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Joseph F. Quinn, Editor

Joseph F. Quinn is legal counsel to more than 30 fire districts in Pierce, King and other counties throughout the State of Washington.

His office is located at:
7909 40th St. West
University Place, WA 98466
(in UP Fire Dept's Station 3-2)

Mailing Address:
P.O.Box 98846
Lakewood, WA 98496

Telephone: 253.589.3226

Fax: 253.589.3772

Email Joe at:
quinnjoseph@qwest.net

Access this newsletter at:
www.Firehouselawyer.com

FMLA – Court Rules No Waiver Can Occur

A recent Fourth U.S. Circuit Court of Appeals decision may be of interest to many. A three-judge panel ruled by a 2-1 decision that FMLA (Family Medical Leave Act) regulations prohibit both prospective and retrospective waivers of all FMLA rights, including claims as to past violations. The federal Department of Labor actually argued that the regulation means an individual can waive claims of past violations but cannot waive **prospective** rights or claims. The regulation provides: "Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA." The majority of the Court noted that the regulation speaks of all rights, not just prospective ones. It may seem odd that the DOL would take the side of the employer on this issue, but the DOL reasoned that an employee might want to make a comprehensive settlement with the employer. For example, at the time of termination, the employee might in effect trade that right for a favorable severance package or other monetary considerations. But the Court apparently rejected that idea due to statutory language making it illegal to interfere with, restrain, or deny the exercise of any right under the statute. The Court also noted that the FMLA waiver limitations are similar to those under the Fair Labor Standards Act. These labor laws preclude unsupervised waivers (waivers should be approved by DOL or the court), unlike waivers under Title VII of the Civil Rights Act of 1964 or the ADEA (Age Discrimination in Employment Act). For the opinion, see *Taylor v. Progress Energy Inc.*, 4th Cir., No. 04-15am25, 7/3/07.

SEXUAL HARASSMENT

The Washington Legislature passed a statute in 2007 requiring state agencies to develop written policies and procedures on sexual harassment and training for all state employees. By chapter 76 of the 2007 Session Laws the Legislature now requires state agencies to define such harassment and provide procedures to deal with allegations when filed. It even requires the agency to inform the complaining employee of their right to file a complaint with the State Human Rights Commission and the federal EEOC. While nothing mandatory like this law affects fire protection districts in Washington, it might be a good idea

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to obtain a copy of the guidelines and policies to be developed by the State Department of Personnel to use by analogy. All fire departments should by now have written policies for dealing with such harassment. If you have none, I suggest you develop such policies before it does become mandatory. Contact any good lawyer who works with such personnel matters.

A SIGNIFICANT ATTORNEY GENERAL OPINION

In September the office of the Attorney General of the State of Washington issued a significant opinion, i.e. AGO 2007 No. 6. The issue presented was whether municipal corporations such as cities and fire protection districts can form a nonprofit corporation and through that corporation, be an "employer" for purposes of the state's pension statutes for public employees. Apparently, the State Department of Retirement Systems had told some agencies that this could not be done through a nonprofit corporation.

By way of background, we have been saying for many years that municipal agencies could execute an interlocal agreement to form a nonprofit corporation, and through that "agency" perform certain regional governmental functions, such as operating a 911 dispatch center or operate a joint fire department. In fact, we even pointed out that available option, when some parties suggested Washington needed a new law to devise a regional fire service agency, such as a "regional fire authority". We argued that no such law is needed, since RCW 39.34.030 allows local governments to form a nonprofit corporation already, under the nonprofit laws such as chapter 24.06 of the RCW. Of course, those persons persisted and a statute was passed creating the new "regional fire authority" option, which has now been pursued to fruition by some cities and perhaps others. See RCW 52.26. But I digress.

Because of the DRS viewpoint, an Attorney General opinion was requested a long time ago. Meanwhile, I issued a legal opinion in January 2007, opining that the pension law definitions of "employer" were broad enough, or explicit enough, to say that a nonprofit corporation, whose members or participants are strictly limited to municipal governments, can certainly serve as an "employer" for pension law purposes. Now, with the issuance of AGO 2007 No. 6, I feel vindicated, as the AGO agrees with that proposition.

The AGO stresses that the municipal governments forming the nonprofit cannot thereby escape from or abrogate their responsibilities to their

retirees or employees. If the nonprofit for some reason did not satisfy the pension obligations of the "employer", then the underlying municipalities would still be liable. This concept is based upon the statutory language in RCW 39.34.030(5), which provides in pertinent part that "no agreement made pursuant to this chapter *relieves* any public agency of any obligation or responsibility imposed upon it by law *except...*" (emphasis added). At that point the statute refers to the actual and timely performance of such an obligation or responsibility by an entity the municipals may create by an interlocal agreement (such as the nonprofit corporation). We are not sure why the AG seems to have presumed that the agencies would create the nonprofit to evade their legal duties, but that idea seemed to pervade the opinion. Nonetheless, the statute means that they are relieved of those duties, so long as the nonprofit performs as designed. If it did not, the local governments would essentially be guarantors. We suspect that such would be the equitable result even if the statute did not say so. Irrespective of that point, it is evident to us that it was never the intent of anyone to evade legal responsibilities, so why dwell on that point?

The underlying question is why would local governments want to form such an agency? In our experience, we can see that the primary reason is one of shared governance or shared responsibility. For example, if one fire district takes the "lead agency" status and operates a dispatch agency for multiple users throughout the region, it thereby takes on certain duties, such as acting as the employer of all employees of the dispatch center. Thus, it may be taking on a contingent obligation for a very long time, i.e. the long-term pension obligation to retirees. Many have noted that perhaps it would be better to share the responsibility of governing the agency with the actual users, or at least those that have the biggest stake in the agency's success. For example, then, perhaps the governing board could be comprised of one representative from each of five agencies—an elected or appointed person from each of five fire districts and cities. Hiring and firing the Executive Director then becomes shared with the

actual users, or the main users, instead of being solely under the control of the "lead agency". Frankly, it is more fair and democratic, as well as being likely to lead to better results.

We suggest it is reasons like the foregoing that actually motivate elected officials of local governments to consider a nonprofit as a vehicle to provide truly regional services, rather than some sinister motive like evading legal responsibilities. In any event, we are happy to report that the AGO once and for all resolved that question that the DRS raised, and we look forward to having some new quasi-municipal nonprofit corporations in this state within the next few years. Oh, and we are glad to have some regional fire authorities as well.

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PROFESSIONAL RESCUER DOCTRINE (LIKE FIREFIGHTER'S RULE) DOES NOT BAR SUIT FOR INJURIES DUE TO ALLEGED NEGLIGENT TRAINING OF CO- WORKER

In a very recent Washington State Supreme Court case, the Court ruled that the professional rescuer doctrine does not operate to bar or preclude a lawsuit against his employer (Pierce County) by a sheriff's sergeant, arising out of injuries sustained during a pursuit, when he was struck by a fellow officer's vehicle. Most of my readers are already familiar with the Firefighter's Rule, which is a close cousin to the

professional rescuer doctrine. Both of these rules or court-made doctrines generally mean that a professional rescuer like a paid or career police officer or firefighter cannot sue the person who negligently creates the need for the response or call. However, as I have pointed out in my classes on the *Legal Aspects of the Fire Service* (taught to all ranks at many of my fire district clients' stations in recent years) and in these *Firehouse Lawyer* pages in the past, the Firefighter Rule is eroding in many states, or it has been riddled with exceptions. Thus, firefighters and cops **can sue** someone, and even their employers, under certain circumstances. In the 21st century, this "rule" is no longer a rule!

shot and killed the suspect. Beaupre sued the county, seeking damages in excess of the money awarded through workers compensation. Pierce County moved for summary judgment, relying on the professional rescuer doctrine. The county argued the injury was part of the inherent risk of such an operation. The trial court held that the doctrine did not apply and that there was a genuine issue of material fact as to Beaupre's allegation that **negligent training of his co-worker** was one of the causes of the injuries. So he was allowed to sue his employer.

The Supreme Court included some discussion of the professional rescuer doctrine and showed how it differed from the rules regarding voluntary rescuers, such as Good Samaritans. But the Court said the question here was whether a professional rescuer can recover when there is *intervening negligence* attributable to a fellow officer. The Washington Court of Appeals (the intermediate appellate court in Washington) had already ruled, this court noted, that intervening negligence by third parties can create an exception to the professional rescuer doctrine and allow such lawsuits. The new twist here, of course, is that the alleged tortfeasor (wrongdoer) was not an outsider, but a co-worker. The county argued that a fellow officer cannot be an intervening party, but this court basically responded, "Why not?" In its decision to let this issue move forward toward trial, the Supreme Court distinguished decisions from California and New York.

The Court also pointed out that Washington law allows such police and firefighters to sue their employers for negligence, despite workers compensation laws that generally bar such actions against employers. On that point, see RCW 41.26.281 (a "right to sue" provision in the LEOFF pension laws) and *Fray v. Spokane County*, 134 Wn. 2d 637, 952 P.2d 601 (1998). We discussed that rule in these pages in May of 1997, at Volume 1, No. 2.

In summary, in *Beaupre* the Court ruled that the doctrine does not apply to negligent or intentional acts of intervening parties not responsible for bringing the rescuer to the scene. I have no doubt the Court



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Let us examine the facts in *Beaupre v. Pierce County*, Washington State Supreme Court, 79976-8 – 091307. Beaupre sued the county, his employer, for negligence after he was injured during a hot pursuit of a domestic violence suspect. Beaupre and several other officers tried to stop the suspect who was driving the wrong way on Interstate 5. Believing the suspect's vehicle was stopping, Beaupre ran along side the vehicle with his sidearm drawn and pointed at the suspect, while ordering him to stop. Meanwhile, another patrol car struck him from behind causing him to fly and land in front of the suspect's vehicle, which ran over him, breaking his pelvis. Other officers then

would apply the same reasoning for fire service personnel, as it did for the policeman in this case. This may be good news for some, and bad news for others...but our job is just to advise you of the law. (Personally, I think it is only fair and just.)

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My old friend Andy McAfee, the Chief at Riverside Fire (Pierce 14) is looking for used bunker gear, helmets or boots that might be useful to Explorer programs that he works with in this area. The goal is to get young people excited about the fire service as a future career. So if you have any surplus items like these, call Andy at (253) 922-5644. See, Andy, we said last month that the Firehouse Lawyer could help with needs like these. Do a good deed today and call Andy.

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