FIREHOUSE LAWYER

Vol. 3, No. 3 Joseph F. Quinn, Editor MARCH 31, 1999

Military Leave for Shift Workers

In the last year or two, several clients have requested legal opinions on how use of military leave, as required by RCW 38.40.060, should be calculated for employees such as firefighters who work 24-hour shifts. In February, the Office of the Attorney General of the State of Washington issued an opinion, which is consistent with what I have said in my opinions, and which I believe correctly interprets this statute and applies it to shift workers.

The above statute provides:

> Every officer and employee of the State or of any county, city or other political subdivision thereof who is a member of the Washington National Guard or of the army, navy, air force, coast guard or marine corps reserve of the United States, or of any organized reserve or armed forces of the United States shall be entitled to and shall be granted military leave of absence from such employment for a period not exceeding 15 days during each calendar year. Such leave shall be granted in order that the person may report for active duty, when called, or take part in active training duty in such manner and at such time as he or she may be ordered to active duty or active training duty. Such military leave of absence shall be in addition to any vacation or sick leave to which the officer or employee might otherwise be entitled, and shall not involve any loss of efficiency rating, privileges, or pay. During the period of military leave, the officer or employee shall receive from the state, or the county, city, or other political subdivision, his or her normal pay.

The question asked by an Olympia state representative was how to apply this statute to various categories of public employees with differing work schedules, specifically referring to a city fire department in which the firefighters worked 24-hour shifts. Typically, these shifts lie partly in one calendar day and partly in the next. Apparently, the employer was taking the position that each time an employee missed a shift due to military duty, two days should be charged against the employee's balance of military leave. The employees argued that a single 24-hour shift should count as a single day so they should be charged only one day of military leave for each shift missed due to military service.

The only Washington case discussing this statute that shed any light on this issue in the past was Washington Federation of State Employees v. State Personnel Board, 54 Wn. App. 305, 774 P.2d. 421 (1989). In

Military Leave for Shift

Workers (continued)

that case the court of appeals held that the term "days" as used in RCW 38.40.060 referred to employment and therefore should be interpreted in the context of work days and not calendar days. Therefore, an employee could not be charged with having taken leave from employment on days they were not scheduled to work, such as weekends. In reaching that decision, the court of appeals declined to follow a prior attorney general opinion. This attorney general opinion issued in February 1999 recognizes that the Washington Federation case is the established law on the subject. In this opinion, the attorney general's office summarizes the basic principles in this area. First, an employee is required to use military leave only for those days on which the employee would otherwise have been required to report for work. The second principle is a corollary of the first: Military leave is used on any day when an employee cannot report to work because of active duty obligations. The third principle is that military leave must be calculated in days and cannot be reduced or converted to hours. The statute uses the word "days" and cannot be interpreted otherwise.

The fourth principle is that the term "day" must be read to mean a 24-hour period beginning and ending at midnight. The case law in Washington requires that result. From these basic principles the attorney general opinion derives the following standard:

> For any calendar day in which an employee cannot report to work because he or she has been called for military duty, the employee is entitled to be excused from work, and is entitled to receive compensation and benefits otherwise paid for that day. For such a day, one day of the annual 15-days of military leave is deducted, without regard to the number of hours the employee would have worked that day.

Certainly, this application of the law does not result in identical impacts on various agency employees who work different shifts. Nonetheless, we believe it is entirely consistent with the statute and the only way to interpret the meaning of the words, such as the word "day".

The attorney general opinion also includes a very good illustrative hypothetical example involving seven different employees called for military duty. Many of them are affected differently because of this statute.

Anyone desiring a copy of the attorney general opinion can contact the undersigned and have it faxed. Alternatively, the attorney general opinion is on the internet at www.wa.gov/ago/opinions/opinion_1999_2.html.

FLSA Salary Basis Test After *Auer v. Robbins*

The Fair Labor Standards Handbook published by Thompson Publishing Group has an excellent article in the March 1999 issue, updating us two years after the Auer v. Robbins decision relating to improper deductions from exempt employee's pay, rendering them ineligible for the salary basis test.

Frequently, public employers have some personnel exempt from the FLSA overtime requirements because they are bona fide executives or administrators or other professionals. One of the requirements is that such personnel be "a salary basis" employee. In order to truly qualify for "salary basis" status, such exempt employees must not be subject to improper pay deductions or they lose their exempt status. Prior to Auer v. Robbins, there were many conflicting court of appeals cases in the various circuits, depending upon whether an employer ever actually did deduct pay, for example, for less than a day or a

FLSA Salary Basis Test After *Auer v. Robbins* (continued)

week, and whether such a deduction was based upon a policy. One of the leading cases was here in the Ninth Circuit, Abshire v. County of Kern, 908 F.2d. 483 (9th Circuit 1990), in which the Court held that an employer which had a deduction policy permitting disciplinary deductions of exempt personnel could be in violation of the act, even if it never enforced that policy. Other courts had ruled that even a written policy did not destroy the exemption if it was never used. A minority of courts held that only if an employee actually suffered a prohibited pay deduction would their salaried status be denied.

In Auer v. Robbins in 1997, the U.S. Supreme Court reached a middle ground result but did shed much light on this question. The Court stated that exempt status would be denied if there was either an actual practice of making such deductions or an employment policy that created a significant likelihood of such deductions. That test required a clear and particularized policy of the employer, effectively communicating that deductions would be made in specified circumstances.

Now, several more cases have reached the circuit courts and district courts; the judges have begun applying the Auer v. Robbins precedent.

Interestingly, another portion of Auer v. Robbins has become quite important. In the case, the Supreme Court relied upon the "window of correction" rule available to employers who may have appeared to violate the FLSA. Section 541.118(a)(6) of the federal regulations allows for a correction when a deduction is inadvertent or made for reasons other than lack of work. The exemption is not considered lost if the employer reimburses the employee for such deductions and promises to comply in the future. In a 1991 case the Second Circuit had held that the window of correction rule did not help the employer which had a policy in place allowing improper deductions, as that could hardly be called inadvertent.

While the Supreme Court denied review of that case in 1992, five years later, in Auer v. Robbins, the Court did shed great light on the "window of correction" rule. As interpreted in Auer v. Robbins, the "window of correction" is very useful to employers. First, there are no time constraints on use of the "window of correction". Also, the Supreme Court in Auer said that even an intentional deduction could qualify for correction under that rule. Indeed, in Arrington v. City of Macon, 973 F.Supp. 1467 (M.D.Ga, 1997), a district court has held that the "window of correction" may be used even after suit has been filed and even to correct an established policy.

The post Auer case law teaches us that any employer policy on discipline should distinguish between non-exempt and exempt employees. It should specify that exempt employees will not be subject to improper deductions, but only those allowed by statute or regulation. Special regulations allow public employers, in certain circumstances, to make partial day deductions without destroying exempt status -- because of taxpayer accountability concerns (see 29 C.F.R. Section 531.5(d). Also, partial day pay docking is permitted in limited instances under the Family and Medical Leave Act, 29 C.F.R. Section 825.206.

Because of the case law, it would appear to aid the employer's position if they have policies including several levels of review before a disciplinary pay deduction is final and/or a policy requiring any suspensions to be reviewed with legal counsel. The courts have said that these mechanisms reduce the "significant likelihood" of

FLSA Salary Basis Test After *Auer v. Robbins* (continued)

deductions referred to in the Auer v. Robbins test.

Since exempt employees are widely used by fire departments, and since some of them seem to be subject to disciplinary suspensions and docking of pay for less than a week, we suggest that these policies be carefully reviewed with legal counsel.

Public Employees -- May They Sue for Invasion of Privacy, Defamation or Negligent Investigation?

Occasionally, a public employee's relationship with a public employer, typically in a discharge setting, can lead to considerable controversy and therefore media coverage. In these particular contexts, some seldom-discussed common law torts may be included in the litigation.

One such recent case involved a public employee, Jeff Corbally, who brought action against Kennewick School District for negligent investigation, defamation and common law invasion of privacy. In arbitration, Mr. Corbally successfully resisted dismissal and gained reinstatement. The case was decided by Division 3 of the Court of Appeals, State of Washington, on March 18, 1999.

Mr. Corbally, an art teacher, was fired after students found several sexually explicit drawings in a storage room near his classroom. However, the teacher successfully arbitrated the dismissal under his collective bargaining agreement and the district was ordered to reinstate him, restoring all benefits and wages lost, minus 30 days. It was the local newspaper's article after the ruling that led to the litigation. The article contained statements by district officials including comments on their disappointment in the ruling and reluctance to reinstate him to a teaching position. The trial court granted the school district's motion for summary judgment, concluding that the tort claim for negligent investigation was not recognized in the State of Washington and that the district officials could not be liable for defamation because the release of information was ordered by the court. Finally, Washington did not recognize a claim for invasion of privacy at the time of the trial court's ruling.

On the "negligent investigation" claim, the court of appeals adhered to the general rule that such a claim is not cognizable under Washington law. The only exception pertains to the Department of Social and Health Services, because a regulation has been held to mean that caseworkers must investigate sexual abuse allegations. No court has extended the DSHS caseworker exception to create a common law duty to investigate without negligence. In essence, the court of appeals would not recognize a "negligent investigation" claim unless the duty to investigate was statutorily and explicitly created. Thus, a public employee whose performance is investigated without any statutory duty to investigate, cannot have a claim of negligent investigation under current law in Washington.

The court of appeals ruling on defamation was in accord with preexisting law and will not be discussed in depth here. Proof of defamation requires proof of falsity, lack of privilege, fault and damages. The degree of fault is negligence if the claimant is a private person but actual "malice" if the claimant is a public figure or a public official. The court of appeals found that the teacher was a public official because the matter involved the manner in which he performed his teaching duties pursuant to a public contract. Under that

Public Employees -- May They Sue for Invasion of Privacy, Defamation or Negligent Investigation? (continued)

reasoning, most public employees would be held to the standard of proof of actual malice. In the defamation context, "actual malice" does not necessarily mean the same thing it does in other contexts in a legal setting. The seminal case of New York Times v. Sullivan held that "actual malice" in a libel or defamation context means publication of the utterance with knowledge of falsity or reckless disregard of whether it is true or false. It does not imply hatred or ill will, as the term "malice" might connote in other contexts such as malicious prosecution.

In the Corbally case, the plaintiff simply failed to establish the falsity of the opinions expressed by the school officials. Even assuming they were false factual statements, the court found that a conditional or qualified privilege arises because of the public interest in the matter. The court noted that the arbitrator did not find the teacher blameless, ruling instead that the district simply did not have just cause to terminate him. The ruling of the arbitrator in essence was that he deserved a 30-day suspension, so the plaintiff/teacher was not totally exonerated. The court also noted that such a qualified privilege may be abused, and its protection lost, if the publication is made with malice, which in this context connotes ill will or absence of good faith. In this instance, the public officials made general statements regarding the situation but did not make specific personal attacks on Mr. Corbally. Also, the plaintiff did not produce evidence disputing the absence of malice or abuse of qualified privilege and therefore the trial court was affirmed on the defamation claim.

The most interesting discussion in this case pertains to the common law invasion of privacy claim. Subsequent to the trial court's decision in Corbally, in Reid v. Pierce County, 136 Wn. 2d. 195, 961 P.2d. 333 (1998) the Supreme Court recognized a common law invasion of privacy claim. That case involved the unprivileged release of autopsy photographs, which were very offensive to the family members of the deceased. Because of the recent holding in the Reid case, in Corbally the court of appeals reversed and remanded the matter for reconsideration because the trial court, without the benefit of the Reid opinion had concluded that there was no common law right of privacy.

Of course, in this procedural context, this does not mean that the plaintiff has succeeded, but only that a public employee whose case is discussed in the media, in theory could have a common law tort claim of invasion of privacy. Until further judicial review of the Corbally case, including a new decision by the trial court, all public employers would be well advised to be respectful of the privacy rights of public employees.

Volunteerism Revisited

Two recent developments -- one legislative and one judicial -- are worth reporting on the volunteerism front this month.

On February 23rd, the House Education and the Work Force Subcommittee on Work Force Protections held a hearing about volunteerism under the FLSA. While most of those parties testifying stated that the Act and the Department of Labor interpretations of the FLSA place excessive restrictions on volunteerism, others argued that changes to the law or regulations could jeopardize overtime protections for firefighters. No specific legislation was introduced or discussed at the hearing.

Volunteerism Revisited (continued)

Generally, pursuant to the FLSA, covered employers, including public employers, are required to pay employees no less than the minimum wage, and must pay time and a half for overtime for hours worked over 40 in a week (except for 7(k) employees in firefighting and law enforcement, who work a slightly longer work period before the overtime requirement applies).

However, the FLSA makes an exception from the definition of "employee", applicable to any individual who volunteers to perform services for a public agency. To qualify as a volunteer, the individual must receive no compensation, but may be paid expenses, reasonable benefits or nominal fees for the services. A person cannot qualify as a volunteer if the services are the same type of services for which the individual is employed and paid to perform for the same public agency. The basic purpose of this law or limitation on volunteerism is the protection of individuals from being coerced by their employers into "volunteering" work hours without pay. Therefore, under the FLSA, a paid firefighter cannot volunteer extra or unpaid hours to fight fires or perform their other duties on the employer's behalf without payment of overtime. Obviously, individuals who qualify as volunteers are exempt from the FLSA wage and hour requirements, including overtime pay.

During the recent hearing in February, several witnesses mentioned the June 23, 1993 opinion letter involving Montgomery County Maryland firefighters. That opinion, written by the DOL regional office in Philadelphia, apparently represents the Department's current position on the issue. In that letter, the Department of Labor representative stated that paid county firefighters could not volunteer unpaid services for a private volunteer fire unit in that county because even though the private unit technically was not a public agency it was found to benefit the county directly.

In opening the hearing, the subcommittee chairman, William F. Goodling, a Republican from Pennsylvania, addressed DOL interpretations, stating that DOL has "expanded what Congress wrote into law." Another Republican representative stated that as a result of the 1993 DOL interpretation, the county had enacted a law prohibiting county employees from volunteering firefighting services anywhere in the county. However, a Democrat at the hearing, Major R. Owens of New York, disagreed. He stated that nothing in current law prevents paid firefighters from volunteering, as long as they don't donate the same services they are paid to perform to the same employer. (This is the interpretation that the Firehouse Lawyer has always given to my clients, as I do not believe it would be difficult to demonstrate that each fire protection district, for example, is a separate municipal corporation, and not the same government as the county or any city or other municipality. While fire districts may have many ties to one another, they are still separate and distinct municipal corporations, until such time as they are merged.)

Nonetheless, there was conflicting testimony from fire service personnel during the hearing. Although several fire chiefs in different areas of the nation expressed the opinion that the FLSA as interpreted by DOL can operate to stifle volunteerism, the witness from the International Association of Firefighters responded that the FLSA volunteerism provisions did not need to be changed. He stated that the prohibition against individuals volunteering the same services they are paid to perform by their employer is a common sense provision that ensures employees are actually paid for all the hours they work. He stated that otherwise employers would be able to evade the minimum wage and overtime

Volunteerism Revisited (Continued)

requirements by getting employees to forego a part of their weekly pay by claiming that they are volunteering. Thus, the IAFF representative did not support changes, and stated that coercion would be a distinct possibility. The IAFF representative stated that: "As the only national organization representing the nation's professional firefighters, we can assure you that our members do not feel constrained in any way by the current law."

Personally, the Firehouse Lawyer is acquainted with numerous paid firefighters, some employed by unionized departments and some by non-unionized departments, who operate quite successfully as volunteers in other districts, either in the same county in which they are employed or in a neighboring county. We are unaware of any DOL enforcement actions against this rather common practice in the State of Washington. Frankly, we believe that issues relating to volunteer firefighters do exist, but they are not the issues highlighted in this hearing.

On the judicial front, there was an interesting federal district court decision in November, 1998. Certain individuals performed unpaid work for a township police department, and as a benefit for this unpaid work, they were made eligible for occasional paid assignments. The U.S. District Court for New Jersey recently found that these workers were still volunteers under the FLSA. In Todaro v. Township of Union, Civil Action No. 97-4875 (D. N.J., November 17, 1998), the plaintiffs worked as special law enforcement officers for the Township of Union, New Jersey. Pursuant to New Jersey law, these special officers were selected to perform police-related duties on a temporary basis in aid to the paid police force. The special officers were appointed to terms of up to one year with renewal possible at the end of each term. Under the local law, the special officers were required to perform at least four hours of town duty, i.e., uncompensated work related to law enforcement or public safety, each week. As long as they remained in good standing with their town duty obligations, the special officers became eligible prior to October 1995 to obtain certain paid assignments known as "jobs in blue". These "jobs in blue" officers performed primarily traffic, crowd control and security work for private or governmental entities, but were supplied by the township. The individuals were paid between $20.00 and $28.00 per hour depending upon the assignment and were paid directly by the private or governmental entity to whom they rendered the service. The only connection to their volunteer status as "special officers" was that their status as special officers made them eligible to get the paid "jobs in blue" work. There was no promise or contract that they would get such work but this established their eligibility.

The plaintiffs claimed, therefore, that they performed town duty volunteer work with the expectation that they would receive compensation through the "jobs in blue" work. Because of the legal concerns they expressed, the township essentially ended the ability of the special officers to work the "jobs in blue" assignments beginning in October 1995. When the township decided to discontinue the entire special officer program at the end of 1997, including the town duty component, the plaintiffs decided to sue under the FLSA. They claimed that they were not really volunteers, that they were employees of the township and that the town had violated the FLSA by not paying them the minimum wage. The township answered that the plaintiffs were volunteers while they performed the town duty non-paid work and were not covered by the FLSA.

The FLSA states that the term "employee" does not include any

Volunteerism Revisited (continued)

individual who volunteers to perform services for a public agency, as long as the individual
receives no compensation other than expenses, reasonable benefits or a nominal fee. See 29 U.S.C., Section 203(e)(4). The Act also states that individuals may not volunteer to perform the same type of services they are employed to perform for the same agency as discussed above.

FLSA regulations implement the act by providing that to be a volunteer an individual must perform services for "civic, charitable or humanitarian reasons". Also, they must do so without promise, expectation or receipt of compensation for services rendered. The court focused on these points, as the plaintiffs argued that they really served as town duty participants so that they could get the paid work eligibility. The court showed a realistic understanding of the circumstances regarding motivation of such volunteers. The court noted that the plaintiffs made no claim prior to 1997 that they were entitled to compensation even though some of them had been serving as "special officers" for as long as 27 years. The court said that no court had ever recognized eligibility for paid work as being itself payment for volunteer work. The special officers never received or had any expectation of receiving financial remuneration for performing the town duty. Eligibility for "jobs in blue" did not constitute a form of compensation, the court held.

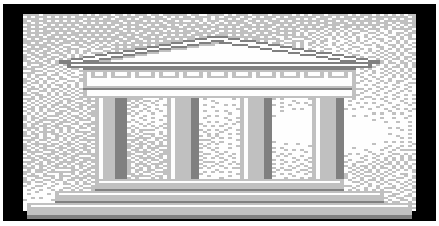
Compensation has been found to include such material substitutes as food, shelter or clothing, but the plaintiffs could provide no support for the claim that eligibility for employment itself constitutes compensation. The court refused to extend any common sense definition of compensation to incorporate such an intangible benefit.

Further, examining the motivation of the individuals to do the work, the court found that this definition of volunteer must be applied in a common sense way that takes into account the totality of the circumstances. The court found that even though plaintiffs were not motivated completely by civic reasons, the circumstances as a whole indicated they were volunteers. The court noted that many people are motivated by many factors. They may have been motivated by their hope that they would retain eligibility for "jobs in blue", a desire to keep certification in police training, or a sense of personal satisfaction and enjoyment derived from the work. None of these other motivations changed the fact that the total circumstances indicated that they were volunteers. The court also noted that FLSA regulations state that volunteers can receive reasonable benefits in exchange for their services and arguably being on the eligibility list for the "jobs in blue" was simply a reasonable benefit.

We believe that what is interesting about this case is recognizing that the regulations acknowledge volunteer status when a person performs services for civic, charitable or humanitarian reasons, but the courts may well recognize that people have many and complex motivations for actually accepting volunteer positions. Nothing is simple in modern life and it could well be that the altruistic reasons are only a partial or even a minority of the reasons for a volunteer remaining a volunteer. Judging by this one court's decision, at least, civic or humanitarian reasons do not need to be the only reason in order to justify volunteer status.

No Sector Boss

There will be no Sector Boss this month as no questions were received.



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