Firehouse Lawyer

Volume 6, Number 1 *January 15, 2006*

Joseph F. Quinn, Editor

Joseph F. Quinn is legal counsel to more than 25 fire districts in Pierce, King and other counties throughout the State of Washington.

His office is located at:
5000 Steilacoom Blvd. SW
Lakewood, WA 98499
(in Lakewood's Station 2-1)

Telephone: 253.589.3226

Fax: 253.589.3772

Email Joe at:
quinnjoseph@qwest.net

Access this newsletter at:
www.Firehouselawyer.com

Inside This Issue

New Chapter Added To RCW 52

For the first time in many, many years the Code Reviser has seen fit to add a new chapter to Title 52 on fire districts. For those not familiar with the office, the Code Reviser does not have anything to do with writing the new laws or amending the old ones, but this little-known office is responsible for organizing the new statutes into the code.

In this case, the legislature passed House Bill 1756, which establishes new laws on response standards for fire departments, including those provided by fire protection districts under Title 52. Now that this bill has become law, every "substantially career" fire department has to establish, locally, response standards. Then, they have to achieve those response times at least 90% of the time.

The Washington State Association of Fire Chiefs web site has an implementation guide to assist you in complying with this new law.

Under the new statutes, every required fire district and regional fire protection service authority must maintain a written statement or policy that establishes the existence of a fire department, the services that the department provides, the basic organizational structure of the department, the expected number of employees and the functions performed by those employees. Service delivery objectives shall be included in the written statement or policy. These objectives shall include specific response time objectives for the following if appropriate: (a) fire suppression; (b) emergency medical services (EMS); (c) special operations; (d) aircraft rescue and fire fighting; (e) marine rescue and fire fighting; and (f) wildland fire fighting. See RCW 52.33.030.

Also, in order to measure the ability to arrive and begin mitigation operations before the critical events of brain death or flashover, the same entities must establish time objectives for (a) turnout time; (b) response time--first arriving engine company and time for deployment of full first alarm assignment at a fire suppression incident; (c) response time for arrival of unit with at least "first responder" capability at EMS incident (d) if ALS service is provided by the department, response time for arrival of ALS unit.

As mentioned above, the statute at RCW 52.33.030 (4) provides simply that such agencies shall establish a performance objective of not less than 90% for the achievement of the foregoing response time objectives.

Pursuant to RCW 52.33.040, the same agencies shall evaluate their level of service, deployment delivery and response time objectives on an annual basis. The evaluations must be based on data relating those matters "in each geographic area" with the jurisdiction, which implies that an agency should recognize that it may contain more than one area. Beginning in 2007, each such agency must issue an annual report, so presumably this means that in 2007 you would report on the evaluation of 2006 data. The annual report shall define the geographic areas alluded to above and any circumstances in which the requirements of this standard are not being met. Finally, the annual report shall explain the predictable consequences of any deficiencies and address steps necessary to achieve "compliance".

It appears that no "risk manager" or attorney briefed the legislature on the legal consequences that might very likely follow from enacting statutes like this one. We are aware of the forces that were marshaled to lobby for passage of this bill, but we still feel that it creates a potential for liability exposure that did not exist before. The testimony of an expert could easily be obtained that this law facilitates the adoption of a negligence standard of care, which when not met makes it very likely that non-compliance would be negligence. In former times, and prior case law, one could well argue that non-compliance with a state statute was negligence per se. This is almost tantamount to strict liability. Perhaps the law has changed somewhat, but nonetheless laws like this one certainly make it easier for plaintiffs' attorneys to prove negligence.

To read more about this new law, you might want to peruse the article I included in the *Firehouse Lawyer* in the March and/or May editions. See the archives.

Stepping down off of that soapbox, let me now turn to a different topic.

PROHIBITION OF SMOKING IN PUBLIC PLACES

Initiative 901, which prohibits smoking in public facilities as well as places of employment, recently went into effect. All fire districts should review their policies and signage to ensure compliance with this new law, which amends and adds sections to chapter 70.160, the Washington Clean Indoor Air Act. (If that is not the informal title of the

law, it should be).

The definition of "public place" in the law definitely includes fire stations and includes a "presumptively reasonable minimum distance" of twenty-five (25) feet from entrances, exits, windows that open, and ventilation intakes that serve an enclosed area where smoking is prohibited. Please note that the definition of "public place" also expressly includes vehicles owned by agencies.

Please review and/or establish district policy prohibiting smoking of any kind in these restricted areas and make sure your signage is adequate, as all owners of property must post signs. Enforcement against violators is done by law enforcement, and enforcement against owners (as to signage, for example) is done by the local health department. An earlier draft seemed to place that responsibility on fire departments, so at least that was changed.

THERE IS STILL TIME TO SIGN UP FOR TRAINING

As mentioned last month, Training Unlimited has commissioner training in January and February. It is not too late to sign up, especially for the Thurston County and King County Locations. See our ad elsewhere in this issue. The seminar materials are now expanded to about 100 pages, so this training is a comprehensive educational experience on virtually all of the laws that the Board and its staff needs to know.

RETALIATION CASE ON ITS WAY TO SUPREME COURT

We often hear the allegation by employees or former employees that an action taken by an employer was an "adverse action" and was therefore retaliatory and violative of Title VII, a federal discrimination law. However, the federal circuits have not always agreed on what constitutes "adverse action" under Title VII. Does it refer only to "ultimate employment decisions" such as firing, demotion, or failure to promote?

In *Burlington Northern & Santa Fe Railway Co. v. White,* 364 F.3d 789 (6th Cir. 2004) that federal Circuit Court of Appeals held that the employer's job transfer and subsequent suspension and reinstatement were adverse actions. Federal circuit analysis has ranged from the liberal view of the Ninth Circuit, which says an adverse action is any employment action reasonably likely to deter an employee from protected activity, to the Fifth Circuit view that only ultimate employment decisions are adverse actions.

The Sixth Circuit enunciated a definition that seems acceptable to many, in *Kocsis v. Multi-Care Management,* 97 F.3d 876 (6th Cir. 1996). It said a plaintiff must show she suffered a "materially adverse change in the terms of her employment." A mere inconvenience or an alteration of job responsibilities, or a bruised ego, is not enough. A reassignment without a salary/wage loss or any work hour changes probably would not be adverse action, but employer's need to be careful not to include a less distinguished title, a loss of benefits, or significantly diminished material duties.

The U.S. Supreme Court granted certiorari in December, so parties with possible retaliation cases may get an answer soon to a question that the High Court has not directly addressed to date. In the meantime, employers should be careful and remember, "Timing is everything."

HIPAA AND MEDICAL RECORDS RELEASES ALWAYS AN ISSUE

One of the most frequent areas of questions that I receive from fire districts relates to release of medical records of patients. Probably this is still a fertile ground for training, as the issues do not arise often enough at each fire district for the records custodian or Privacy Officer to learn all they need through just "on the job" training.

There are various types of "requestors" other than the patient, and that presents most of the problems. Numerous statutory exceptions allow, or even require release to certain categories of "requestors". Rather than trying to keep track of all of the exceptions, I recommend that Privacy Officers and their assistants release only with an authorization of the patient, and for all exceptions and attorney requests, call your legal counsel first.

By the way, if the patient has died, the Washington statute provides that the "personal representative" can sign an authorization for the release. The "PR" is either named in the will and appointed by the court, or just named by the court if there is no will.

DISCLAIMER

The Firehouse Lawyer newsletter is published for educational purposes only. Nothing herein shall create an attorney-client relationship between Joseph F. Quinn and the reader. Those needing legal advice are urged to contact an attorney licensed to practice in their jurisdiction of residence.