both brief and infrequent. Extensive personal use of state provided Internet access is not permitted. In addition, your agency must have adopted a policy that specifically permits personal use of the Internet. (See WAC 292-110-010(4)) The following examples address uses of the Internet:

Example A: Several times a month an employee quickly uses the Internet to check his or her children's school website to confirm if the school will end early that day. The transaction takes about five minutes. This is not an ethical violation. The use is brief and infrequent, there is little or no cost to the state, and the use does not interfere with the performance of official duties.

Example B: An employee routinely uses the Internet to manage her personal investment portfolio and communicate information to her broker. This is an ethical violation. Using state resources to monitor private stock investments or make stock trades are private activities that can result in a private financial benefit or gain. Allowing even an occasional or limited use of state facilities to facilitate a private financial gain undermines public confidence in state government.

Example C: An employee spends thirty to forty minutes looking at various web sites related to a personal interest. This is an ethical violation. The use is not brief and can interfere with the performance of state duties.

Example D: An employee visits several humor and joke sites. While at a site, he/she downloads a joke file and e-mails it to several co-workers. This is an ethical violation. By e-mailing a file to co-workers the employee disrupts other state employees and obligates them to make a personal use of state resources. In addition, downloading files and distributing them to co-workers can introduce a computer virus, which can compromise state databases.

Question 5: What do I do if I access the wrong Internet site?

Answer: Don't panic! The best thing to do is to back out of the site and remember what it was that got you there and don't go back. Everyone makes this kind of mistake. It is also advisable to contact your supervisor or information systems staff to notify them of your mistake.

Question 6: Can I use my agency's computer and/or access the Internet for training or educational purposes, either personal or work related?

Answer: Yes, an agency may authorize the use of an agency's computer and/or access to the Internet for training or education that is related to official duties, including career and educational development identified and approved by the agency, pursuant to RCW 41.06.410, and is documented by the agency as such. This training or education may be done on state time as approved by the agency, while other use of computers and/or access to the Internet for personal training or educational purposes is limited to an agency's de minimis use policy. Tuition-reimbursement training or education in itself does not authorize other than de minimis use where it is not related to official job duties.

C. Use of State or Resources to Support Charities

Question 1: Can I use state resources to support charities?

Answer: The limited use of state resources to support charities may be allowed if an agency head or his/her designee approves the activity as one that promotes organizational effectiveness. Approval may be in the form of a specific policy that establishes guidelines for limited use of state resources. (See WAC 292-110-010(3))

Question 2: Can you give me examples of limited uses that might be ok?

Answer: Yes. Sending an e-mail to notify employees of a blood drive would be a limited and acceptable use of state resources. Another example might be a bake sale to support an Adopt-A-Family Program. Here, the baking would be performed at home and after working hours. The baked goods are then displayed for purchase during break times and the lunch hour. When gifts are purchased for the family, the purchases are made after working hours.

Question 3: Is there anything employees shouldn't do while conducting charity work on state time?

Answer: Any use of state resources that results in an expenditure of funds should be avoided. Consider this scenario: a group of employees spend 6 working hours of staff time a week for over a four-week period to plan a charitable fund-raiser, and use the computer, fax, and copier to produce fund-raising materials. This is an expenditure of state funds that would not be considered a de minimis or limited use of state resources. In addition, state resources may not be used for the benefit of any other person, whether or not operated for profit, unless the use is within the course of official duties. The following example addresses another area of concern. (See WAC 292-110-010(3))

Example: An employee is active in a local PTA organization that holds fund-raising events to send children to the nation's capital. Although a parental payment of expenses for the trip is expected, the more raised through individual contributions, the less the parent must pay. The

employee uses agency e-mail to solicit contributions to the fund-raiser from a broad distribution list of co-workers. The e-mail asks each recipient to pass along the e-mail to other state employees. This is an ethical violation. The employee is using state resources to promote an outside organization and a private interest. By sending the e-mail to other state employees and asking state employees to pass the solicitation along, the employee is asking other state employees to improperly use state resources in a manner that interferes with the performance of official duties.

Question 4: What about the Combined Fund Drive?

Answer: The Combined Fund Drive is somewhat different than other independent charitable organizations because it has been established by the state legislature. Therefore, it is part of the official duties of those employees who are assigned by the agency to conduct the Drive. Fund Drive coordinators should confine the time and effort spent conducting the drive to agency guidelines. (See WAC 292-110-010(2) and EEB Advisory Opinion 00-09)

Question 5: What about the employees who are not officially assigned to conduct the Combined Fund Drive?

Answer: As noted above with charitable groups, the use of state resources to support the Combined Fund Drive charities should be reasonable, involve little or no cost the agency, and should not disrupt the conduct of official business in state offices. (See WAC 292-110-010(3) and EEB Advisory Opinion 96-11)

Question 6: How about agency participation in commercial activity that benefits the Combined Fund Drive?

Answer: State agencies should avoid direct involvement in commercial activity even if the proceeds may benefit the Combined Fund Drive. Examples of improper direct involvement include distributing commercial product sales brochures and order forms to agency employees, collecting product order forms in the workplace or on state paid time, and distributing products in the workplace or on state paid time. Activities permitted under the de minimis rule, such as those described in the answer to Question 15, should not involve commercial activities. (See WAC 292-110-010(6))

D. Solicitations by State Employees on Behalf of Charitable Organizations

The solicitation of goods and services from private companies is addressed under several provisions of the Ethics in Public Service Act. In addition to interpreting and applying the use of state resources provisions, this section of questions and answers is intended to provide examples of how the Board would interpret and apply RCW 42.52.070, 42.52.140, and 42.52.150 to common occurrences in the state workplace.

Question 1: Can agency employees solicit donations for charitable events from outside businesses?

Answer: The state's ethics law contains a very strong presumption against solicitation by any state officer or state employee for any purpose, including charitable events. Solicitation by state employees can create the appearance that a donation might result in favorable treatment from the state, whereas a failure to donate might result in unfavorable treatment. A state officer or state employee whose official duties include regulation or the contracting for goods and services needs to be especially careful about solicitation. Accordingly, State officers and employees may not use their official state positions to solicit goods and services from private organizations and businesses. The following examples address solicitation on behalf of charitable organizations. (See RCW 42.52.070, RCW 42.52.140 and RCW 42.52.150(4))

Example A: The head of a state agency purchasing office sends a letter requesting gifts or donations for use at a CFD kick off luncheon to several vendors who provide goods and services to the agency. This is an ethical violation. While the purchasing supervisor will not personally benefit from the gifts, the CFD charities and the gift recipients would benefit from them. In addition, it would be reasonably expected that vendors who respond favorably to the solicitation did so with the intent to influence the vote, action, or judgment of the purchasing supervisor. (See RCW 42.52.070 and RCW 42.52.140)

Example B: The head of a state agency sends a letter to local businesses, including several vendors who provide goods and services to the agency, requesting gifts or donations for a use that will benefit agency employees and a private charity. This is an ethical violation. While the agency head will not personally benefit from the gifts, the private charity would benefit from them. In addition, it would be reasonably expected that vendors who respond favorably to the solicitation did so with the intent to influence the vote, action, or judgment of the agency head. This expectation in the vendors would be true even if the agency head did not routinely participate in such decisions. (See RCW 42.52.070 and RCW 42.52.140)

Example C: On their lunch break a group of agency employees who work for an agency that regulates or administers benefits for private business, but who are not personally involved in regulating or administering benefits for their agency, solicit holiday gifts on behalf of a family sponsored by Adopt-a-Family. When soliciting the gifts they voluntarily inform the businesses that they are employed by their state agency but are soliciting on behalf of the sponsored family or Adopt-a-Family. This is an ethical violation. By stating that they are employed by an agency that regulates or administers benefits for the private businesses they are using their state positions to influence the private businesses and support the private charity. (See RCW 42.52.070)

Example D: On their lunch break or after work a group of agency employees who are involved in regulating or contracting on behalf of their agency solicit holiday gifts on behalf of a family sponsored by Adopt-a-Family. They do not solicit from agency vendors or other individuals with whom they conduct state business. When soliciting the gifts they tell the businesses that they are soliciting on behalf of the sponsored family or Adopt-a-Family. This is not an ethical violation. By soliciting on behalf of the private charity and not a state agency they are not using their state positions to influence the private businesses. In addition, the employees are not using state paid time or resources for the solicitation.

Example E: After work or on the weekend a group of state employees solicit holiday gifts on behalf of a family sponsored by Adopt-a-Family or their local private school. They solicit door to door in their neighborhood and do not solicit from agency vendors or other individuals with whom they conduct state business. When soliciting the gifts they indicate that they are soliciting on behalf of the private school, the sponsored family, or Adopt-a-Family. This is not an ethical violation. The employees are not using their state positions to influence the private businesses and are not using state resources to support the private charities.

Question 2: Are there any other considerations we should take into account when conducting charitable solicitations?

Answer: Yes, avoid direct personal solicitations of your co-workers and colleagues and opt for voluntary participation. Managers and supervisors should always avoid direct personal solicitations of employees who work under their supervision. In this way, employees avoid creating a situation in which others feel pressured to give or perceive the risk of an unfavorable job action if they fail to give. Please remember that our valuable dedication to helping others sometimes obscures the fact that those we ask to give may not be able to give or may chose to give to other charities.

Question 3: If we can't solicit, then what should we do?

Answer: A state employee may purchase a gift certificate or other item for its fair market value and donate the item to an agency-sponsored charitable event.

E. Political or Campaign Buttons, Bumper Stickers, Signs

Question 1: During the last election, several co-workers wore large political buttons promoting a candidate that I opposed. One co-worker hung a political sign in his work space promoting the passage of an initiative that would impact our agency. Another co-worker placed several political yard signs in the window of her van and parked it in the agency lot. Isn't political campaigning in the work place prohibited?

Answer: Yes, the Ethics in Public Service Act prohibits a state officer or employee from using state

facilities to support or oppose political campaigns. "Facilities" is broadly defined and includes agency office space and working hours. Personal clothing and personal vehicles, however, would not be considered an agency facility. Therefore, the Ethics Act would not absolutely prohibit an agency policy that permits wearing typical political buttons on an individual's clothing or affixing a political bumper sticker to a personal vehicle. Officials or employees who wear political pins or buttons are urged to exercise caution and prudence. Closely related activity in the state workplace, such as wearing political buttons while interacting with the public or displaying political signs in public areas, could result in prohibited campaigning or violate agency policy. In determining if certain activity violates the Ethics Act the Board would determine if the conduct would lead a reasonable person to believe that the state officer or employee was making a political endorsement. The Board may review and approve agency policies adopted to prevent agency employees from violating the Act. See RCW 42.52.180, WAC 292-110-010, WAC 292-110-020, WAC 292-120-035.

Amendment approved by the Executive Ethics Board, this 13th day of April, 2007.

Susan Harris
Executive Director

Index to Statutory/Regulatory/Constitutional Appendix

RCW 42.52.160

RCW 42.52.360

49 CFR 392.60

Wash. Const. art.VIII, § 7

RCW 42.52.160

Use of persons, money, or property for private gain.

(1) No state officer or state employee may employ or use any person, money, or property under the officer's or employee's official control or direction, or in his or her official custody, for the private benefit or gain of the officer, employee, or another.

(2) This section does not prohibit the use of public resources to benefit others as part of a state officer's or state employee's official duties.

(3) The appropriate ethics boards may adopt rules providing exceptions to this section for occasional use of the state officer or state employee, of de minimis cost and value, if the activity does not result in interference with the proper performance of public duties.

[1996 c 213 § 7; 1994 c 154 § 116; 1987 c 426 § 3. Formerly RCW 42.18.217.]

RCW 42.52.360

Authority of executive ethics board.

(1) The executive ethics board shall enforce this chapter and rules adopted under it with respect to statewide elected officers and all other officers and employees in the executive branch, boards and commissions, and institutions of higher education.

(2) The executive ethics board shall enforce this chapter with regard to the activities of university research employees as provided in this subsection.

(a) With respect to compliance with RCW 42.52.030, 42.52.110, 42.52.130, 42.52.140, and 42.52.150, the administrative process shall be consistent with and adhere to no less than the current standards in regulations of the United States public health service and the office of the secretary of the department of health and human services in Title 42 C.F.R. Part 50, Subpart F relating to promotion of objectivity in research.

(b) With respect to compliance with RCW 42.52.040, 42.52.080, and 42.52.120, the administrative process shall include a comprehensive system for the disclosure, review, and approval of outside work activities by university research employees while assuring that such employees are fulfilling their employment obligations to the university.

(c) With respect to compliance with RCW 42.52.160, the administrative process shall include a reasonable determination by the university of acceptable private uses having de minimis costs to the university and a method for establishing fair and reasonable reimbursement charges for private uses the costs of which are in excess of de minimis.

(3) The executive ethics board shall:

(a) Develop educational materials and training;

(b) Adopt rules and policies governing the conduct of business by the board, and adopt rules defining working hours for purposes of RCW 42.52.180 and where otherwise authorized under chapter 154, Laws of 1994;

(c) Issue advisory opinions;

(d) Investigate, hear, and determine complaints by any person or on its own motion;

(e) Impose sanctions including reprimands and monetary penalties;

(f) Recommend to the appropriate authorities suspension, removal from position, prosecution, or other appropriate remedy; and

(g) Establish criteria regarding the levels of civil penalties appropriate for violations of this chapter and rules adopted under it.

(4) The board may:

(a) Issue subpoenas for the attendance and testimony of witnesses and the production of documentary evidence relating to any matter under examination by the board or involved in any hearing;

(b) Administer oaths and affirmations;

(c) Examine witnesses; and

(d) Receive evidence.

(5) Except as provided in RCW 42.52.220, the executive ethics board may review and approve agency policies as provided for in this chapter.

(6) This section does not apply to state officers and state employees of the judicial branch.

**Subpart E—License Revocation;
Duties of Driver**

§§ 392.40–392.41 [Reserved]

Subpart F—Fueling Precautions**§ 392.50 Ignition of fuel; prevention.**

No driver or any employee of a motor carrier shall:

(a) Fuel a commercial motor vehicle with the engine running, except when it is necessary to run the engine to fuel the commercial motor vehicle;

(b) Smoke or expose any open flame in the vicinity of a commercial motor vehicle being fueled;

(c) Fuel a commercial motor vehicle unless the nozzle of the fuel hose is continuously in contact with the intake pipe of the fuel tank;

(d) Permit, insofar as practicable, any other person to engage in such activities as would be likely to result in fire or explosion.

[33 FR 19732, Dec. 25, 1968, as amended at 60 FR 38747, July 28, 1995]

§ 392.51 Reserve fuel; materials of trade.

Small amounts of fuel for the operation or maintenance of a commercial motor vehicle (including its auxiliary equipment) may be designated as materials of trade (see 49 CFR 171.8).

(a) The aggregate gross weight of all materials of trade on a motor vehicle may not exceed 200 kg (440 pounds).

(b) Packaging for gasoline must be made of metal or plastic and conform to requirements of 49 CFR Parts 171, 172, 173, and 178 or requirements of the Occupational Safety and Health Administration contained in 29 CFR 1910.106.

(c) For Packing Group II (including gasoline), Packing Group III (including aviation fuel and fuel oil), or ORM-D, the material is limited to 30 kg (66 pounds) or 30 L (8 gallons).

(d) For diesel fuel, the capacity of the package is limited to 450 L (119 gallons).

(e) A Division 2.1 material in a cylinder is limited to a gross weight of 100 kg (220 pounds). (A Division 2.1 material is a flammable gas, including liq-

uefied petroleum gas, butane, propane, liquefied natural gas, and methane).

[63 FR 33279, June 18, 1998]

§ 392.52 [Reserved]

Subpart G—Prohibited Practices**§ 392.60 Unauthorized persons not to be transported.**

(a) Unless specifically authorized in writing to do so by the motor carrier under whose authority the commercial motor vehicle is being operated, no driver shall transport any person or permit any person to be transported on any commercial motor vehicle other than a bus. When such authorization is issued, it shall state the name of the person to be transported, the points where the transportation is to begin and end, and the date upon which such authority expires. No written authorization, however, shall be necessary for the transportation of:

(1) Employees or other persons assigned to a commercial motor vehicle by a motor carrier;

(2) Any person transported when aid is being rendered in case of an accident or other emergency;

(3) An attendant delegated to care for livestock.

(b) This section shall not apply to the operation of commercial motor vehicles controlled and operated by any farmer and used in the transportation of agricultural commodities or products thereof from his/her farm or in the transportation of supplies to his/her farm.

[60 FR 38747, July 28, 1995]

§ 392.61 [Reserved]

§ 392.62 Safe operation, buses.

No person shall drive a bus and a motor carrier shall not require or permit a person to drive a bus unless—

(a) All standees on the bus are rearward of the standee line or other means prescribed in § 393.90 of this subchapter;

(b) All aisle seats in the bus conform to the requirements of § 393.91 of this subchapter; and

(c) Baggage or freight on the bus is stowed and secured in a manner which assures—

SECTION 7 CREDIT NOT TO BE LOANED. No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company or corporation.