



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." This course is taught at the University of Cincinnati and other universities in the NFA's distant learning program, reaching firefighters nationwide.

[File – Chapter 2]

FIREFIGHTER CANCER - SOOT - IAFC TO PUBLISH ANOTHER ARTICLE

The IAFC (International Association of Fire Chiefs) has kindly agreed to publish a follow-up article by the author of this newsletter on new research being conducted by UC into the dangers of soot. This article will review the Firefighter Cancer / Wellness seminar we hosted at UC on July 12, 2009 (now posted at www.uc.edu/cas/firescience), and the on going research being conducted by UC Medical – Department of Environmental Health. On April 15, 2009, IAFC On Scene published our article, "Firefighter / EMT Safety, Health & Survival: Firefighter Cancers: Soot," <http://www.iafc.org> (search "Bennett").

SOOT: Fire Department should carefully review their practices on cleaning of turn out gear, and interior cabs of fire apparatus. See the presentation by District Chief Ron Texter, Cincinnati FD's Health & Safety Officer, at the July 12, 2009 seminar: www.uc.edu/cas/firescience.

NEW RESEARCH: FDs are urged to watch the presentation by Dr. Erin N. Hayes, UC Medical at our July 12, 2009 seminar.

LEGAL ISSUES SEMINARS:

Contact us if your FD might be interested in seminar covering topics in my National Fire Academy course, "Political & Legal Foundations of Fire Protection." The host FD selects the topics to be covered – see 18 topics: www.uc.edu/cas/firescience (ON LINE BENNETT).

- Feb. 2009 – Palm Beach, FL and area FDs;
- Oct. 31, 2009 – Ohio Society of Fire Service Instructors, Columbus FD;
- Oct. 1, 2, 3, 2009 – Rancho Santa Fe FD, San Diego;
- Sept. 17, 2009 – Delhi FD and area FDs, Cincinnati;
- July 30, 2009 – Mason FD, Warren County, OH.

[File – Chapter 2]

WA: GUARD YOUR FIRE POLE OPENINGS - SEATTLE FIREFIGHTER, SEVERELY INJURED WHEN HE FELL THROUGH UNGUARDED FIRE POLE HOLE - AWARDED \$12.75 MILLION BY JURY

On October 23, 2009, the Seattle Times reported that the firefighter was on temporary assignment to Station 33 on Dec. 23, 2003, when he walked towards the second floor bathroom in the early morning hours from a dark bunk room, entered the wrong door, and fell through the pole hole to the concrete floor below. He fractured five vertebrae in his lower back, and had lung, bladder and liver injuries. This ended his career as a firefighter; his injuries prevented him from even doing light duty, clerical work. After a six-week trial, the jury awarded him \$12.75 million. Lesson learned for all FDs – install metal guard that requires manual opening to the pole.

http://seattletimes.nwsourc.com/html/localnews/2010120928_webfirefighter23m.html.

In many jurisdictions, however, workers compensation is your sole remedy against a public employer. Cities and other political subdivisions in many states enjoy governmental immunity. For example, in the civil litigation filed by the families of the nine firefighters who died in 2007 the Sofa Super Store fire in Charleston, SC, the trial judge in August, 2009 ruled that the plaintiffs may not add the City of Charleston as a defendant. This ruling came despite the fact that the FD was fined \$42,100 by State OSHA officials for safety violations.

<http://www.firerescue1.com/fire-products/incident-management/articles/311536-Charleston-Fire-Department-sofa-store-fined-for-deadly-June-fire/#>.

<http://www.postandcourier.com/news/2009/aug/18/judge-charleston-not-part-civil-lawsuit-sofa-store/>.

In Ohio, for example, firefighters and other public employees have had little success in suing their public employers for damages arising out of workplace injuries. While employees working for a private employer may file “intentional tort” lawsuits seeking damages not reimbursed under workers comp., they face a very difficult burden of proof. The injured employee must prove not only that the employer knew of a dangerous workplace condition, but also that the employer knew that harm was substantially certain to occur.

For example, on May 23, 2009 in Helfinstine v. Plasticolors, 12 Ohio App.3d 430, 2009-Ohio-2442, the Court of Appeals for Ashtabula County upheld the dismissal of an “intentional tort” lawsuit filed by an employee who suffered severe chemical burns to his feet and ankles when the company failed to supply appropriate protective footwear. He was loading dangerous chemicals into a shipping container, wearing a Tyvek pair of coveralls from his neck to his ankles, two sets of gloves, and a respirator hood. The gloves were taped to his arms, and the Tyvek pants were taped to his ankles. He inadvertently kicked over a container which spilled onto his steel toed shoes and his socks. The lawsuit was dismissed because no other employees had ever suffered such injuries. The Court of Appeals quoted from a 2006 decision, “The absence of prior

accidents strongly suggests a lack of knowledge by an employer that injury from a particular procedure or process was substantially certain to occur.”

Legal Lessons Learned: Guard the poles to prevent inadvertent entry. Even if workers comp is the sole remedy, what a terrible way to end a career in the fire service.

[File – Chapter 6]

PA: AMERICAN FLAG PATCHES ON FD LOCKERS - U.S. CODE SPECIFICALLY ALLOWS FLAG PATCH ON FIREFIGHTER UNIFORMS

On October 19, 2009, a Chester City, PA firefighter was reinstated after his suspension for two day without pay for refusing to remove all postings on his locker, including an American flag patch. The Fire Commissioner and the IAFF reached a sensible resolution; they would follow the U.S. Code provisions on display of the flag.

[http://cms.firehouse.com/content/article/printer.jsp?id=66218;](http://cms.firehouse.com/content/article/printer.jsp?id=66218)

According to an Oct. 24, 2009 story in the Philadelphia Enquirer, the Fire Commissioner, who is an African American, had earlier ordered all items removed from the lockers in response to a racially charged cartoon that had been posted by an African-American FF on his own locker.

“Over the summer, Robert Butler, 48, a 15-year veteran, posted a cartoon on his locker that depicted two black minstrel characters and included a racial slur. Butler, who is black, said he posted the cartoon as a protest against the department's union leadership, who he says have targeted him for discipline.”

[http://cms.firehouse.com/content/article/article.jsp?id=66320§ionId=46.](http://cms.firehouse.com/content/article/article.jsp?id=66320§ionId=46)

The U.S. Code, Title 36, Section 176, “Respect for flag” provides in part:

“No part of the flag should ever be used as a costume or athletic uniform. However, a flag patch may be affixed to the uniform of military personnel, firemen, policemen, and members of patriotic organizations. The flag represents a living country and is itself considered a living thing. Therefore, the lapel flag pin being a replica, should be worn on the left lapel near the heart.”

<http://www.usflag.org/uscode36.html#176> .

Although the U.S. Code does not specifically include a firefighter’s locker, in many stations these lockers can be observed by members of the public touring a fire station. Putting a flag patch on a locker, properly aligned, appears to be in keeping with the “spirit” of the 1942 statute. The opening sentence of Section 176 provides:

“No disrespect should be shown to the flag of the United States of America; the flag should not be dipped to any person or thing. Regimental colors, State flags, and organization or institutional flags are to be dipped as a mark of honor.”

Legal Lessons Learned: It is appropriate to have a FD policy which regulates items placed on FD lockers, particularly items that are racially charged. An American flag patch, however, does not appear to violate the spirit of the U.S. Code provision on “Respect for the flag.”

[File – Chapter 1]

D.C. – METRO TRAIN CRASH ON JUNE 22, 2009 KILLED 9 AND INJURED 76 - LOVELY TRIBUTE VIDEO - BUT NOT SO LOVELY SOLICITATIONS BY LAWYERS

On Oct. 21, 2009 the D.C. Fire & EMS Department released a video of the incident, dedicated to the victims and their families and to the emergency responders. It is a wonderful, 15-minute video.

<http://cms.firehouse.com/content/article/article.jsp?sectionId=46&id=6626>.

The Oct. edition of the D.C. Bar Association magazine, “Washington Lawyer” includes a sobering article by the Bar Counsel (investigates complaints against attorneys) Gene Shipp, Esq. and law clerk Joe Perry, entitled “Tragedy and the Attorney Solicitation Debate.” Shortly after the crash, lawyers began soliciting clients:

“Meanwhile, Web sites directed at victims of the crash began sprouting up, speculating on the potential negligence involved in the crash and prodding would-be clients with flashing buttons announcing live chats with attorneys who were only a mouse-click away. Other lawyers chose instead to make both phone and in-person calls to victims’ homes.”

If this had been an Amtrak train crash or other “interstate” rail line, instead of a Metro commuter line, then the federal Rail Passenger Family Assistance Act, 49 U.S.C. 1139 (2008), would have imposed a 45-day waiting period of attorney solicitation.

Likewise, if this had been an aviation crash, the Aviation Disaster Family Assistance Act, 49 U.S.C. 1136, imposes a 45-day waiting period.

Many states have enacted similar waiting-period laws, and Bar Associations in numerous states have adopted ethical rules on this issue. Florida, for example, prohibits direct-mail solicitation of motor vehicle accident victims and disaster victims for 30 days. The U.S. Supreme Court upheld this rule in Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995), finding that Florida had a legitimate interest in protecting the “flagging reputation of Florida attorneys.”

Legal Lessons Learned: It is time for the D.C. Bar Association, and other state Bar Associations or legislatures, to impose similar restrictions on direct solicitations.

[File: Chapter 4]

NY: INCIDENT COMMAND - WENT DEFENSIVE AT LARGE INDUSTRIAL FIRE – CHEMICALS FROM BUILDING - FD AND TOWN NOT LIABLE UNLESS GROSS NEGLIGENCE

On Oct. 19, 2009 in AMW Materials Testing, Inc. and Anthony Antonious v. Town of Babylon and North Amityville Fire Company, Inc., 2009 U.S. App. LEXIS 22893, the U.S. Court of Appeals for the Second Circuit (3 to 0) affirmed the decision of the U.S. District Judge and trial jury that the FD and the Town were not liable for release of chemicals at the fire. Under the federal environmental law, CERCLA (Comprehensive Environmental Response, Compensation, and Liability Act 42 U.S.C. § 9601 et seq.), emergency responders are not liable for chemical releases unless there is proof of gross negligence.

The Court described the fire:

“In 2000, plaintiffs owned an industrial facility in North Amityville, New York, where they engaged in metal finishing for the aerospace industry. Pursuant to permits, plaintiffs stored various ‘hazardous substances,’ see 42 U.S.C. §§ 9601(14), 9602(a), in the AMW facility for use in their work.

Sometime before 3:00 p.m. on October 9, 2000, a fire broke out in plaintiffs' facility, which Antoniou and an AMW employee unsuccessfully attempted to extinguish. Meanwhile, individual callers and an automatic alarm system in the AMW facility alerted defendant North Amityville Fire Company ("Fire Company") -- a volunteer association -- to the fire. Within minutes, members of the Fire Company responded to the scene. Fire Company Chief Willie Tutt initially ordered firefighters into the AMW building to fight the blaze from within. Almost immediately, the firefighters were compelled to withdraw by the extremely high heat and thick smoke that they encountered. Soon after their exit, the front wall and roof of the building collapsed. As a result, the Fire Company decided to employ defensive firefighting techniques, using a deck gun and a tower ladder to suppress the fire. Chief Tutt testified that, at the time, he understood that the building was likely lost. After firefighters thus extinguished the accessible portions of the fire, Chief Tutt instituted an "overhaul" phase in which pay loaders removed portions of the collapsed roof so that firefighters could gain access to the fire that continued to smolder underneath.

As a result of the fire and the subsequent building collapse, hazardous substances stored in plaintiffs' facility were released into the surrounding environment. During and after the fire, plaintiffs took various steps to contain, remove, and remediate these hazardous substances.”

The FD knew of the hazardous materials at the scene, and properly called for a HAZMAT response. The Court described the Fire Chiefs actions:

“The Fire Company Alarm Detail Dispatch for the AMW fire said, ‘Please Note Hazardous Materials.’ Fire Company Chief Tutt testified that, within a minute of arriving at the scene of the fire, he called Dispatch to note that there were "a lot of chemicals" on the scene and to request assistance from the Environmental Protection Agency. Shortly thereafter, representatives of the New York State Department of Environmental Conservation and the Suffolk County Department of Health arrived at the scene.”

Under CERCLA, there is no liability for emergency responders unless proof of gross misconduct.

“By their nature, emergency situations require quick responses, often before risks are fully understood. The affirmative defense afforded by § 9607(d)(2) serves to ensure that states and municipalities are not dissuaded from responding to emergency situations by the threat of strict liability under CERCLA. This goal would hardly be served by conditioning § 9607(d)(2) immunity on subjective knowledge, thereby encouraging delay in responding to an emergency while such knowledge was acquired. As the House Report to the 1986 CERCLA amendments notes, § 9607(d)(2) ‘removes a disincentive for governments to respond to emergencies covered by CERCLA.’ H.R. REP. 99-253, 73, reprinted in 1986 U.S.C.C.A.N. 2835, 2855; see also *Pennsylvania v. Union Gas Co.*, 491 U.S. at 49 n.3 (White, J., concurring in part and dissenting in part) (quoting House Report). With this understanding of the purpose and history of § 9607(d)(2), we conclude that the proper inquiry under that section is solely objective, i.e., was the state or local government responding to an emergency caused by the release or threatened release of hazardous substances. If so, then regardless of what subjective knowledge the responders had about the hazards at issue when they first arrived on the scene, their CERCLA liability under § 9607(a) is limited to ‘gross negligence or intentional misconduct’ in dealing with the emergency. 42 U.S.C § 9607(d)(2).”

Legal Lessons Learned: This is a helpful decision for the fire service; without the “gross negligence” defense FDs we be required to pay substantially higher insurance premiums to cover the risk of multi-million dollar environmental cleanups.

[File: Chapter 6]

FED: AGE DISCRIMINATION – REQUIREMENT THAT ALL DEA SPECIAL AGENTS BE 37 OR YOUNGER WHEN HIRED DOES NOT VIOLATE AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA)

On Oct. 20, 2009, in *Paula Albert, et. al v. Eric Holder, Attorney General of the United States*, 2009 U.S. Dist. LEXIS 96770, a U.S. District Court Judge for the Eastern District of Michigan, dismissed the lawsuit by seven Drug Enforcement Agency employees who had applied to become Special Agents, but were rejected because they were each over the age of 37 when they applied. They are employed as inspectors and other non-law enforcement positions.

The Court described the special status of Law Enforcement Officers (LEOs) in the Drug Enforcement Administration:

“Special Agents, because of their LEO status, are entitled to enhanced benefits that Diversion Investigators are not. For example, Special Agents are eligible for retirement at age 50 with 20 years of service, 5 U.S.C. § 8336(c), and supplemental pay, 5 U.S.C. § 5305. Special Agents, as LEOs, are also subject to a maximum initial entry age authorized by statute. *See* 5 U.S.C. § 3307. The maximum initial entry age statute, however, does not apply to Diversion Investigators, as they are not LEOs. DEA employees' classification as LEO or non-LEO is, thus, determinative of significant employment conditions and benefits. ***

The Department of Justice (DOJ) established a maximum age of 37 for initial entry into LEO positions within the DEA, including the Special Agent position.

(Def.'s Mot., Ex. E.) Because Plaintiffs were older than the maximum initial entry age, their applications for Special Agent were denied.”

The ADEA was enacted to protect employees age 40 for age discrimination:

“Congress passed the ADEA in 1967 to combat improper treatment of federal employees on the basis of age. The statute currently states, in part, that „[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age ... shall be made free from any discrimination based on age.” 29 U.S.C. § 633a(a).”

However, Congress enacted other legislation that allows Federal agencies to impose an age limit on new hires of law enforcement officers:

“In 1974, Congress enacted Public Law 93-350 amending 5 U.S.C. § 3301 *et seq.* with respect to the retirement of certain law enforcement personnel. This statute was a „major piece of legislation designed to enhance the “youth and vigor” of federal law enforcement.’ *Stewart v. Smith*, 673 F.2d 485, 487 (D.C. Cir. 1982). Along with provisions on mandatory retirement, 5 U.S.C. § 8335(b), and incentives for early retirement, 5 U.S.C. § 8339(d), Public Law 93-350 provided federal agencies employing LEOs the authority to set maximum initial entry ages for appointment to those law enforcement positions. Specifically, 5 U.S.C. § 3307 provides:

(d) The head of any agency may determine and fix the ... *maximum limits of age* within which an *original appointment* may be made to a position as a *law enforcement officer* ..., as defined by section 8331 (20) [CSRS] ...

(e) The head of an agency may determine and fix the *maximum age limit for an original appointment* to a position as a ... *law enforcement officer*, as defined by section 8401(17) [FERS] ...5 U.S.C. § 3307 (emphasis added).”

Congress has subsequently lifted most mandatory retirement ages, but it did not alter mandatory retirement ages for law enforcement officers (LEOs), nor did it alter the authority of agencies to have age limits on hiring law enforcement agents:

“In 1978, Congress amended the ADEA when it enacted the Age Discrimination in Employment Act Amendments of 1978. The 1978 amendments eliminated most federal maximum age limits, however, it left untouched the mandatory maximum retirement age limits for LEOs. The amendments also left, undisturbed, federal agencies' authority, under 5 U.S.C. § 3307, to set maximum initial entry age limits for LEO positions.”

Plaintiffs also claimed they were misclassified by the DEA, and that they should have been classified as LEOs. The Court rejected this claim, and referred them to the Office of Personnel Management appeal process.

Legal Lessons Learned: Many states have also enacted statutes imposed minimum age for hiring of career firefighters who will be in the state pension program. Increasingly, such statutes have come under attack. For example, the Montana Supreme Court, on Aug. 11, 2009 in Steven

Jaksha v. Butte-Silver Bow County held that the Montana statute which disqualified those over 34 from original appointment as a County firefighter was unconstitutional. The Court held unanimously that the statute violated the Equal Protection Clause of the Montana Constitution, particularly in light of the fact that in 1985 the State Legislature repealed the mandatory retirement age of firefighters. The Court wrote, “While the working life of a firefighter who begins work at age 35 or later may be shorter than that of an individual who begins at an earlier age, this does not in any way imply or demonstrate that public or firefighter safety would be compromised.”

http://fnweb1.isd.doa.state.mt.us/idmws/custom/sll/sll_fn_home.html;

see also www.firehouse.com, Aug. 13, 2009, “Montana Court Overturns Firefighter Age Limit.”

[File – Chapter 9]

FL – CITY OF PORT ST. LUCIE – AMERICANS WITH DISABILITIES SETTLEMENT - TTY SERVICES FOR 911 CALLS - MEDICAL RECORDS MUST BE SEPARATE FROM PERSONNEL FILES

On August 10, 2009, the City of St. Lucie, FL entered into a settlement agreement with the U.S. Department of Justice (Civil Rights Division – Disabilities Rights Section) that focused on access to public buildings and direct access via TTY (text telephone) or computer-to-telephone 911 services: <http://www.usdoj.gov/crt/> (search Port St. Lucie).

Three particular items of interest to the fire service:

- TTY: The review included compliance with Title II of the Americans With Disabilities Act:

“to provide direct access via TTY (text telephone) or computer-to-telephone emergency services, including 9-1-1 services, for persons who use TTY’s and computer modems, 2 C.F.R. Sec. 35.162.” (Page 2 of Settlement Agreement.)

“The City has equipped each police station or substation with a working TTY to enable persons who are deaf, hard of hearing, or who have speech impairments to make outgoing telephone calls.” (Paragraph 16 of Settlement Agreement.)

- Job Applicants:

“[The City] will not ask a job applicant about the existence, nature, or severity of a disability. Applicants may be asked about their ability to perform specific job functions. Medical examinations or inquiries may be made and only if required of all applicants for the position.” (Paragraph 24 of the Settlement Agreement.)

- Medical Records Filed Separate From Personnel Files:

“[The City] will maintain any employee’s medical records separate from personnel files and keep them confidential.” (Paragraph 24 of the Settlement Agreement.)

Legal Lessons Learned: Review the Settlement Agreement and implement ADA corrective action plans.



Lawrence T. Bennett, Esq.
Program Chair
Fire Science & Emergency Mgmt.
CEAS - Applied Science
2220 Victory parkway
Cincinnati, OH 45206

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

lawrence.bennett@uc.edu