FIREHOUSE LAWYER

Vol. 2, No. 4 Joseph F. Quinn, Editor April 30, 1998

Section 207(k) Controversy Heats Up

Under the Fair Labor Standards Act (FLSA), as many of our readers know, employees engaged in fire protection activities may qualify for the 207(k) exemption from the FLSA, which allows such employees to work up to 212 hours in a 28 day work period without necessarily being paid overtime pay. To qualify as being "engaged in fire protection", an employee must (1) be employed by an organized fire department or fire protection district; (2) have been trained in accordance with applicable law; (3) have legal authority to fight fires; and (4) perform activities directly concerned with preventing, controlling or extinguishing fires.

In recent months, there have been conflicting decisions by the Federal Circuit Courts of Appeal, and this issue could be headed for the U.S. Supreme Court.

On February 18, 1998, the 4th Circuit Court of Appeals held that certain Emergency Medical Technicians (EMT) who spent less than 80% of their time engaged in firefighting did not qualify for the partial exemption under 207(k) of the FLSA.

The case arose in Anne Arundel County, Maryland. A group of current and former EMTs for the County Fire Department's EMS Division sued the employer for back overtime pay, disputing their classification as fire protection workers. The District Court found the employees not 207(k) exempt and the 4th Circuit Court of Appeals essentially affirmed. The trial court had also ruled that certain plaintiffs who were EMS captains and lieutenants were not exempt, but the Appellate Court reversed as to them, finding them fully exempt from the FLSA as administrators or executives.

The reasoning of the 4th Circuit Court of Appeals should be troublesome to all employers of emergency medical service workers, such as EMTs, paramedics, and even paramedic/firefighters. The court was obviously troubled by the amount of work these employees performed that was not fire protection, due to the 20% limit. The court found they performed mostly medical services and related work, making them medical personnel rather than firefighters. Evidence indicated that at least 80% of the departments' calls necessitated emergency medical services and not fire protection. The court found the EMTs were prohibited by "standard operating procedure" from engaging in firefighting. In light of that evidence, the plaintiff EMTs generally did not and could not fight fires.

The Court of Appeals found that the EMS Captains, Field Lieutenants and Training Lieutenants were paid under the salary basis test. These individuals received a minimum predetermined amount each week

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which compensated them for 50 hours even if they only worked 48, and they were not subject to improper reductions in pay. The court found the captains exempt as executives, since they spent most of their time managing other employees, evaluating their performance, attending managerial meetings and instructing subordinates. These captains supervised either a whole fire station or an entire shift of workers, either of which numbered well above two other employees.

As to the Field Lieutenants, the Appellate Court reversed the trial court, finding that the Field Lieutenants were not working foremen but were executives, as they not only supervised workers in the field but also evaluated subordinates and managed the people and equipment assigned to their units.

As to the Training Lieutenants, again the Court of Appeals differed with the District Court and found that the Training Lieutenants qualified for the administrative exemption from the FLSA because they did exercise discretion and independent judgment. Therefore they met the duties test and the salary basis test.

The decision of the 4th Circuit Court of Appeals in this Anne Arundel County, Maryland case may affect many employers who have been claiming the 207(k) exemption for emergency medical services personnel. The practical result in this case was that the county is now liable for payment of back wages totaling nearly $4,,000,000 as well as expensive staffing changes to avoid future violations. The employees in question were fully cross-trained firefighter/EMTs. While certified as firefighters, they were apparently dispatched in ambulances to structure fires, vehicle accidents and hazardous materials incidents. As many as 90% of their calls were EMS related. It seems to this writer that there was nothing unusual about these employees, as they were cross trained like many departments do throughout the United States. It is not uncommon at all for the call volume in an urban fire department to be highly concentrated on EMS calls and not fire calls. Even in Anne Arundel County itself, firefighters assigned to engine companies are certified EMTs. They will respond to EMS calls either on their engine or in a basic life support (BLS) ambulance. Typically, 50% of the call volume are EMS calls. Therefore, arguably, even Arundel County firefighter/EMTs not in the EMS division, exceed the 20% limitation and may not be eligible for the partial overtime exemption. In our experience, most fire departments that provide first responder firefighter/EMTs through fire suppression companies on fire engines are similarly situated due to the call volume. Therefore, as a practical matter the question might be asked whether the 207(k) exemption has been gutted by this decision.

It should be noted, however, that the 4th Circuit view is not the only view on this question and perhaps the matter should be reviewed by the United States Supreme Court. See the following article.

Supreme Court Declines To Hear 8th Circuit Case

As reported in the Firehouse Lawyer in June of 1997, the 8th Circuit Court of Appeals ruled last year that certain Gladstone, Missouri firefighter/paramedics were qualified for the 207(k) exemption even though they spent more than 20% of their time on unrelated activities that were not strictly firefighting. The United State Supreme Court recently denied review of that case, declining to hear it, and letting the 8th Circuit ruling stand. The employees in that case responded to fire alarms, accidents and

Supreme Court Declines To Hear 8th Circuit Case (continued)

medical emergencies. They were available to respond to all fire calls and were dispatched to about 50% of the fire calls annually. These paramedics had argued they spent less time on fire calls than medical calls responding to more medical emergencies than fires or motor vehicle accidents. The 8th Circuit noted that a key element in that case was the fact that the paramedics in question actually did fight fires. The 8th Circuit noted that the four part test of the regulations did not contain a requirement that firefighting be an employee's primary duty. In reversing the District Court, the 8th Circuit Court of Appeals stated that congress intended to include within the scope of the 207(k) exemption paramedic and rescue work substantially related to fire protection. The fact that they were providing paramedic services on accident and medical emergency calls not stemming from a fire or a vehicle accident did not alter the nature of their duties or cause them to perform tasks unrelated to their job. Although the Gladstone, Missouri case does not support application of the 207(k) exemption to paramedics who purely respond to emergency medical calls, with no fire certification or training, it does seem to support the exemption application to the mixed employees, such as fire fighter/paramedics or EMT/ paramedics who are certified and trained, and who do respond to fires.

In summary, there does seem to be a conflict in reasoning between the 8th Circuit and the recent 4th Circuit case. However, the U.S. Supreme Court having now declined to hear the 8th Circuit case, suggests it may not necessarily agree with the 4th Circuit ruling. It will be interesting indeed to see if the attorneys for Anne Arundel County, Maryland seek Supreme Court review of the recent decision. Inasmuch as there is a conflict between the circuits, one of the criteria for Supreme Court review does seem to be present. While most Supreme Court cases involve the Bill of Rights, or other constitutional principles, the interpretation of Federal statutes also comprises a significant part of the court's workload. This is particularly true when the Circuit Courts of Appeal have rendered conflicting rulings. The author was involved in just such a situation during the years 1980 through 1986, when the Federal Circuits entered conflicting rulings interpreting a portion of the comprehensive Employment and Training Act. The author argued for Pierce County, Washington, in the April 1986 case of Brock v. Pierce County in the U.S. Supreme Court.

ADEA Release Voided

It is not unusual for an employee, at retirement or termination, to be asked to sign a release of all claims. Typically, an employer offers the employee a monetary incentive, such as severance pay, which coupled with the release should guarantee that no lawsuits would stem from the separation. In a decision announced in January, 1998, however the U.S. Supreme Court reinstated an employee's age discrimination lawsuit under the Age Discrimination in Employment Act (ADEA) even though the employee did sign a release of all claims, received her entire severance package and did not offer to repay it.

The ADEA does allow older employees, over the age of 40, to waive their right to sue for discrimination. To be valid, however, the waiver must be "knowing and voluntary." After differing court interpretations, Congress clarified the language in 1991. The act was amended to state that a waiver must specifically refer to claims arising under ADEA, employees must be given at least 21 days to consider the release and 7 days to rescind it.

ADEA Release Voided (continued)

In the case in question, Oubre v. Entergy Operations Inc., Supreme Court No. 96-1291 (1998), the company only gave the plaintiff 14 days to make a decision. She consulted lawyers, accepted the severance package and signed the release. She received 6 payments over 4 months totaling $6,258.00. Thereafter, she sued under the ADA claiming she was "constructively discharged" due to her age. (A constructive discharge is when an employee resigns but then claims they were forced to quit.)

The employer claimed the plaintiff validated the otherwise invalid release of claims by accepting and keeping her severance pay. The employer argued she couldn't invalidate the release unless she returned or tendered the money back. It is a commonly accepted contract law doctrine that a party cannot challenge a contract, while at the same time continuing to claim the benefits of the contract.

The employer won at the District Court and the 5th Circuit Court of Appeals, but lost in the United States Supreme Court in a 6 to 3 decision. The Supreme Court found the employer violated the act by failing to give 21 days notice, failing to give the plaintiff 7 days to change her mind and failing to include specific reference to ADEA claims in the release. Obviously, the court required strict compliance with the statutory requirements or the release was invalid.

It does seem absurd that the plaintiff should be able to keep the money. In a concurring opinion, Justice Breyer noted that nothing in the statute or the agreement would stop the employer from asking for the money back. He even suggested that the employer might be able to deduct the amount of the severance pay from any judgment that the plaintiff received in her age discrimination lawsuit. The effect of the Supreme Court's decision is to send the matter back for trial. Justice Clarence Thomas, dissenting, argued that the traditional "tender-back" requirement of contract law should apply since the statute did not provide otherwise.

Clearly, whenever an employer offers early retirement or lays off employees age 40 and over, the statutory requirements of the ADEA must be satisfied. Employers are well advised to consult with their attorney to draft and/or negotiate the severance or other agreement and the release of claims.

Brief Updates

Here are a few short updates on issues of interest, or those previously dealt with in the Firehouse Lawyer:

- **Firefighter's Rule**

Last month's lead article related to the Firefighter's Rule, which in most states makes it difficult, if not impossible, for a public servant to recover damages in a case arising out of the hazards of their job. As we pointed out last month, one should not jump to the conclusion that there is no liability, as there are many exceptions to the rule. A recent Arizona case points out the accuracy of the analysis. A firefighter was injured during a routine building inspection of an apartment complex. Although the trial court ruled against the firefighter, the Court of Appeals of Arizona, Division 1, reversed, holding that the firefighter's rule does not apply to routine building inspections.

- **Same Sex Harassment**

In a ruling that was really not very surprising, the U.S. Supreme Court has held that sexual harassment of a man by another man, in the workplace, violates Title VII of the Civil Rights Act of 1964. Employers should be alert to the possibility that all of the usual principles

applicable to sexual harassment can apply even though the harasser and the victim share the same gender. Of course, this is not limited to unwelcome advances of a homosexual nature. It also can apply to the hostile environment cases, wherein comments or humiliating actions can lead to an oppressive environment in the workplace, even if there is no unwelcome advance or quid pro quo activity.

- **FMLA Requires Medical Necessity**

Frequently we have reported the confusing FMLA decisions and how an employee qualifies for FMLA. In a case arising in Ohio, an arbitrator held that a public employee was not qualified for FMLA leave because she failed to prove medical necessity. Although the employee's physician stated that the worker would need intermittent FMLA leave to attend doctor's visits, there was no medical certification for her absence attributable to the depression that was causing the doctor visits. The arbitrator found no proof that the condition was shown to be disabling but only that she needed time off to attend doctor and/or counselor appointments. This case demonstrates the necessity of dealing with all FMLA requests on an individualized case-by-case basis.

Q AND A COLUMN

Since we have received only one suggestion for renaming the column, we are extending the contest for one more month. If there are no other suggestions, we will declare the winner at the end of May. Also, we did not receive any questions this month, and the column has been created using actual questions asked by clients. Probably, if we do not receive more questions we really will have to discontinue this column.

Disclaimer

The purpose of this feature is to allow readers to submit short questions which lend themselves to general answers, on various legal issues. Questions may be submitted by e-mail or by regular mail from those readers who are not getting *The Firehouse Lawyer* online. More detailed questions would require a formal legal opinion and are beyond the scope of the Q&A column. By giving answers in the Q&A column, the Firehouse Lawyer does not purport to give legal advice and disclaims any attorney/client relationship with the reader submitting the question. Readers are cautioned that detailed legal opinions require a greater explanation of the facts, possible legal research and a more thorough discussion of the issue. Readers are therefore urged to contact their legal counsel for legal opinions.

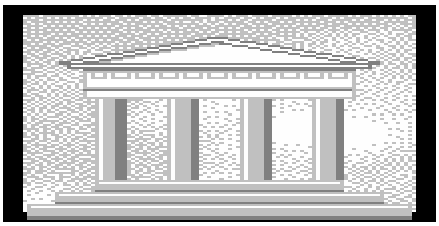
Q Is a firefighter in Washington on disability leave eligible to sit for promotional examinations?… Steve Marstrom, Chief, Lakewood Fire Department.

A In my opinion, yes. The applicable disability statute, RCW 41.26 120 provides no basis for excluding such disabled members from sitting for a promotional exam. While they may be disabled and unable temporarily to perform their own job and perhaps the promotional position, the statute preserves all other rights and privileges during the temporary disability. There is no way to assume that they cannot perform the essential job functions of the promotional position simply because they are temporarily disabled. I would recommend allowing such individuals to sit for the promotional examination and thus avoid any discrimination charges.

Q Is it possible to merge with a Fire Protection District in another county?… James Gregory, Chief, Elbe/Ashford, WA.

A As long as the Fire Protection District in the adjoining county is adjacent to the boundaries of your Fire Protection District, such mergers are expressly contemplated by the statutes. The usual procedures under RCW 52.06 should be followed. The process starts either with an elector (voter) petition from persons residing in the merging

district, or it can start with a resolution by the commissioners of the merging district. Either that petition or resolution, or both, if the circumstances dictate, should be forwarded by the commissioners of the merging district to the merger district, which is the district that would survive the merger. Once your commissioners of the merger district receive that, they may accept or reject it or modify the terms and conditions suggested in the resolution from the merging district. Thereafter, if approved, it is sent back to the merging district commissioners who then call for an election. The election that takes place is of those registered voters in the merging district only. If a majority of the voters approve merger, then the merging district commissioners inform the merger district commissioners of that fact and both districts pass a resolution declaring the merger accomplished. In the case of an inter-county merger of this nature, there are special provisions regarding the name and numbering of the district. Assuming that Pierce County had more fire districts than Lewis County, the designation would be "Lewis County and Pierce County Fire District No. 28," as the merging district name is preserved and used first, the merger district second, and the number chosen is the next highest number in the county with the highest number of districts. (I am assuming that Lewis has fewer districts than Pierce County and taking the next highest number available.) If this merger goes forward, I would be more than happy to provide you with the appropriate paperwork.



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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.

NOTA BENE:

In 1997 I developed a fire department safety checklist and a set of forms for safety officers. Designed to help fire departments comply with the new WAC 296-305 safety standards, these materials are available to fire departments throughout the state, subject to payment of $50.00 to defray reasonable copying and mailing costs.

In June, 1997, a model Safety Resolution and complete set of operating instructions (SOPs) were completed, to comply with the "vertical standards". Cost $100.

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