FIREHOUSE LAWYER

Vol. 2, No. 7 Joseph F. Quinn, Editor July 31, 1998

Public Duty Doctrine and its Exceptions

Generally, under the public duty doctrine, a law enforcement officer or firefighter who acts negligently does not create a cause of action to an injured individual unless (1) that individual is a member of a particular narrow class of persons who the legislature intended to protect, or (2) a special relationship exists between the officer and the individual. See Bailey v. Forks, 38 Wn. App. 656 (1984).) In other words, a duty owed to the public in general is usually considered a duty owed to no one in particular. One purpose of this article, however, is to caution fire departments about the dangers of the "special relationship" exception.

The other exception relating to protection of a circumscribed class of members is also important to fire departments. In Mason v. Bitton, 85 Wn. 2d 321 (1975), the Washington Supreme Court held that the statute on operation of emergency vehicles, RCW 46.61.035, which requires the driver of an authorized emergency vehicle to act with due regard for safety of others is for the express purpose of protecting specific persons and property from injury caused by the negligent driving.

Another example of this exception would be Halvorson v. Dahl, 89 Wn. 2d 673 (1978) which stands for the proposition that the government may be liable for an unenforced building code, when the foreseeable result of a violation is injury or death to occupants of the building, which is unfit for human habitation. That is why we express the opinion that discovered violations of the Uniform Fire Code must be followed up on or else there is a risk of liability to the municipality by whom the fire marshal is employed in the event of a fire with injuries, death or property damage.

However, herein we focus on the "special relationship" exception".

In J & B Development Company v. King County, 100 Wn. 2d 299 (1983), the state supreme court held that a special relationship existed between the developer and the county, and that the county had breached its duty of due care in issuing a permit, leading to an action for damages. In J & B, the permit technician failed to recognize that the street fronting the property had only a 30 foot right of way and that the King County Code required an additional setback of approxi-mately 18 feet. The technician therefore granted a building permit that did not satisfy the additional setback requirement. Next, the county building inspector did a quick inspection of the forms and the setback and approved both. He measured the setback without looking at other lots on the street and may not have noticed there was only a 30 foot right- of-way adjacent to J & B's lot. The inspector was also unaware of

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county code provision which would have required the 18 foot setback and therefore he did not detect the setback error. The supreme court in J & B explained the difference between the public duty doctrine and a similar defense, that of sovereign immunity. Essentially, the sovereign immunity defense has been abrogated by statutory exception, creating liability for the State and its political subdivisions whenever a similar private individual would be liable. The public duty doctrine, however, is a defense to liability because of lack of a specific duty rather than any policy exception.

The supreme court said that, as a matter of common sense, a home builder should be able to rely on the county division of land development to furnish accurate information as well as valid building permits. The home builder should be able to rely upon a building permit, especially after an inspection, and if they are damaged by the county employee's negligence, they can recover in damages.

A similar special relationship case was Chambers-Castanes v. King County, 100 Wn. 2d 275 (1983). In that case, the court found there was a special relationship between police officers and certain victims of crime, because a duty arose to the individuals due to assurances of protection, either explicitly or implicitly, giving rise to reliance by the individuals. The two victims were beaten by other motorists, in an unprovoked attack. A total of 11 calls for assistance were made to the King County dispatchers until the police arrived at the scene one hour and 20 minutes later. The supreme court's rendition of the facts of the case suggest that there were several call receiver/ dispatchers, and that they made several assurances of police response which were in fact not true statements, when compared with the police reports done after the fact. In any event, based on the facts of the case, the court found that a special relationship had been created between the county and the victims of the assault above and beyond the duty owed to the general public.

Suppose now that your fire department and/or dispatch agency personnel have become personally familiar with certain callers, who request emergency medical assistance frequently. One of my clients refers to these individuals as "frequent flyers". Suppose further that in every instance, or nearly so, the EMS responses result in no transport and very little emergency care, as the caller needs only reassurance or minor medical attention. For example, suppose they are having a panic attack and not a heart attack, as they had suspected. Suppose this happens 12 times in six months. The question becomes whether a special relationship has been created between that individual and the responding fire department. Now suppose that you decide you will not respond because this person has been found repeatedly not to require medical attention. You do not respond and the person dies of a heart attack, lacking prompt medical attention. Does this present a serious risk of liability, and if so, what could have been done to prevent it?

Another realistic hypothetical might be as follows. Suppose there is a brush fire on a vacant lot near a residential neighborhood. The call for assistance is made from a cellular phone and the E-911 system, of course, does not show a readily identifiable address to which the department should be dispatched. The dispatcher tries to get the caller to identify their location, but they are visitors from another part of the state. The dispatcher does the best she can under the circumstances and dispatches an engine company, a command vehicle, and an aid car to the location. Due to lack of familiarity with the neighborhood, which is relatively new, and still under development, the driver of the engine gets lost, at least for a few minutes. Arguably, because of the delays in identifying the right neighbor-

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hood or site, the brush fire does take hold and due to wind conditions, actually damages a house next to the vacant lot. It can be shown that if they had responded more quickly, the brush fire would not have been that significant and in fact would never have reached the house. Is there a special relationship between the fire department/dispatch agency and the caller or property owners under these circumstances?

The first case is probably more difficult than the second. We do not believe that any special relationship was created in the second case, as no particular assurances were made, and finding the location of the fire was made more difficult by a lack of familiarity of the caller with the location. The factual scenario does suggest that perhaps more neighborhood familiarization training should be instituted for drivers of the engines, but the public duty doctrine still applies.

The first situation is a tricky question. There may be a "special relationship" but it would seem to decrease the duty rather than increase it. Certainly, if the facts were different, and the caller were a suicidal person whose life had been saved several times by the emergency personnel, it would clearly be a liability case. If the department, for whatever reason, was very slow to respond to such a person, in spite of knowing where they lived quite well having been there so often, then we have a case of liability under the special relationship exception.

However, under our odd set of facts here, the "special relationship" that had developed between the department and the "frequent flyer" was enough to indicate that this person really had no medical problems and probably was wasting department resources to the detriment of other more needy persons. None-theless, we cannot find there is not a special relationship, as this person has come to rely on a response.

The temptation, of course, is not to respond, but we certainly do not recommend that option be chosen. Instead, what we have recommended with "frequent flyers" is that the department, its physician advisor, or its attorney, notify the person that they must be address their problem in a different way and that the department should not have to respond when there is no medical emergency. Only after all efforts like this have been exhausted should the department even consider a lack of response.

I am sure that readers can hypothetically develop other fact situations that would fit the special relationship exception.

No Questions - No Answers

Since no questions have been submitted for the question and answer column this month, again that feature will not be included in the Firehouse Lawyer.

Supreme Court Term Ends - A Few Cases of Interest

The United States Supreme Court ended its recent term in the late part of June. A few cases in this term might be of interest to public employers and are therefore summarized and analyzed in this article.

A few of the Court's cases on sexual harassment are significant and of interest. The Court did clarify the law of sexual harassment in the workplace, making some such actions easier for employees to win, while at the same time indicating how employers can limit their liability by adopting effective anti-harassment policies and complaint procedures. In two decisions decided by a vote of

Supreme Court Term

Ends - A Few Cases of Interest (continued)

7 - 2, with Justices Scalia and Thomas dissenting, the Court laid down some new doctrine. In Faragher v. City of Boca Raton, Number 97-282, the Court made it clear that employers are responsible for preventing and eliminating harassment in the workplace. Employers can be liable for even those harassing acts of supervisory employees that violate clear policies, even if top management had no knowledge it was occurring. In Burlington Industries, Inc. v. Ellerth, Number 97-569, the Court held an employee could sue even without showing job related harm, but only if the employee availed herself of effective complaint policies and other protection offered by the company. In a third case, the court expanded the category of protected people, ruling unanimously that the law covers harassment by people of the same sex. In Once v. Sundowner Offshore Services, Number 96-568, Justice Scalia wrote for the unanimous court that it is the conduct at issue, not the gender of the people involved, and certainly not the presence or absence of sexual desire, that is determinative.

Ironically, while the Court ruled expansively in these employment cases, the Court interpreted a different statute and set a highly restrictive rule for determining when a school district could be found liable under a different federal law for a teacher's sexual harassment of a student. Interpreting the Title IX rules, the Court ruled 5 - 4 that a victim can only recover damages from a school district if an official with authority to intervene knew of the situation and acted with deliberate indifference and failed to stop the harassment. See Gebser v. Lago Vista Independent School District, Number 96-1866.

In another area of discrimination law, the Supreme Court made new law by ruling that the Americans with Disabilities Act offers protection against discrimination to people who are infected with the HIV virus, which causes AIDS, even if they show no present symptoms of disease. Again, the decision was 5 - 4 in Bragdon v. Abbott, Number 97-156. The majority found that the 1990 ADA definition of disability, *i.e.*, an impairment that substantially limits a major life activity, did apply to a woman who said she had decided never to have children because of her HIV positive status. She sued, under the ADA when a dentist refused to treat her in his office.

The court also ruled unanimously that Congress intended the ADA to apply to inmates in state prisons. See Pennsylvania v. Yeskey, Number 97-686.

Finally, in a First Amendment case, *i.e.*, free speech, the court ruled 6 - 3 that government-owned TV stations have the discretion to exclude minor party candidates from political debates as long as the exclusion was not based on the candidate's views. In Arkansas Educational Televi-sion Commission v. Forbes, Number 96-779, Justice Kennedy for the majority said that a candidate debate was not a public forum like a street corner or a park. Instead it is a "non-public forum" subject to reasonable restrictions to prevent the forum from being overrun by unmanageable numbers of participants. The case was filed by a former member of the American Nazi Party and self-described Christian supremacist who was running for con-greases in Arkansas and sought access to a debate at a state-run public TV station.

Sometimes we may believe that decisions of the U.S. Supreme Court have little or no impact on the operation of fire departments or other municipal entities. As you can see, some of these decisions, by the highest court in the land, can have a tremendous impact on the way we do business and the way constitutional rights are protected.

Supreme Court Term Ends - A Few Cases of Interest (continued)

tected. Certainly these decisions will have a great impact on future decisions of the federal circuit courts of appeal and the United States district courts, as well as state courts. (The author is licensed to practice before the U.S. Supreme Court and represented Pierce County there in the 1986 case of Pierce County v. Department of Labor.)

SOPs and Resolutions

This article lists and describes briefly the most generally applicable SOPS and Resolutions I have developed or reviewed in recent years for special purpose districts. There are a lot more, but many are special or unique to the district in question. Feel free to ask if I have a particular policy on a specific topic even if it is not on this list. Those items without a price are free; a small copying and mailing charge may be imposed, especially if multiple policies are requested.

1. Safety SOPs (operating instructions) to comply with WAC 296-305 vertical standards in WA, approximately 170 pages, cost $100.
2. SOP Book—"Policies and Procedures for Fire Districts," Chapter 1—"Commissioners," approximately 50 pages, cost $50.
3. SOP Book—"Policies and Procedures for Fire Districts," Chapter 2—"Personnel," approximately 100 pages, cost $50.
4. Resolution on Open Public Meetings.
5. Resolution on Open Public Records.
6. Updated Whistleblower Resolution.
7. Guidelines for Personal Property on Premises (Resol.)
8. Resolution on Health Care Information Act (Patient Records)
9. Resolution Appointing Safety Officer and Infection Control Officer.
10. Physical and Mental Fitness and Substance Abuse Testing (Resolution).
11. Employee Harassment Policy (Resolution).
12. Resolution Establishing Accounting System and Various Funds.
13. Resolution on Use of Credit Cards (revised 1998).
14. Resolution on Appointment and Termination of Volunteers.
15. Resolution Designating Incident Command Agency for HAZMAT incidents.
16. Resolution Establishing Small Works Roster.

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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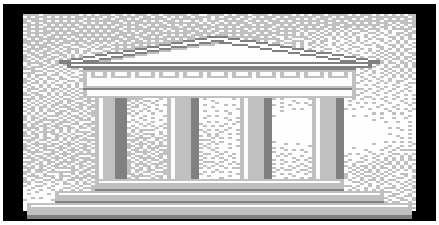

Joseph F. Quinn

6217 Mt. Tacoma Dr. S.W.

Lakewood, WA 98499

(253) 589-3226

(253) 589-3772 FAX

e-mail: firehouselaw@earthlink.net

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