FIREHOUSE LAWYER

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Revisiting FLSA

The purpose of this article is to follow up on the aftershocks of the U.S. Supreme Court declining review in the Anne Arundel County FLSA case.

For purposes of review, the Fair Labor Standards Act contains an exemption in Section 207(k) exempting workers engaged in fire protection activities from the requirement to pay overtime after 40 hours per week. What the Anne Arundel case and others have called into question is whether it is appropriate to consider certain ambulance and rescue personnel as being engaged in firefighting activities so as to qualify for the so-called 7(k) exemption.

We will not review further the results of the Anne Arundel County (Fourth Circuit U.S. Court of Appeals) decision here, because you may simply review last month's article in the Firehouse Lawyer. Also, various other commentaries have been written in numerous publications, so anyone engaged in the fire service who hasn't heard about the Anne Arundel case is probably working in some other country!

Needless to say, there has been a great deal of activity in the last 30 days or so. Apparently, both the International Association of Fire Chiefs and the International Association of Firefighters have been planning their strategies to resolve this matter once and for all. It appears that it is safe to say that no one really desires to see the demise of shift work in the fire service, and therefore the shortcomings of the regulations, as highlighted by Anne Arundel and similar cases, will apparently be addressed.

First, we would like to report that the Department of Labor is expected to release soon the new Standard Occupational Classification (SOC) for firefighter. The new SOC for firefighter is expected to explicitly include emergency medical services among the tasks carried out by a firefighter. Obviously, the new SOC would include all of the usual activities such as fire suppression and other listed activities that have long been associated with firefighting. In the new SOC, apparently emergency medical services will not be limited to the scene of a fire or a motor vehicle accident.

We believe that this new SOC may well have a significant positive impact on future court interpretations of the Department of Labor regulations. However, we also strongly believe that this change alone will not suffice as the problem will still remain with some ambiguities contained in the important sections of the federal regulations.

Second, just a quick report on what the International Association of Fire Chiefs is doing. We have seen a draft

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special report which will be published soon by the IAFC. The association is also preparing a comprehensive text on the FLSA as it affects the fire service, and that will be available from the Publication Fulfillment Department at IAFC headquarters. Also, there will be a presentation on this issue at the IAFC EMS section conference in Las Vegas between April 26th and 28th.

The IAFC government relations team is actively working with congressional representatives and staff for the reintroduction and passage of legislation to clarify the language of the FLSA so that it more accurately defines fire service activities. We believe that is exactly the type of legislation needed to clearly state congressional intent as to the FLSA's coverage or exemption of today's modern fire service employees.

Third, in the meantime there are certain steps that fire departments can take to minimize their exposure to potential liability for failure to comply with the 7(k) exemption. While compliance with other regulations is beyond the scope of this article, it goes without saying that the organization should review periodically whether the executive and/or administrative exemptions are complied with on any applicable personnel. Also, the department should review whether "regular rate" calculations are being made appropriately and all types of pay that must be included therein are being included.

In my review of the applicable case law, I discern certain patterns or themes that suggest greater exposure to FLSA liability. For example, a department with a separate EMS division, which is not truly integrated with the rest of the department, would certainly raise a judicial eyebrow. Similarly, job descriptions that prohibit paramedics or emergency medical technicians from engaging in fire suppression duties would also be suspect. That was one of the factors in the Anne Arundel County case.

Cross-training is certainly advisable. If a worker is not receiving, or has never received, any training on fire suppression but only training on emergency medical care, that would certainly increase liability exposure.

Although ultimately a department may not be able to satisfy the 80/20 rule alluded to in prior articles, that is not the only regulation that must be complied with, and therefore, each department should start with the basic four-part test of the definition contained in one of the primary regulations, i.e., Section 553.210.

To get over the first hurdle, the employee must (1) be employed by an organized fire department or fire protection district; (2) be trained to the extent required by state statute or local ordinance; (3) have the legal authority and responsibility to engage in the prevention, control or extinguishment of a fire of any type; and (4) perform activities required for, and directly concerned with, the prevention, control or extinguishment of fires, including such incidental non-firefighting functions as housekeeping, equipment maintenance, lecturing, attending community fire drills and inspecting homes and schools for fire hazards. Thus, if a department's personnel cannot meet, for example, items (3) or (4) in the above definition, one never gets to the issue of the 20% limitation on non-exempt work. If the personnel do not meet that definition, they are not 7(k) exempt.

There is no guaranteed, or absolute, method of preventing this particular liability for some departments. If a department has already structured its paramedic or EMS division as a separate entity, then there are no good choices other than revamping the program. Therefore, for those

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departments, the best hope is to press hard for changes to either the statute or the federal regulations implementing the FLSA. Certainly the change in the Standard Operation Classification is a step in the right direction.

FMLA "BRIEFS"

There have been a few interesting recently reported cases arising under the Family and Medical Leave Act. But before we discuss any cases, it should be noted that legislation is being proposed to amend the FMLA. The amendments would expand the law to include more employers. In the House, H.R. 91, known as the "Family and Medical Leave Improvements Act" would decrease from 50 to 25 the number of employees required for an employer to be covered by this leave law. H.R. 91 would also allow FMLA eligible employees to take 24 hours of leave within a 12-month period to participate in children's school activities, to accompany children to routine medical and dental appointments, and to accompany an elderly relative to medical, dental or professional services appointment.

In the Senate, S. 201, known as the "Family and Medical Leave Fairness Act" would expand FMLA coverage to employers of 25 or more workers.

Court cases

First, the Fifth Circuit recently held that an employee who adopts a child may take leave under FMLA only within the first twelve months after placement of the child. In the case in question, the person did not request FMLA until almost three years after the adoption proceedings had been completed. Therefore, the court held he was ineligible to invoke the FMLA. See Bocalbos v. National Western Life Insurance Company (5th Cir.), No. 97-50445, Dec. 23, 1998.

In a First Circuit case, because an employee's healthcare provider had released the employee to return to work, she no longer had a "serious health condition" as defined by FMLA. The Court found that once the worker has been certified as fit for duty, they no longer are eligible for FMLA leave. The employee was not able to meet the burden of proof to show she was unable to perform her job's function when she returned from leave. In the particular case, the employee also had a history of absenteeism throughout the duration of her employment, which cannot be ignored. See Szabo v Trustees of Boston University, (5th Cir.), No. 98-1410, Dec 31, 1998.

In a third case, the employer was not successful. A gas station manager replaced while on leave under FMLA, and not offered the same or equivalent position upon return to work, was rightfully awarded $43,000.00 by a federal jury. The First Circuit so held on December 30, 1998. The U.S. District Court for Maine, at the trial court level, held that hiring someone to replace the gas station manager while he was on leave did not itself violate the FMLA. However, the court held that the oil company was required to offer him equivalent work and compensation when he returned.

The employer appealed but lost at the First Circuit. The employer argued that he resigned, however, the court held that his comment that he and the employer were "going to part company" did not constitute a voluntary resignation. The court also ruled that a worker seeking reinstatement does not need to physically present himself to the employer's place of business in order to "return from leave". The court said that requiring employees to show up on the employer's doorstep in order to be eligible for reinstatement would be contrary to the spirit, if not the letter, of the regulation.

FMLA Briefs (continued)

See Watkins v. J&S Oil Company, Inc., (1st Cir.), Nos.98-1002 and 98-1003, Dec. 30, 1998.

SAFETY REGULATIONS UPDATE

As many readers know, the State of Washington Department of Labor and Industries has been engaged in the process of amending the Safety Standards for Firefighters. Recently, the WISHA Services Division published a concise explanatory statement, discussing the amended regulations. The Firehouse Lawyer received a copy of the department document, since the author was one of the commenters on the regulations. Anyone needing a copy of the department's concise explanatory statement regarding these amendments can contact the Firehouse Lawyer and we will fax you a copy of this 19-page document. The purpose of this comment is to just highlight a few of the key changes.

WAC 296-305-01005 "Definitions" was changed somewhat. The definition of "incipient (phase) fire" was modified for clarification. Definitions were added for "interior structural firefighting", "proximity protective clothing", "rapid intervention team (RIT)" and "respirator".

The section on Management's Responsibility -- 01509) -- was changed somewhat. The subsection was rewritten and formatted differently to create a (7)(a) and (b). Ultimately, the amended regulation makes it clear that the employer shall assure that employees who are expected to do interior structural firefighting are physically capable of performing duties that may be assigned to them during emergencies. Second, in 7(b) it states that the employer shall not permit employees with known physical limitations reasonably identifiable to the employer, for example, heart disease or seizure disorder, to participate in structural firefighting emergency activities unless the employee has been released by a physician to participate in such activities. The department's response to various comments makes it clear that the department does not feel it is appropriate to specify any particular way of ensuring compliance with the physical fitness needs, instead stating that the employer can satisfy the standard in many different ways.

The amendments also clarify several regulations pertaining to various types of personal protective equipment.

With respect to subsection 05001, Emergency Fire Ground Operations -- Structural, this subsection has been reformatted and written more clearly for better understanding. The rewritten subsection clarifies the role of the incident commander, the necessity for two standby firefighters and the provision of rapid intervention teams. It also addresses the "initial stage" of a structure fire incident.

The foregoing are the major, but not the only, amendments to various sections or subsections of WAC 296 - 305. The amendments also touched upon chapter 296 - 24, part G-2, Fire Protection, particularly with clarification of the applicability to fire brigades and private fire departments.

Sector Boss

Disclaimer

We need to clarify the purpose of this question and answer column. Like the Q&A column in any newspaper, the purpose of the Sector Boss column, and indeed the purpose of the Firehouse Lawyer newsletter, is to educate with respect to the law, but not to give

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legal advice to any particular client. There is no attorney-client relationship, simply because an agency or person has sent in a question to the newsletter editor. The Sector Boss column is not a free legal clinic for those submitting questions, even if they happen to be clients of Joseph F. Quinn. In other words, the purpose of this column is to answer short legal questions if there is room in the newsletter. A question may or may not be selected for publication. There may simply not be room. Joseph F. Quinn is not practicing law in any state except Washington, and therefore materials in the Firehouse Lawyer are not a substitute for obtaining legal advice for a particular situation. Therefore, readers are advised to consult with a qualified and competent attorney in their state or with respect to the federal questions sometimes discussed here.

Now that we have cleared up any confusion, let's try to educate and answer some interesting questions!

Q: In a volunteer fire department, what are the pros and cons of considering the volunteer application of a person with, for example, no hands such as a thalidomide-affected individual? Are there liabilities to the fire department if such a person were to be allowed to serve as a firefighter?

Skamania County,
Washington

A: We will assume for purposes of this discussion that the Americans with Disabilities Act would apply to a volunteer applicant and a volunteer fire department, even though technically they may not be considered an employee. The ADA provisions include public accommodations and other aspects in the employment sections, but we will assume the ADA applies. The ultimate fact is that the occupation of firefighter does have certain bona fide occupational qualifications (BFOQs) which involve physical activity.

We can assume that a person with no hands, affected by the drug known as thalidomide, for example, would be ordinarily considered a qualified individual with a disability. That is because there would be several major life activities that they may not be able to perform. I believe it would be appropriate to allow such a person to participate in the application process and/or interviews. However, the job description of volunteer firefighter should be written to require certain physical activities that such a person probably would not be able to perform. For example, one volunteer firefighter job description in our files states that a volunteer must have certain qualifications, including "physical skill, strength and stamina to reach, remove, and use effectively heavy and bulky items from vehicles and handle heavy hose loads". The same list of qualifications states that the volunteer must have no physical or mental health impairment that would interfere with the tasks required.

It would seem that a person with the described impairment would not be able to perform the physical duties of a firefighter. Of course, it may be that a department has many types of volunteers. Many departments have a designation called "support firefighter" or even some other sort of support services division. These are not truly firefighter positions, but yet may be functions that qualified individuals with disabilities could perform in spite of their physical limitations. If that was the intent of your question, then I would stress that you need to distinguish between volunteer firefighter and other types of "volunteers".

If a disabled individual were hired as a volunteer firefighter and were assigned duties in a firefighting capacity, there might be liability situations created. It seems to me that such a person could present a danger to himself/herself or others because of their physical limitations. If

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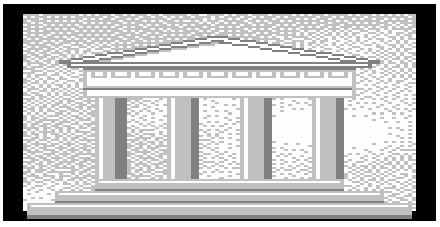
ever there were any untoward incident such as an injury to a co-worker or a member of the public, the district might be taken to task for hiring a person who is not qualified.

The bottom line is that firefighting is a physically demanding and dangerous activity performed in hazardous atmospheres. It requires a significant amount of physical strength and capability. Since these are BFOQs for firefighters, there is no violation of the discrimination laws if such persons are deemed unqualified.



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