FIREHOUSE LAWYER

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FLSA - §207(k) Amended

We have often reported in these pages the conflicting court decisions interpreting §207(k) of the FLSA, with respect to EMS personnel and cross-trained firefighters with regard to whether they qualify as fire protection workers.

As most of you know, §207(k) provides a partial overtime exemption for emergency workers such as police and firefighters, allowing them to work more than 40 hours per week without the payment of overtime. Such personnel are often shift workers, and may work an official work period of between 7 and 28 days, subject to a sliding scale of hours depending upon the length of the work cycle, before they are entitled to overtime pay.

For example, a qualifying fire protection worker could work 106 hours in 14 days before being entitled to overtime compensation.

In recent history, however, there has been a real problem defining whether rescue workers and ambulance drivers, for example, as well as paramedics and EMTs meet the qualifications.

Different courts focused on different sections of the regulations and, not surprisingly, came up with differing results. Some courts focused on 29 C.F.R. §553.215 to see if the EMS workers were "an integral part of the public agency's fire protection activities. Other courts focused more on §553.210(a) which requires the workers to actually participate in fire suppression activities in their work, to qualify for the partial exemption.

A good illustration of the confusion facing public employers is illustrated by a comparison of the 8th Circuit and the 4th Circuit Court of Appeals rulings. In *Lang v. City of Omaha*, No. 98-3445, decided August 13, 1999, the 8th Circuit ruled that paramedics working for Omaha, Nebraska had also been trained as firefighters. Their medical support work directly concerned them with firefighting so they were partially exempt. That ruling was consistent with *Christian v. City of Gladstone*, 108 F.3d 929 (8th Circuit, 1997) which resulted in a similar ruling.

By contrast, the 4th Circuit Court of Appeals ruled that emergency medical technicians (EMTs) did not qualify under the exemption because they performed almost exclusively medical services. Their actual duties did not allow them to go on fire calls. The court in *West v. Anne Arundel County*, 137 F.3d 752 (1998), ruled that this situation exceeded the 20% limitation on non-exempt work and therefore the EMTs were ineligible.

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As previously reported here, the *Anne Arundel* case and other cases have resulted in a general uproar over the issue, which was seen by many as jeopardizing shift work for firefighters in the United States. Public employers could no longer expose themselves to the potential back pay risk if they construed the exemption wrongly. Therefore, a move began in Congress to amend §207(k). Now, by Public Law 106-151, enacted December 9, 1999, the FLSA has been amended to add a definition of the term "fire protection" at 29 U.S. Code §203(y):

> "'Employee in fire protection activities' means an employee, including a firefighter, paramedic, emergency medical technician, rescue worker, ambulance personnel, or hazardous materials worker, 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 exinguishment of fires or response to emergency situations where life, property, or the environment is at risk.

This new amendment should eliminate a good deal of the confusion about the application of the exemption. But, as we shall see, it probably will not eliminate all of the confusion or the ambiguity. Let us examine the four elements of the new definition.

To qualify for the partial exemption, the employee must first be trained in fire suppression. This is relatively clear and is not different from the pre-amendment regulations. Second, the employee must have the legal authority and responsibility to engage in fire suppression. This element is not free from ambiguity. Since it is a separate element, we would argue that legal authority and responsibility requires more than just being trained in fire suppression.

How are employees' responsibilities usually defined? Most municipal employers establish job descriptions, setting forth the duties or responsibilities of their employees. If the job description does not include both the legal authority and the responsibility to engage in fire suppression, how can the employee meet the definition? For example, a paramedic or EMT, whose duties do not include fighting fires of any kind (even car fires) should fail to meet this definition. We would suggest that paramedics and EMTs be trained and have the capability of pitching in on fire suppression, even if their actual duties do not include fighting any fires. This element does not require 20% (or any) of the employee's actual duties to include fire suppression. It remains to be seen whether the courts will interpret this statutory definition to mandate that the employee's actual duties include fire suppression. However, it seems to this writer that if the employer is going to bother training such employees in fire suppression, they should at least have the responsibility of pitching in in fire suppression activities in some capacity when needed.

Third, the workers must be employed by a fire department of a municipality, which is nothing new.

The fourth element of the new law seems to effect the greatest change. This again relates to actual duties as it uses the term "engaged". This requires that the employee be engaged in the prevention, control or extinguishment of fires or response to emergency situations where life, property or the environment is at risk. Since

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this requirement is written in the disjunctive ("or") as opposed to the conjunctive ("and") it is clear that these requirements are in the alternative. The amendment was written for the express purpose of allowing emergency responders such as EMS workers or hazardous materials workers to fit within the definition even though they are not actually engaged in the prevention, control or extinguishment of fires.

This fourth element of the definition seems to embody the intent of the sponsors of the bill. Already, however, there is some disagreement in Congress as to the effect of the change. The bill was introduced by Representative Robert Ehrlich, a Republican from Maryland. One of his staff personnel was asked whether EMS workers would actually have to respond to fire-related calls to be considered exempt under the new definition. The staffer responded that his understanding was that training and not response was the key exemption issue. We believe the language does not quite square with that interpretation, but he might well be correct concerning the intent. By contrast, Senator Edward Kennedy, a Democrat from Massachusetts, stated his understanding. He said that the second element of the amendment – legal authority and responsibility to engage in fire suppression – was included in the law for the express purpose of assuring that single-role emergency medical personnel are not covered by the exemption. Senator Kennedy added that: "Simply sending paramedics to the fire academy will not automatically bring them under the exemption."

Federal Department of Labor personnel have also already indicated that they feel the amendment would not change the result of the *Anne Arundel County* case. The source stated that the existing criteria for determining whether EMS employees are exempt basically remain the same under the new law. The DOL source felt that the amendment was aimed more at clarification as to firefighters than EMS workers. Certainly, the amendment does preserve the exemption for those firefighters who actually spend more than 20% of their time responding to medical emergencies as opposed to fighting fires.

In summary, while the recent amendment to the law does clarify the situation to a great degree, the definition would not seem to allow a partial exemption under §207(k) for purely emergency medical personnel with no duty or responsibility to engage in fire suppression. Many public employers may not want to expend the funds and time required to continually train and qualify as firefighters those medical personnel who spend very little time actually engaged in fire suppression duties.

Firehouse Lawyer Survey

In 1997, The Firehouse Lawyer conducted a survey of Pierce County fire districts, to collect certain basic data about them. Now, three years later, The Firehouse Lawyer is doing an updated survey to compare the various parameters with the results from three years ago. It will be interesting to see any increases in assessed valuation, whether taxes have kept pace with inflation, whether employees and volunteer forces have grown or shrunk and the like. For that reason, this month's Firehouse Lawyer will probably be mailed to all fire districts in Pierce County, although many of you receive the newsletter by e-mail. The actual survey form is included on the last page of this month's newsletter.

New Commissioner Training Conference

Training for new commissioners will be held on Saturday, March 11, 2000 at 10:00 a.m. at the Gig Harbor Training Facility. Call for details.

Wrongful Discharge for Violation of Public Policy Extended

On January 27, 2000, the Washington Supreme Court issued a very significant decision. In this 6-2 decision, the Supreme Court extended the wrongful discharge tort at common law, which many believed only applied to terminable-at-will employees to those employees protected by the "cause" provisions commonly contained in collective bargaining agreements or statutes.

In recent years, Washington, like many other states, has recognized various exceptions to the doctrine allowing public employers as well as private employers to terminate employees at will. One of the major exceptions stems from *Thompson v. St. Regis Paper Company*, 102 Wn.2d 219, 685 P.2d 1081 (1984), in which the court recognized a cause of action in tort for wrongful discharge in violation of public policy. At that time, it was quite evident that the ruling was an exception to the terminable at will doctrine, designed to prevent a result which contravened stated public policy. Subsequent case law from Washington and other jurisdictions suggested that public employees with collective bargaining agreements, and/or civil service protections, and perhaps also certain rights under the public employment laws (see *e.g.*, RCW 41.56) did not have a cause of action in court for wrongful discharge in violation of public policy. The common sense notion was that they simply did not need it, since they had their rights to proceed to arbitration of grievances under the union agreement and the right to file unfair labor practice charges with the Public Employment Relations Commission, as well as any possible civil service remedies for those with civil service protections.

Now, however, in *Smith v. Bates Technical College*, No. 67374-8, the Supreme Court has extended the wrongful discharge common law tort for violation of public policy to <u>all</u> employees, whether they are "at-will employees" or those terminable only for good cause. Because the court also ruled that exhaustion of remedies does not bar a court action before completion of the remedies under the collective bargaining agreement or statutory remedies, the employee now has a virtual panoply of options that may apparently be pursued concurrently or in the alternative.

In the case before the court, Kelly Smith was a traffic programmer for Bates at its on-site television station for approximately eight years. She was entitled to civil service protections and was covered by a collective bargaining agreement subject to RCW 41.56, the Public Employees Collective Bargaining Act. Thus, she had union remedies, civil service remedies, and PERC remedies. The employee pursued many grievances during her employment. In one of those grievances, she received a favorable arbitration award requiring reinstatement and back pay. Before the matter was determined in court, Smith had also filed unfair labor practices with PERC, but those were still pending at the time of the court's ruling.

Apparently, Bates complied with the arbitrator's order by reinstating Smith, reimbursing her lost wages and benefits, and purging her personnel file of adverse materials. She filed four separate ULP complaints with PERC, two preceding dismissal and two following dismissal. She complained of retaliation for filing her earlier grievances and challenged her dismissal in those ULPs. Before PERC could address those claims, she filed her complaint in Pierce County Superior Court, suing Bates, the college district, and four supervisory personnel, seeking monetary damages for wrongful discharge in violation of public policy, defamation, and violation

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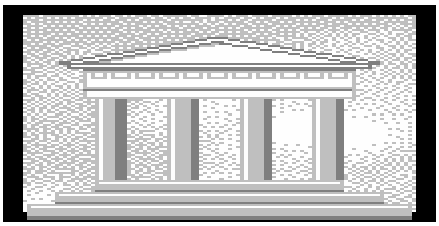
violation of her first amendment rights pursuant to 42 U.S. Code §1983.

The trial court granted a summary judgment in part, dismissing the wrongful termination claim for failure to exhaust her PERC remedies. While the Section 1983 claim (as to the individuals) was preserved for trial, at the end of the trial the court granted a defense motion to dismiss them as well. The defamation claim was allowed to proceed to trial, but the jury found that Smith had not been defamed. The trial court did allow Smith more than $10,000 for attorneys' fees incurred in the successful arbitration. The court of appeals affirmed in an unpublished opinion, but the Supreme Court granted review, confined to the issues of the common law tort of wrongful discharge in violation of public policy and the Section 1983 issue. In essence, the Supreme Court majority ruled that the common law tort of wrongful discharge for violation of public policy should apply to all employees. The court found there is an important distinction between tort and contract actions. The tort is independent of the term of employment or the nature of it, the court ruled. In effect, the court said that the remedies Bates pointed to were all contractual remedies and this was a tort action. Also the court said it was illogical to grant at-will employees greater protection from tortious terminations than "cause" employees.

While the majority had some logical and compelling arguments, at least in theory, Justices Guy and Talmadge, dissenting, were correct in my opinion. They pointed out that the wrongful discharge tort for violation of public policy was created as an exception to the employment-at-will doctrine. It was deemed to be necessary to protect those employees from violations of public policy. By contrast, public employees with cause protections have many remedies. At this point, as pointed out by Justices Guy and Talmadge, there will be a disincentive to utilize arbitration, civil service, and PERC as the court alternative may be more appealing to many. Frankly, we believe the judges should be encouraging alternative dispute resolution rather than further add to the congestion problem in the courts. This case engenders confusion and duplicity of actions, driving up the cost not only for public employers but also for the employees. The Firehouse Lawyer would acknowledge that, as a former PERC Commissioner and as a public employer's attorney, I may not be the most objective of reviewers. However, I predict that this decision will be regretted inevitably by both sides, employers and employees, will cause increased litigation and therefore increased costs, and will actually delay the delivery of just and fair results in a timely manner.



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