



FIRE, EMS & SAFETY NEWSLETTER

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE].

lawrence.bennett@uc.edu

Cell 513-470-2744

Larry Bennett is an attorney and Program Chair, Fire Science & Emergency Management, College of Engineering & Applied Science; www.uc.edu/cas/firescience/index.aspx. He has been a volunteer firefighter/EMT for the past 27 years, and is the author of a new textbook, Fire Service Law, Prentice Hall / Brady (2007, ISBN 0-13-155288-0) that was selected for use by the National Fire Academy in its distant learning course, "Political & Legal Foundations of Fire Protection."

Training Opportunities:

Jan. 15, 2010; Greater Cincinnati Airport Fire Department

8:30 am – 10:30 am

Improved EMS Documentation – Mock Trial

Paramedic refresher for National Registry

Host: Anthony Kramer

University of Cincinnati – Paramedic Associate Degree Program

Cell: 859-630-8290

Feb. 10, 2010; W. Palm Beach and other Florida FD

1 pm – 4:30 pm

Incident Command – Legal Lessons Learned

[Seminar will include two ICs from FL incidents.]

Host: Division Chief Ray Altman, Boynton Beach FL

Cell 561-602-1230

Feb. 15, 2010; Cincinnati Fire Department

8:30 am – 10:30 am

Improved EMS Documentation – Mock Trial

Host: Alicia M. Henson, EMS Education Coordinator

Work: 513-352-1690

Feb. 22, 2010; Cincinnati Fire Department

6:00 pm – 8:00 pm

Improved EMS Documentation – Mock Trial

Host: Alicia M. Henson, EMS Education Coordinator

Work: 513-352-1690

Feb. 23, 2010; Cincinnati Fire Department

8:30 am – 10:30 am

Improved EMS Documentation – Mock Trial

Host: Alicia M. Henson, EMS Education Coordinator

Work: 513-352-1690

[MOCK TRIAL VIDEO: The Feb. 23, 2010 seminar will be professionally videotaped by University of Cincinnati, Presentations Technologies & Services Group. The CD will be available free to FDs and schools which purchase my new fund-raising book, which is also on a CD: **Ohio Fire & EMS Law** (Dec. 2009; 18 Chapters of prior newsletter articles, including Ohio EMS Law; over 350 pages). Cost: \$100 per FD or school; 100% will be donated to UC Fire Science scholarship fund; make checks payable to Lawrence T. Bennett, and mail to University of Cincinnati, Room 301, Administration Building, 2220 Victory Parkway, ML 0103, Cincinnati, OH 45206-2837.]

FED: 9/11 ATTACK - WHITE HOUSE WAS TO BE STRUCK BY 747 AIRCRAFT - CONSPIRATOR ZACARIAS MOUSSAOUI WAS TRAINING AT FLIGHT SCHOOL IN MINNESOTA – COURT OF APPEALS REFUSES TO SET ASIDE HIS PLEA OF GUILTY AND JURY’S LIFE SENTENCE

On Jan. 4, 2010 in Zacarias Moussaoui v. United States, the U.S. Court of Appeals for the 4th Circuit in Richmond, VA, <http://pacer.ca4.uscourts.gov/opinion.pdf/064494.P.pdf>, upheld (3 to 0) the plea of guilty and jury’s life sentence. At his plea hearing, he signed a Statement of Facts prepared by federal prosecutors which chillingly described the plan to attack the White House, and also the U.S. Capitol, in addition to the planes that flew into the World Trade Centers in New York, and the Pentagon.

The Court described the facts as follows:

“Zacarias Moussaoui pled guilty to six criminal conspiracy counts arising from the al Qaeda terrorist organization’s plot to use commercial aircraft to commit terrorist attacks in this country, including the attacks that occurred on September 11, 2001. In a subsequent sentencing proceeding, the jury declined to impose the death penalty and the district court sentenced Moussaoui to life imprisonment without the possibility of release on all six counts, with the sentence on the first count to be served consecutively to the sentences on the other counts. In this appeal, Moussaoui challenges the validity of his guilty plea and his sentences. He has also filed a motion to remand, based upon the Government’s disclosure of classified information during the pendency of this appeal. We affirm Moussaoui’s convictions and sentences in their entirety and deny his motion to remand.

I. Facts

On August 16, 2001, Moussaoui, a French citizen, was taken into custody for overstaying his visa after he raised the suspicions of his instructor at the Pan American International Flight Academy in Eagan, Minnesota, where he was receiving pilot training on a jet simulator. Less than a month later, September 11, 2001, nineteen members of al Qaeda hijacked three commercial airlines and crashed them into the World Trade Center towers in New York City and the Pentagon in Virginia. A fourth airplane, apparently destined for the Capitol Building in Washington, D.C., crashed in a field in Pennsylvania after its

passengers attempted to retake control of the airplane from the al Qaeda hijackers. Collectively, the 9/11 attacks resulted in the deaths of nearly 3,000 people. Moussaoui was still in custody, awaiting deportation, when the attacks occurred.”

In April 2005, Moussaoui pled guilty as a tactic to avoid the death sentence. His tactic worked. He signed the following chilling statement of facts:

2. The Statement of Facts

In connection with his guilty plea, a written statement of facts (the "Statement of Facts") was prepared, detailing the facts pertaining to al Qaeda's plans for terrorist attacks in the United States, Moussaoui's association with al Qaeda, and the steps Moussaoui took to prepare for the operation and to protect it after he was detained. When he signed the document, Moussaoui added the designation "20th Hijacker" to his signature. J.A. 1413.

A summary of the Statement of Facts, as adopted and executed by Moussaoui, follows.

Al Qaeda is "an international terrorist group" founded by Usama Bin Laden (hereinafter "Bin Laden"), that is "dedicated to opposing the United States with force and violence." J.A. 1409. The head of its military committee was Mohammed Atef, a/k/a Abu Hafs al-Masri (hereinafter "al-Masri"). Al Qaeda members pledge "bayat" to Bin Laden and al Qaeda, J.A. 1409, meaning that they "give allegiance to Bin Laden and the group." J.A. 1671. Since 1996, al Qaeda has been headquartered in Afghanistan, but it associates with terrorists in other parts of the world to further its goals. In the mid-1990s, Bin Laden issued a fatwah (or religious ruling) declaring jihad (or war) against the United States and its allies, sanctioning the killing of United States military and civilians alike. In furtherance of these aims, "Bin Laden and al Qaeda provided and supported training camps and guesthouses in Afghanistan, including camps known as al Farooq and Khalden." J.A. 1409. The training "camps were used to instruct members and associates of al Qaeda and its affiliated groups in the use of firearms, explosives, chemical weapons, and other weapons of mass destruction." J.A. 1409/

In connection with al Qaeda's declaration of war, "al Qaeda members conceived of an operation in which civilian commercial airliners would be hijacked and flown into prominent buildings, including government buildings, in the United States." J.A. 1410. In preparation for the attacks, "al Qaeda associates entered the United States, received funding from abroad, engaged in physical fitness training, and obtained knives and other weapons with which to take over airliners." J.A. 1410.

Some of these "associates obtained pilot training, including training on commercial jet simulators, so they would be able to fly hijacked aircraft into their targets." J.A. 1410. "Bin Laden personally approved those selected to participate in the operation, who were willing to die in furtherance of their religious beliefs and al Qaeda's agenda." J.A. 1410. Moussaoui was a member of al Qaeda and pledged bayat to Bin Laden. He trained at al Qaeda's Khalden Camp and managed an al Qaeda guesthouse in Kandahar, "a position of high respect within al Qaeda." J.A. 1410. Moussaoui communicated directly with Bin Laden and al Masri while in Afghanistan. He "knew of al Qaeda's plan to fly airplanes into prominent buildings in the United States" and "agreed to travel to the United States to participate in the plan." J.A. 1410.

As he did with the other hijackers, Bin Laden personally selected Moussaoui to participate in the planes operation and approved Moussaoui to attack the White House, which had been Moussaoui's dream.

In preparation for the operation, the al Qaeda leadership first sent Moussaoui to Malaysia to explore flight training. They also provided him with information about flight schools in the United States. In September 2000, Moussaoui contacted Airman Flight School in Norman, Oklahoma. Moussaoui's intent was to obtain pilot training to further "al Qaeda's plan to use planes to kill Americans." J.A. 1411. "On February 23, 2001, Moussaoui traveled from London to Chicago and then on to Norman, Oklahoma," where he enrolled at Airman Flight School and began pilot training on small planes. J.A. 1411.

Like his co-conspirators, he joined a gym and purchased knives, intentionally selecting knives with blades short enough to pass through airport security. In the summer of 2001, Moussaoui was instructed by an al Qaeda associate to train on larger jet planes. Ramzi Bin al- Shihb, another al Qaeda operative, sent Moussaoui a wire transfer of money from Germany to the United States to pay for the flight training. Shortly thereafter Moussaoui enrolled at the Pan American International Flight Academy in Eagan, Minnesota, and began simulator training for a Boeing 747-400. Moussaoui told another al Qaeda associate that his simulator training would be completed before September 2001.

At the time of his arrest, Moussaoui was in possession of knives, flight manuals for the Boeing 747-400, a flight simulator computer program, fighting gloves and shin guards, a piece of paper referring to a handheld Global Positioning System ("GPS"), software that could be used to review pilot procedures for the Boeing 747-400, and a hand-held aviation radio. When questioned after his arrest, Moussaoui "lied to federal agents to allow his al Qaeda 'brothers' to go forward with the operation." J.A. 1412. He "falsely denied being a member of a terrorist organization and falsely denied that he was taking pilot training to kill Americans." J.A. 1412. He told the "agents that he was training as a pilot purely for his personal enjoyment and that, after completion of his training, he intended to visit New York City and Washington, D.C., as a tourist." J.A. 1412.

The attacks of 9/11 happened less than a month after Moussaoui's arrest. At the *ex parte* guilty plea proceeding, Moussaoui advised the court that he had read the Statement of Facts "more than probably ten time[s]." 2 Supp. J.A. 45. Moussaoui made a single correction to the Statement of Facts, changing the date that he told his al Qaeda associate that he would finish jet simulator training from "by August 20, 2001" to "before September 2001." 2 Supp. J.A. 45-46. At the public Rule 11 hearing, Moussaoui confirmed that he had received a revised copy of the Statement of Facts, which had been corrected in accordance with his request at the *ex parte* hearing.

The U.S. Department of Justice asked for the death sentence, but Moussaoui took the stand and convinced the jury to not sentence him to death.

"Moussaoui told the jury that he wanted to advance two arguments in his defense: first, that 'jail [was] a greater punishment than . . . being sentenced to death, and [that] martyrdom, execution, [would] be a reward" and, second, that the jury 'could save [an] American life by keeping [him] alive because they could use [him] as a bargaining chip, so if one day some American serviceman [is] taken hostage in Iraq or Afghanistan, they

could . . . exchange Moussaoui [for] the American soldier." J.A. 4433. Moussaoui testified that the 'jury might spare the death penalty to their enemy, but . . . not to a coward liar,' J.A. 4480, and that 'by testifying truthfully, I will save my life,' J.A. 4482."

The Court of Appeals concluded that his guilty plea and conviction is final:

"In the meantime, the finality of the guilty plea, entered knowingly, intelligently, and with sufficient awareness of the relevant circumstances and likely consequences, stands.

VII. *Conclusion*

For the reasons set forth above, we affirm Moussaoui's convictions and sentences in their entirety. We also deny his renewed motion to remand for further proceedings."

Legal Lessons Learned: The facts in this case are a chilly reminder that we all must be diligent about homeland security.

NEW HAMPSHIRE: LEAVING SCENE OF ACCIDENT - CRIMINAL CONVICTION OF "FALSE PUBLIC ALARMS" - DRIVER IN ONE VEHICLE MVA WAS POLITICAL CANDIDATE FOR CONGRESS – FOUND UNHURT IN WOODS BY SEARCH & RESCUE TEAM 72 HOURS LATER

On Nov. 18, 2009 in State of New Hampshire v. Gary Dodds, the Supreme Court of New Hampshire, 159 N.H. 239, 982 A.2d 377, 2009 N.H. LEXIS 112, published their Aug. 21, 2009 opinion upholding the jury's conviction of Mr. Dodds of false public alarms. He was involved in a one-vehicle MVA on a snowing night, and he disappeared for 27 hours after the car accident, evading search and rescue personnel.

The strange facts of this case were reported by the Court:

"On April 5, 2006, the defendant, who was a candidate in the Democratic primary for the United States House of Representatives, was traveling southbound on Route 16 between Dover and Portsmouth in a snowstorm. Shortly after 8 p.m., a woman driving behind him observed his car swerve left and right and then veer off the road. At the point where his car left the road, she noticed that the guardrail was bent and that the defendant's car was on the far side of it. She drove her car onto the shoulder, stopped and dialed 911.

A short distance west of where the accident occurred, an adjacent roadway, Spur Road, runs parallel to Route 16. To the west of Spur Road lies the Bellamy River. Caren Peloso, who lives on Spur Road, heard the sound of the crash and went out to her driveway to investigate. When she observed the headlights of the defendant's car, she ran back into her house and dialed 911. She then walked through a brushy area to the accident scene. When she reached the defendant's car, she noticed that its interior light was on, that its passenger side window was down, and that its airbags had deployed. No one was inside the car. Peloso then approached the witness's car and asked her whether she knew the whereabouts of the driver. She did not.

Emergency personnel and firefighters soon arrived at the scene. They unsuccessfully searched the area for the driver of the vehicle. After determining that the car belonged to the defendant, the police called his wife and she came to the scene. She reported that the defendant was supposed to have been on his way to a campaign-related meeting in Somersworth.

The defendant's whereabouts remained a mystery for nearly twenty-seven hours, and his disappearance was the subject of extensive news coverage. Family, friends, emergency personnel and other state and federal officials searched for him on land, by boat on the Bellamy River, and by helicopter. He was eventually found by a search and rescue volunteer in a wooded area west of the Bellamy River, less than a mile from the accident scene, approximately 550 feet from the Garrison School. When he was found, the defendant was awake and knew who and where he was, but not what day it was. He was wearing casual business attire, including a button down shirt, khakis and a fleece pullover. He had on dress socks and one shoe, which were very wet. His oral temperature, taken in the ambulance about fifty minutes after he was found, was 96.8 but later dropped to 96.4 degrees. His face was gray and his feet were discolored, swollen and cold to the touch.'

The facts get even stranger; prior to the accident he had somehow backtracked on toll road:

“Route 16, also known as the Spaulding Turnpike, is a toll road. The defendant had an EZ pass transponder in his vehicle that automatically paid his toll when he passed through the toll plaza. The defendant's EZ pass records reflect that his car passed through the Dover toll plaza southbound at 7:39 p.m. on the night of the accident. However, the accident occurred north of the toll plaza approximately one half hour later, as the defendant was again driving southbound on the stretch of Route 16 he had already traversed. He could not recall why he backtracked northbound on a non-toll road and then headed south again.”

“The defendant claimed to have little memory either of the accident or the events leading up to it. He recalled that his car swerved and crashed, and that he left the scene because he smelled smoke and thought his car was on fire. He recalled swimming across a river, walking for a long time, following a power line up a steep hill, becoming exhausted and collapsing. He did not recall the details of what he was doing or where he was going immediately before his car swerved off of the road.”

The Court of Appeals affirmed his conviction of false public alarms. You don't have to dial 911 to be guilty of the offense; failure to remain at the scene of a MVA, and evading search and rescue are sufficient.

“To be guilty of false public alarms, a defendant must (1) directly or indirectly communicate to a governmental agency (2) a report of an emergency (3) known by him to be false. *See* RSA 644:3, I. The defendant does not dispute that the police constitute a governmental agency within the meaning of the statute, and it is undisputed that he did not directly report an emergency. Accordingly, we are concerned only with whether the defendant indirectly communicated a report of an emergency that he knew was false.

The plain and ordinary meaning of ‘indirectly’ includes ‘not directly aimed at or achieved ... : not resulting directly from an action or cause.’ Webster's Third New International Dictionary 1151 (unabridged ed. 2002). ‘Communicate’ means, among other things, ‘to ake known.’ *Id.* at 460. A ‘report’ includes ‘something that gives information... .

NOTIFICATION.’ *Id.* at 1925. We find that these terms are not ambiguous, and that they are sufficiently broad to include the conduct at issue in this case. The plain meaning of these terms does not require that an indirect communication occur solely by spoken word from the mouth of the defendant. To the contrary, a defendant could make known or ‘communicate’ an emergency through his conduct -- in this case, by evading search and rescue. The statute proscribes communicative conduct that indirectly causes a "report" of an emergency that the defendant knows is false, as was the case here.

The defendant was convicted of ‘failing to return from an undisclosed location and failing to communicate his location thereby evading search and rescue personnel,’ after having been in an automobile accident, and of doing so knowingly. Conviction for this conduct was not inconsistent with our interpretation of the false public alarms statute and did not constitute an error of law under the plain meaning of its terms. The acts of failing to return from an undisclosed location, evading search and rescue personnel and of doing so knowingly constitute conduct that ‘indirectly communicates’ a report of an emergency based upon the plain meanings of those terms.”

Legal Lessons Learned: Nice to see criminal conviction for evading search & rescue efforts.

OHIO: ALCOHOL - CITY OF TOLEDO EMPLOYEE ORDERED TO PARK HIS CITY VEHICLE AND GIVE BREATHALYZER AND BLOOD SAMPLE AT HOSPITAL – ARRESTED FOR OVI AT HOSPITAL WHEN RESULTS RECEIVED - MOTION TO SUPPRESS EVIDENCE SHOULD HAVE BEEN GRANTED UNDER GARRITY v. NEW JERSEY

On August 14, 2009 in State of Ohio v. Gary Groszewski, 2009-Ohio-4062 (Ohio App. 2009), 183 Ohio App.3d 718, the Court of Appeals (3 to 0) held that the trial judge should have suppressed the statements made by the defendant at the hospital. His consent to testing was not voluntary, but directed by his employer.

On Dec. 7, 2006, Mr. Groszewski reported to work at 7:00 a.m. as a utility worker in the Division of Transportation, and left in the city vehicle about 7:35 a.m. His supervisor said he smelled a faint odor of alcohol, but was not certain and therefore took no action. A few minutes after Mr. Groszewski drove off, a young lady came in and accused him of running her off the road in a red Jeep. The supervisor said that City of Toledo no longer uses red Jeeps, but that Groszewski owned a red Jeep and drives it to work.

Another Transportation employee then told the Supervisor that other co-workers had smelled alcohol on Groszewski. The supervisor called the Superintendent of Transportation, and contacted Groszewski by radio and told him to return to the office. When he came in at 8:22 a.m., he took him to the Superintendent’s office – they both smelled a slight odor of alcohol. The supervisor explained to Groszewski, in the presence of his union rep., that he must be tested at a local hospital pursuant to his signed employment contract, and refusal would result in termination.

The supervisor drove Groszewski, and the union rep. to a local hospital. The breathalyzer showed a blood alcohol level of 0.093. The supervisor had this faxed to Superintendent’s office. Toledo Police Sergeant Richard Murphy, in uniform, was at the hospital for other business. The Toledo Director of Public Safety came to the hospital and asked him to talk with Groszewski’s supervisor and union rep. and they showed the Police Captain the test results.

The Police Captain then interviewed Groszewski, who said he “screwed up.” The Captain also noticed that Groszewski’s eyes were glassy. He also told Groszewski to perform two field sobriety tests: tough-the-nose test; one-legged-stand test. He then was arrested and charged with OVI. Two more officers arrived, and after being given warning of Ohio Administrative License Suspension, he consented to blood test.

His attorney later filed a motion to suppress the test results, and any police testimony about their observations. After a hearing, the trial judge denied the motion. Groszewski then appealed.

The Court of Appeals reversed the trial judge, holding that evidence must be suppressed under U.S. Supreme Court’s decision in Garrity v. New Jersey:

“The Fifth Amendment protects persons against compelled self-incrimination, and any testimony given under compulsion invokes the constitutional right.... If the state forces a public employee to choose between either answering incriminating questions or forfeiting his job for refusing to answer, the state cannot use the employee’s statements against him in any subsequent criminal prosecution if the employee chooses to answer because the statements were not given voluntarily. See Garrity v. New Jersey, 385 U.S. 493.... Thus, all statements made by the public employee under these conditions become immunized testimony.” [Citations omitted.]

The Court was critical of the “ambush tactics” employed by the City of Toledo:

“Although we do not condone appellant’s actions, neither can we condone the ambush tactics that were employed to create a criminal offense from an employee’s compliance with his employer’s drug / alcohol testing requirement. Therefore, under the specific facts and circumstances of this case, we conclude that the police obtained the results of the breathalyzer and blood tests in violation of appellant’s Fourth Amendment right against illegal search and seizure. As a result, we further conclude that the trial court erred in denying appellant’s motion to suppress the blood and breathalyzer test results, as well as any observations of any sobriety tests because appellant’s consent to testing was not voluntary at it related to any criminal charges.”

Legal Lessons Learned: FDs should handle results of blood and alcohol tests as an administrative disciplinary matter, not criminal charges.

OHIO: ARBITRATION - POLICE OFFICER WAS FIRED AFTER PATROL CAR STRUCK BY BICYCLE AT INTERSECTION – ARBITRATOR ORDERED HIM REINSTATED AND CITY APPEALED - COURT OF APPEALS UPHOLDS ARBITRATOR SINCE CBA SILENT ON BURDEN OF PROOF

On Dec. 11, 2009, in City of Piqua, OH v. Fraternal Order of Police, Ohio Labor Council, 2009-Ohio-6591 (Court of Appeals for Second District, Miami County), the Court (3 to 0) reversed the trial court’s order, and held that the arbitrator had the authority under the collective bargaining agreement to order Patrol Officer Brett Marrs back to work.

It was a dark night on May 4, 2008 when Officer Marrs stopped at a four-way intersection. He came to a full stop, and as he proceeded through, a bicycle struck the front side of the cruiser. Fortunately the bicyclist had jumped off his bike prior to the collision and was not serious hurt.

Officer Marris had been disciplined three prior times in the past two years. His prior discipline included: backing into another cruiser (written reprimand); excessive use of Police Department issues cell phone for personal use (one-day suspension); and late for duty assignment (written reprimand).

The Police Department decided this accident was, in the words of the Court, the “straw that broke the camel’s back.” They suspended Officer Marris, and began termination proceedings. They also issued him a court citation for “improper starting” at the intersection, and brought two administrative charges: violation of Standard of Conduct 06 (committing unsafe act) and Standard of Conduct 12 (incompetent performance).

The police union filed a grievance, and as this was proceeding through the three-step process under the Collective Bargaining Agreement, Brett Marris went to court on the traffic citation. He had a bench trial before a judge, where both he and the bicyclist testified. The evidence showed that the bicyclist had failed to stop at the intersection, and jumped off the bike moments before it struck the cruiser. The judge found him not guilty of “improper starting.”

The grievance then went to an arbitration hearing on September 26, 2008. The arbitrator heard the evidence, and issued a written opinion, finding that the PD had failed to prove that Brett Marris was terminated for “just cause.” The arbitrator referenced the trial judge’s acquittal of Marris, and held that the PD failed to prove by “clear and convincing evidence” that Officer Marris had violated Standards of Conduct.

The City of Piqua appealed to Court of Common Pleas, arguing that the arbitrator exceeded his authority under the CBA by requiring proof by “clear and convincing evidence” instead of the lower standard of “preponderance of the evidence.” The Common Pleas judge agreed with the city, and ordered Officer Marris to remain terminated. The union filed an appeal to the Court of Appeals.

The Court of Appeals reversed the Common Pleas judge, and held that Officer Marris should be reinstated even if the arbitrator used the incorrect standard of “clear and convincing evidence.” The Court wrote, “It is because arbitration is a creature of private contract that courts must ignore errors of fact or law.” The Collective Bargaining Agreement is silent on this issue of burden of proof.

The PD argues that because the CBA is silent on this issue, the arbitrator should have followed the “preponderance of evidence” standard commonly used in Ohio in labor and employment disputes before administrative agencies, and in most civil law suits in Ohio.

The Court of Appeals disagreed:

“The Ohio Supreme Court says that the arbitrator has the inherent power to decide the question of proof: in determining whether ‘just cause’ exists for discipline, and ‘[i]n the absence of contract language expressly prohibiting the exercise of such power, the arbitrator, by virtue of his authority and duty to fairly and finally settle and adjust (decide the dispute before him, has the inherent power to determine the sufficiency of the cause and the reasonableness of the penalty imposed..’” [Citations omitted.]

Legal Lessons Learned: Fire Departments, as well as Police Departments, should consider negotiating language in their Collective Bargaining Agreement on the burden of proof to be used by an arbitrator.

OHIO – GENDER DISCRIMINATION NOT PROVED - SUPERVISOR THOROUGHLY DOCUMENTED WORKPLACE PERFORMANCE PROBLEMS - COMPANY PROMPTLY INVESTIGATED HER COMPLAINTS TO HR - NO PROOF SHE WAS TERMINATED IN RETALIATION FOR CONTACTING OSHA

On Dec. 21, 2009 in Sharon Putney v. Contract Building Components, et al, 2009-Ohio-6718 (Court of Appeals for Third District, Union County), the Court (3 to 0) held that the trial court properly granted summary judgment for the employer. Stark Truss Company operates Contract Building Products (CBC is a supplier of building components). Ms. Putney's supervisor was very thorough in documenting supervisor evaluations and warnings of Ms. Putney, who worked as an office manager at the CBC plant in Marysville, OH.

Shortly after Ms. Putney was hired, problems arose with her performance. She was issued multiple disciplinary actions in the form of written notices, and poor performance review from her direct supervisor, Plant Manager Paul Coulter, who also managed the Stark Truss facility at Washington Courthouse, OH.

For example, in September, 2006 she failed to attach purchase orders to two invoices, and was issued a written disciplinary notice that further problem could result in a 3-day suspension. When Ms. Putney sent a letter to the HR Manager alleging "harassment" and "hostile work place" by Paul Coulter, the matter was promptly investigated by HR employee Alice Wehrlin, who documented that the allegations were meritless.

Ms. Wehrlin also offered additional training of Ms. Putney, which she declined. In Oct. 6, 2006, she was suspended for 3-days after further clerical errors. She was warned that further mistakes could result in her termination.

She wrote another letter to the HR Manager, advising she had contacted OSHA in March, 2006, about diesel powered forklifts being used in an unventilated building, and she believed her suspension was in retaliation. Once again, HR employee Alice Wehrlin investigated, and again found her allegations to be meritless. In fact, OSHA had never disclosed the name of the complainant and no one knew Ms. Putney was the person who contacted OSHA.

Upon her return to work after the 3-day suspension, the company required her to take additional training. She was also placed on "probation" and warned that failure to improve her performance would result in termination. On Feb. 2, 2007 she was terminated.

The Court of Appeals held that the trial court properly dismissed her lawsuit claiming gender discrimination:

"Stark Truss and CBC have articulated a legitimate, non-discriminatory reason for her termination, which Putney cannot show is false. As previously noted, throughout this litigation, including the motion for summary judgment, Stark Truss and CBC have maintained that Putney was disciplined and ultimately terminated due to her inability to perform her job in a satisfactory manner, and they have provided documentation and affidavits to support this position. This is a legitimate, nondiscriminatory reason for her termination."

Legal Lessons Learned: FDs should thoroughly document employee poor job performance, and corrective action plans.

OHIO: INTENTIONAL TORT LAWSUITS – FOURTH COURT OF APPEALS TO DECLARE STATUTE REQUIRING PROOF THAT EMPLOYER “INTENDED TO CAUSE INJURY” VIOLATES OHIO CONSTITUTION - MORE INJURED EMPLOYEES WILL BE FILING LAWSUITS IF OHIO SUPREME COURT ALSO HOLDS STATUTE ILLEGAL

On Dec. 18, 2009 in Edward W. Warren v. Libby Glass, Inc., 2009-OH-6686 (Court of Appeals for Sixth District, Lucas County), held (3 to 0) that the Ohio intentional tort statute was unconstitutional. This is the fourth Ohio Court of Appeals to hold the statute is too restrictive. If the Ohio Supreme Court agrees, then Ohio employers (including fire departments) will undoubtedly see more lawsuits by injured employees who seek not only workers comp, but also punitive damages from a jury.

This holding does not, however, help the plaintiff, Edward W. Warren. He had been injured on a cardboard bailer machine, which he claimed had inadequate guarding. His employer proved, however, that (1) there had never been any injuries or even “near misses” with this machinery, and (2) Mr. Warren was never required to work on the machine or to even enter the area where he was injured. The Court of Appeals held that his lawsuit was therefore properly dismissed by the trial court.

In 1999, the prior version of the Ohio intentional tort statute was declared unconstitutional by the Ohio Supreme Court in Johnson v. BP Chems., Inc., 85 Ohio St.3d 298 (1999). On April 7, 2005, the Ohio General Assembly amended the statute in an effort to protect Ohio employers from frivolous lawsuits. The new statute requires injured employees to prove that injury was “substantially certain” to occur. Ohio Rev. Code 2745.01(A) and (B).

Three other Ohio Courts of Appeal have found the 2005 amended statute to be a violation of rights protected by the Ohio constitution. The issue has been certified to the Ohio Supreme Court in Kaminski v. Metal & Wire Prods. Co., 119 Ohio St. 3d 1407, 2008-Ohio-3880; but that court has not yet issued a decision. If the Ohio Supreme Court also declares the statute as unconstitutional, then employees may bring “common law” intentional tort claims seeking damages from a jury.

Legal Lessons Learned: The fire service is collecting “near miss” reports and this is commendable; FDs like other employers, however, must aggressively address safety issues to avoid jury trials.



Lawrence T. Bennett, Esq.
Program Chair
Fire Science Department
College of Applied Science
2220 Victory parkway
Cincinnati, OH 45206

Tel 513-556-6583
Cell 513-470-2744

lawrence.bennett@uc.edu