FIREHOUSE LAWYER

Vol. 3, No. 5 **Joseph F. Quinn, Editor** **May 31, 1999**

Little Privacy for Public Employees

A frequent client question relates to the degree of privacy afforded to public employees' records and files. A recent case from Anchorage, Alaska points up the very limited privacy to which public employees are entitled. The City of Anchorage was asked to release a salary list of municipal employees, and they did so, including names, titles, departments, base salaries, overtime and benefits. The IAFF protested, asking the city to release the salary information by classification instead of by name.

The Alaska constitution provides individuals with a right to privacy. The Anchorage city code exempts from disclosure personnel file information if the information reveals the financial status of any individual and would constitute an unwarranted invasion of privacy. The IAFF asked the court to declare that the release of employees' salaries violated the firefighters' privacy rights.

The court held the disclosure did not invade privacy because the firefighters had no reasonable expectation of privacy in the amount of public money they were paid. The IAFF appealed to the State Supreme Court which affirmed.

The Supreme Court held that public employees did have a legitimate expectation of privacy in their personnel files, but "personnel files" included only information that revealed something about an individual's personal life. The court said employees' names and salaries did not meet that definition. Also, the court found that public employees' salaries are not merely private matters and that the amount a city pays a public employee affects the public. The court held the disclosure also did not violate the city code as it was not an unwarranted invasion of privacy. See International Association of Firefighters v. Municipality of Anchorage, Supreme Court No. S-7993 and 5081 (1999).

What is the status of the law in the State of Washington on the same subject?

Actually, there are many statutes that may have some application to this question, including but not limited to Washington's Public Disclosure Act, RCW 42.17, the federal Freedom of Information Act, the Americans with Disabilities Act, the Fair Credit Reporting Act, etc.

Probably dealing with employee records issue-by-issue would be most appropriate. With respect to medical information of employees, the highest degree of confidentiality is required by law.

Generally speaking, personnel files and records should be kept confidential and should be released only to those persons legitimately needing to

Page	Inside This Issue
1	**Little Privacy for Public Employees**
3	**The Duty to Accommodate Disabled Firefighters**
4	**Partial Day Pay Docking Does Not Disqualify Nurses from FLSA Exemption**
4	**Recent EEOC Policy Guidance**

Little Privacy for Public Employees (Continued)

know. It is not appropriate to disclose identifying information and social security numbers. Some information, while sensitive, must be released upon an appropriate request, but is usually kept confidential in the ordinary course. For example, information regarding discipline or wage garnishments of employees could be very embarrassing and harmful to release. Nonetheless, there is a countervailing public interest in knowing about public employee discipline.

It is commonplace with public employers that criminal and credit background checks are performed prior to hiring. The results of these checks should be kept separate from the personnel file and maintained in a confidential manner.

With respect to medical information, the Americans with Disabilities Act (ADA) requires employers to maintain certain medical records confidentially and separately from other records. Only supervisors and managers with a need to know can have access to such information because of the duty to accommodate disabled workers.

The Family and Medical Leave Act (FMLA) also requires employers to maintain medical information regarding an employee and the employee's family, in the event of FMLA leave. Any documents relating to medical certification, medical histories, or any aspect of FMLA leave shall be maintained as confidential records in separate files from the usual personnel files.

If you have a worker's compensation claim, any medical information related to that claim should be kept in a separate confidential claim file.

Any records relating to an employee's participation in an Employee Assistance Program should be treated as a confidential medical record. If the mandatory drug and alcohol testing regulations of the federal Department of Transportation apply to your transportation workers, then regulations governing drug and alcohol testing procedures require that these records be retained in a confidential manner.

Any documents disclosing medical information or conditions, kept for health insurance purposes, should also be placed in the employee's separate medical file and confidentiality maintained.

While vacation time accruals and usage do not need to be kept confidential, sick leave records probably should be kept confidential. Since there is such a close connection between sick leave, FMLA leave, and ADA issues, sick leave records should be kept in a separate confidential file with the other medical information.

In summary, while Washington's Public Disclosure Act does allow protection of the privacy rights of employees, such protection is limited to those items on which the public has no legitimate right to know. Certainly, medical information is the primary `protected type of information. Employees' identities should be protected from commercial abuse and so data such as addresses and social security numbers should be kept confidential. On the other hand, the public has a legitimate right to know employees' salaries, and it is not unduly intrusive into very personal matters for the public to know how much public employees are paid. Similarly, the public has a legitimate right to know about the performance of public duties, and therefore disciplinary records must be open upon proper request. Nonetheless, an employer should be prudent to maintain the confidentiality of internal investigations to the extent possible, consistent with the right of the alleged wrongdoer to confront the accusers.

The Duty to Accommodate Disabled Firefighters

A recent client inquiry, and recent cases, suggest that the duty to accommodate disabled firefighters or police officers can create difficult issues.

A client recently asked me to evaluate the extent to which the employer was required to accommodate a firefighter who, after at least 15 years on the job, acquired a chronic condition of sleep apnea and resultant hypersomnia (excessive sleeping during the day). The firefighter had used up all of his sick leave and almost all of his vacation leave. The question raised interesting possibilities for claims under the Americans with Disabilities Act and a possible duty to accommodate. The department had no permanent light duty positions and considered the ability to stay awake during day shift an essential function of a firefighter position.

Recent cases from Ohio and the Sixth Federal Circuit raise similar issues. The City of Cincinnati established a separation policy for police officers who became permanently disabled. Essentially, the city determined that police officers in sworn officer positions needed to maintain "combat readiness". If they were not physically able to maintain that condition, they were required to be separated from duty. Apparently, this police officer suffered a retinal detachment in his eye.

The trial court found, however, that the employer did not properly accomplish the medical separation, because the police division of Cincinnati had its own regulations requiring the chief of police to notify an employee of the right to request an accommodation. Once the officer requested reassignment to a staff position as a sworn officer, the City became obligated to look for a position for him within the police division, the department, and within the City of Cincinnati as a whole. The department did not have permanent light duty jobs; it offered the officer a non-sworn position as a 9-1-1 operator, with a $13,000.00 cut in pay.

The officer appealed his separation to the Civil Service Commission which upheld the separation, but declined to rule on the accommodation issue. The state trial court in Ohio reversed and the court of appeals upheld that ruling.

The City of Cincinnati argued that the court should not second guess the city's determination that combat readiness is an essential function of a sworn officer position.

Apparently the state court relied upon a U.S. Circuit Court of Appeals decision placing the burden on the employer to prove the essential functions of the position. In Hamlin, et al. v. Wright and the Charter Township of Flint, No. 97-126, the Sixth Circuit reinstated a jury verdict in favor of a Michigan firefighter. The firefighter claimed he was fired after the City of Flint refused to accommodate his request for a permanent reassignment to assistant fire chief.

The court found the city failed to meet its burden to prove that firefighting was an essential function of the position sought, not the job title previously held. The evidence showed, as would be expected, that the essential functions of the assistant chief position were supervisory and administrative. An assistant chief was not a responder to emergencies, did not engage in strenuous front-line fire suppression, search or rescue. It would appear, therefore, that the Hamlin court would include in the duty to accommodate the duty to make available to the disabled firefighter a promotional opportunity.

The duty to accommodate must be limited to reasonable

The Duty to Accommodate Disabled Firefighters (continued)

accommodations. Ordinarily, we believe that means returning the employee to duty in the same position, by making adjustments to the duties or facilities so that they can continue productive work without creating an undue hardship on the employer. We are not familiar with a case where an employer has been required to promote a person in order to accommodate them. Certainly it does not seem unreasonable to give them the opportunity to compete for a promotion, assuming there is a promotional vacancy existing at that particular time.

However, in a small work place, for example, a fire department with only six or eight firefighters, and very few staff positions for which the ordinary firefighter would be qualified, the ruling does not make much practical sense. In Mason v. Frank, 32 F.3d 315 (8th Cir. 1999) the court held the postal service properly declined to consider a clerk for a higher level position, stating that the duty to accommodate in such a manner would violate others' rights under a collective bargaining agreement.

The Cincinnati police officer case is Cook v. City of Cincinnati, No. C-980552 (Ohio Court of Appeals, First District, March 26, 1999.)

Partial Day Pay Docking Does Not Disqualify Nurses from FLSA Exemption

A Michigan federal court has applied 29 C.F.R. Section 541.5(d). That regulation is a special rule for public sector employers, recognizing that principles of public accountability to taxpayers often prevent such employers from paying employees for hours they do not work. The rule provides that public employees who otherwise qualify as salaried employees exempt from the overtime provisions of the FLSA will not be disqualified from exempt status solely because they are subject to pay reductions for lost time of less than eight hours. Generally, FLSA rules prohibit reductions based on the number of hours an employee works, even if employees work only part of a day. With private employers, such partial pay docking may jeopardize the exempt status and therefore require overtime pay. Not so with public agencies under the regulations, according to this court in the Eastern District of Michigan.

The case involved nurses who worked full time for a county provider of mental health services, but beyond their regular work hours performed nursing work part time at a crisis clinic operated by their employer. The court first analyzed in depth the allegation that they were independent contractors and not employees as to their after-hours work, concluding that they were in fact employees. Then the court looked at the various exemptions that might apply to these nurses. The court concluded that they were exempt professional employees and then addressed the salary basis portion of that test. It is in the salary basis portion of the regulations that this special rule exists for public sector employers. Essentially, the court found that the regulation was appropriate and applicable given the public status of the agency. See Richardson v. Genesee County Community Mental Health Services, E.D. Mich., Case No. 98-71697, decided April 8, 1999.

Recent EEOC Policy Guidance

The Equal Employment Opportunities Commission issued an Americans with

Recent EEOC Policy Guidance (continued)

Disabilities Act policy guidance on March 1. The guidance document is helpful in examining situations where a leave request is covered by both the Family and Medical Leave Act (FMLA) and the ADA.

Essentially, the employer should determine the employee's rights under each law separately before considering how they overlap, the EEOC said. These statutes provide distinct employee protections and employer requirements. Obviously, however, a serious health condition under the FMLA may also be a disability under the ADA.

Under the ADA, an employee needing leave is entitled to such leave only if there is no other effective accommodation available and if the leave will not cause the employer undue hardship. "Undue hardship" under the act means a significant difficulty or expense for the particular employer.

An employee may apply any accrued paid leave to an ADA-related absence. If the paid leave does not sufficiently cover the entire leave period needed, the employer should grant unpaid leave under the ADA, the EEOC said. The employer must continue the worker's health insurance benefits while they are absent only if it does so for other employees in similar leave circumstances. An employee's position must be held open while the worker is on ADA leave unless the employer can show that doing so causes undue hardship, according to this new guidance.

The employer must return the worker to the same position when the employee is ready to return, so long as the employee is still qualified for the position. In other words, if the employee can perform the job's essential functions, with or without reasonable accommodation, the employee is entitled to return to the same position.

Comparing the FMLA, we find that it provides only 12 weeks of leave in a 12-month period under specific circumstances. Unlike the ADA, the FMLA states that an employee must be returned to the same or an equivalent position upon returning from leave. Moreover, the FMLA requires the employer to continue a workers' health insurance coverage during the leave, as long as the employee pays their share of the premiums.

An example contained in the guidance might be helpful. An employee with an ADA disability needs 13 weeks of leave for treatment. While the FMLA entitles the worker to only 12 weeks of leave, because the worker is ADA covered, the employer cannot deny the longer leave unless it could show that would cause undue hardship to the employer.

In another example, an employee with an ADA disability is ready to return to work after taking ten weeks of leave under the ADA. The employer wants to place the worker in an equivalent position instead of the same position. The FMLA allows that, but the ADA requires the worker to be reinstated to the original job, unless the employer can show undue hardship.

While EEOC "insiders" reacted to the issuance of the guidance by stating it is quite helpful, some outside commentators have stated that the guidance obviously does not cover all of the bases. The guidance does seem helpful, but like any regulation or court case, it does not provide all the answers. The employer would be wise to review employees leave absences in a comprehensive manner. There may be issues of workers compensation, SOPs or other policies of the employer, disability insurance benefits, medical opinions and certifications, and many other issues.

The EEOC guidance is available at the EOC's website:

Recent EEOC Policy Guidance (continued)

www.eeoc.gov. You may also call the commission's publications distribution center at 1-800-669-3362 or write to the EEOC's Office of Communications and Legislative Affairs, 1801 L Street NW, Washington, D.C. 20507. We feel that any employer would find the guidance useful.

Seminars

The 1999 Seminar Series has been finalized according to the schedule below:

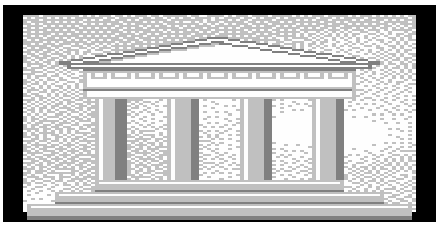
June 24, 1999 --
Legislative Update

August 26, 1999 --
Insurance and Risk Management/Liability

October 28, 1999 --
Labor/Management Issues

December 16, 1999 --
Annexation and Incorporation Issues

Seminars are open to all authorized fire district personnel of the State of Washington. The admission price for non-contract parties is $75.



Joseph F. Quinn

6217 Mt. Tacoma Dr. S.W.

Lakewood, WA 98499

(253) 589-3226

(253) 589-3772 FAX

e-mail:

firehouselaw@earthlink.net

INFERNO WEBSITE: If you're not reading this issue online, you could be. Go to www.ifsn.com and you'll find the *Firehouse Lawyer* and many fire-service features.