Firehouse Lawyer

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FLSA – The 207(K) Exemption and Paramedics (Again)

Many times in the history of this publication we have discussed the 207(k) exemption to the federal Fair Labor Standards Act, and how it may apply to paramedics. As frequent readers will recall, the FLSA requires the payment of overtime pay at time-and-a-half rates whenever firefighters work more than 40 hours in a work week, *unless* the Section 207(k) exemption to the Act applies. In that instance, firefighters may work up to a certain number of hours in a repeating work period (which can range from 7 to 28 days in length) without the need for paying overtime pay. This in effect allows public employers to pay these (usually) shift workers at straight time, even though in effect they are averaging about 52 hours work per week, or more. But for many years there have been debates about whether paramedics qualify for that exemption, as in many departments paramedics are only marginally, if at all, "engaged in fire protection" activities.

As we have previously stated in these pages, we felt that the Department of Labor's issuance of revised regulations on this topic in 1999 would reduce the number of disputes about this issue. Nonetheless, the issue seems to end up in federal court fairly often anyway.

The 11th U.S. Circuit Court of Appeals recently ruled in *Gonzalez v. City of Deerfield Beach, Fla.,* No. 07-11280, 2008 WL 4964696, Nov. 24, 2008, that paramedics who were rarely called to fire scenes and never required to wear protective clothing are nonetheless qualified for the exemption. The key question seemed to be whether they had any *responsibility* to engage in fire protection activities, not whether they actually did that sort of work. If the paramedic can be ordered to perform fire suppression, and disciplined for disobeying that order, chances are they qualify for the exemption.

The December 1999 amendments included 29 U.S.C. §203(y), which defines a fire protection employee as one who:

"(1) is trained in fire suppression, has the legal authority and *responsibility* to engage in fire suppression, and is employed by a fire department of a municipality, county, fire district, or State; and (2) is

engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk (emphasis added)."

One can see from this definition why the concept of responsibility is important to the courts. One can also see from subsection (2) that it is written in the "disjunctive" because of the word "or". In other words, the employee may either be involved with fire suppression or prevention or be involved with other emergency responses such as rescue or emergency medical care. So both (1) and (2) are pertinent in these fact situations.

It still seems to me that a consensus is emerging and that we should see fewer of these cases in the future. It cannot be that difficult to write the job descriptions to satisfy this regulation.

AND SPEAKING OF CASES WE'D LIKE TO SEE FEWER OF...

Will employers and supervisors never learn? The scourge of sexual harassment incidents, in the form of hostile environment and unwelcome advances cases, is still with us. In spite of all the money spent on training, education, and the shock of large verdicts, we are still seeing far too many instances of actionable sexual harassment in the workplace, along with other types of harassment or retaliation.

The latest ruling comes from Division 2 of the Washington State Court of Appeals, which recently upheld a trial court judgment and jury verdict in the total amount of almost $3 million to three female attorneys who worked for Thurston County in the prosecutor's office. Their complaints were typical: (1) that a supervisor made demeaning comments; (2) that women were treated differently than men; (3) that comments were made, or innuendos suggesting relationships the women had with men in the office; (4) that the office was run like a "good old boys club"; (5) that one man stared at a plaintiff's breasts constantly during conversations and finally; (6) that retaliatory actions were taken for complaints made. Even the elected prosecutor was allegedly "guilty" of making inappropriate comments about body parts.

The three cases went to trial together, based on claims of violation of the Washington Law Against Discrimination (Chapter 49.60 RCW) and retaliation for complaining. Although the jury awarded differing amounts to each plaintiff, the total compensatory damages were just over $1.5 million. Additionally, as is also typical today, the attorney fee award was large. The court applied a multiplier of 1.5 to actual fees paid, to award $1,296,108 in fees, plus $158,474 in costs. (Costs can include such expensive items as expert witness fees.)

Thurston County appealed, but lost on appeal. The county argued primarily (1) it was not technically the employer, as the elected prosecutor is an independent elected official beyond its control; (2) even if it was technically the employer, the county could not control his actions; (3) the trial court erred by allowing evidence of acts that took place before the three year period imposed by the WLAD statute of limitations. The Court rejected the first argument as the county had admitted in the initial answer to the complaint that it was the employer. The second argument also failed because although the county cannot control the prosecutor's discretion on charging and prosecuting criminal cases, it is responsible for his administrative acts as a county officer. The third argument also failed, because (as I would have expected based on settled case law) evidence of acts occurring beyond the statute of limitations is still admissible in evidence to show a pattern of discriminatory acts that allegedly continued into the actionable three-year period, even though those older acts cannot be the subject of the damage award or used to make out the basic claim or cause of action. Thus, the large judgment was affirmed. The case may not be over, as the county could petition the Supreme Court to review this decision. The Supreme Court of course may not even accept the case for argument.

Regardless of the final outcome, this case teaches us a lesson all employers should have learned by now. The culture needs to change if your work place is still seen as a "good old boys club". First and foremost, if harassment of any kind is brought to the attention of a supervisor, the Fire Chief, or the Board, you must take action right away. Prompt and speedy investigation is called for. Prohibiting contact between alleged harasser and the "victim" is often needed to prevent any claim of recurrence. Put the accused on administrative leave with pay if necessary to prevent that contact. Keep the door open for the complainants to report any ongoing problems. Continue the training and consider just having your attorney speak with all employees to tell them what kinds of liability results this harassment is causing in our state and around the nation. Sometimes scare tactics work!

HERE'S ANOTHER ONE, RATHER CLOSE TO HOME

In the past, I had a close working relationship with Vashon Island Fire & Rescue, King County Fire District No. 13. In recent years, the relationship has evolved to the current situation where they call occasionally for advice, but actually rely on several different attorneys for guidance. Thus, I was not really aware that the following case was ongoing or reaching the trial stage, as another law firm is responsible for representing VIFR.

Recently, a King County Superior Court Judge ruled that VIFR discriminated against a female volunteer who had been repeatedly passed over for hiring into a career firefighter post. She awarded the plaintiff $150,000 in emotional distress damages, three years back pay and three years front pay—about $250,000---but has not yet ruled on attorney fees and costs. This case may well cost more than half a million dollars before it is over. The judge said there was an "overriding male culture" (sound familiar?) and that top administration "failed to take reasonably prompt action" to correct problems.

We make no comment on the merits of the case, as the case may not be over, and we have no personal knowledge of such conditions within the department. The fire department just wants to move on, placing this case behind them. VIFR has a brand new fire chief, who was not the chief when this claim arose. The department also points out that women are very well established in various positions within the department.

Irrespective of the foregoing, viewing the case from the standpoint of the taxpayers, the risk managers, or the plaintiff, the case is troubling. We need to learn how to manage these risks better, by changing the workplace culture any time we can identify the need for change.

HARASSMENT AND HOSTILE WORK ENVIRONMENT CLAIMS ARE PERVASIVE

I cannot re-emphasize enough how we all need to realize that the workplace environment, and several people within it, are now often the breeding ground for these claims. Lest you think they are rare, I can assure you they are not. As the general legal advisor for approximately 35 fire departments, including fire districts and regional fire authorities in Washington, I am personally familiar with ongoing harassment investigations (hostile work environment, for example) in a few departments. Within the last year or so, another Fire Captain lost his job in a downward spiral of misconduct and insubordination, which began as a rather minor harassment incident and escalated from there. We recently defeated his claim for unemployment benefits; the ALJ ruled he was ineligible for benefits due to misconduct. In another department, a completed harassment investigation showed that a fairly high level chief was engaging in unwelcome advances. The penalty will be severe in order to send a strong message that such behavior needs to stop immediately. Termination is possible for such misconduct.

Therefore, I urge all departments to stop thinking, "Well, it isn't happening here." My impression is that it

is happening in many places and it needs to stop. Until it does, when you uncover it, investigate thoroughly to see if the allegations have merit. If they do, take decisive and prompt disciplinary action as well as preventive action, such as counseling and/or training. The status quo of showing an annual video is *not* doing the job, in my humble opinion. End of sermon for this month.

PERSONAL NOTE

There is no way I can thank all of you in our fire service family for praying for our family in January and keeping us in your thoughts. After 19 days at Swedish Hospital and two brain surgeries, our son Eric, 26, is doing well. No epileptic seizures… and he wants to return to work next week! Thanks to all of our friends for caring. This is the most thoughtful, supportive group of people in the world—you firefighters and medics, and all related folks. Now that this ordeal is behind us, I promise to be available a lot more than I was last month to deal with your issues! It was a good excuse, but our ordeal is over.

DISCLAIMER