



FIRE, EMS & SAFETY NEWSLETTER

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE].

SELF-SIGN-UP at www.uc.edu/cas/firescience.

Larry Bennett can be reached at:
lawrence.bennett@uc.edu, or
Cell 513-470-2744

Larry is an attorney and the Deputy Director of Fire Science Education at the University of Cincinnati's Fire Science Department. 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.

January 23, 2009

FED: KATRINA - NATIONAL RESPONSE PLAN - FEMA AND OTHER OFFICIALS ENJOY SOVEREIGN IMMUNITY FOR DISCRETIONARY ACTIONS

On January 22, 2009, in *Herbert Freeman, et al, v. United States of America*, the U.S. Court of Appeals for the 5th Circuit (located in New Orleans), held 3 to 0 that the families of three elderly loved-ones who died in the Katrina Hurricane evacuations cannot sue for alleged negligence of FEMA and other officials, since the National Response Plan is a discretionary activity of the government, and therefore the U.S. Government and its officials enjoy immunity from suit. See full opinion at <http://www.ca5.uscourts.gov/opinions/pub/07/07-31066-CV0.wpd.pdf>.

Death of Ms. Freeman: Herbert Freeman's mother died on Sept. 1, 2005 in the New Orleans Convention Center. Hurricane Katrina made landfall on Aug. 29, 2005 and Mrs. Freeman was chronically ill and decided to stay in her home. After waters from Lake Ponchartrain breached the Industrial Canal, her home was flooded. Her son borrowed a boat from a friend, and safely removed her and her wheelchair to higher ground. New Orleans police officers directed them to the Convention Center. She needed immediate medical attention. Officers told them that she would be evacuated by bus, but the bus never came. She died the next day. The Court wrote:

"Squalid conditions existed at the Convention Center, and it was not equipped with food, water, medical assistance, triage, or transportation. Ms. Freeman died the day after she arrived there. An image of her blanket-covered body was broadcast on national television."

Death of Ms. Elby: Ms. Elby was bedridden, and remained in her home with a care taker as the hurricane hit. Later they were rescued by boat, and delivered her and a care-taker to a highway, where they spent the night without food, water, shelter or medical care. The next day her family carried her to an Interstate highway, where a large truck took her to the Convention Center. She died at the Convention Center on September 1, 2005.

Death of Mr. DeLuca: Mr. DeLuca died on September 3, 2005 at the Louis Armstrong International Airport. A helicopter crew had rescued him from an assisted living facility and took him to the Ponchartrain Center in Kenner, LA. When this Center also flooded, another helicopter moved him to a cloverleaf on Interstate 10. He was taken to the cloverleaf on August 30, where he remained without water, food, shelter, medical assistance, triage or transportation until he collapsed on Sept. 2 from dehydration, stress, heat exhaustion and hunger. He was airlifted to the airport, where he died the next day.

National Response Plan: The families of the three deceased filed a lawsuit in U.S. District Court, alleging that FEMA and other officials contributed to the deaths by negligently failing to perform “nondiscretionary” duties arising under the National Response Plan (now replaced by the National Response Framework).

The NPR was promulgated by the Department of Homeland Security under a 2003 Presidential Directive, to “integrate Federal Government domestic prevention, preparedness, response, and recovery plans into one all-discipline, all hazards plan.” Presidential Directive HSPD-5 (Feb. 28, 2003). Department of Homeland Security Secretary Michael Chertoff released the NPR in Dec. 2004. It included an Annex (called the Catastrophic Incident Annex) that formed the backbone for the federal government’s response to catastrophic incidents, like hurricanes. This included FEMA supporting state and local agencies. See 44 CFR 206.5.

The 5th Circuit noted that FEMA performed poorly, writing:

“the federal government was unprepared for Hurricane Katrina, and its response was universally criticized as inadequate, unorganized, and flawed [citing Congressional hearings]. Among the many shortcomings, FEMA officials displayed a lack of situational awareness that led to organizational inaction, and critical elements of the National Response Plan were executed late, ineffectively, or not at all. See H.R. Rep. No. 109-377, at 2-5. More specifically, the record reveals that federal agencies did not initiate decisive action to assist the Convention Center until September 2, 2005, and contains no evidence of any mission to aid evacuees at the [Interstate 10] Cloverleaf.”

The lawsuits named former FEMA Director Michael Brown, DHS Secretary Chertoff, and numerous other officials, seeking to sue them personally, as well as in their official capacity. The U.S. Government filed motions to dismiss, arguing that Congress has not waived under the Federal Tort Claims Act (28 U.S.C. 2680(a)) or the Stafford Act (42 U.S.C. 5121 – 5208) the government’s sovereign immunity for discretionary conduct of its officials, and that the NPR did not create any nondiscretionary duties.

The U.S. District Judge granted the government’s motion, and dismissed the lawsuits on the basis of sovereign immunity. The Court refused plaintiffs’ request for pre-trial discovery prior to deciding to dismiss the case – therefore plaintiffs did not take any pretrial depositions or obtain any documents in pretrial discovery.

The families appealed to the U.S. Court of Appeals, which affirmed the District Court:

“In this case, plaintiffs argue that the government failed to perform or was negligent in its performance of the specific duties prescribed by the NRP—namely, the provision of food, water, shelter, medical assistance, and transport to the Convention Center and to the Cloverleaf. (See Pls.’ Br. 34.)”

“The NRP directives that plaintiffs cite permit agents to exercise judgment or choice that is subject to policy analysis. We therefore hold that the government’s conduct under the NRP—even its failure to provide food, water, shelter, medical assistance, and transport to the Convention Center and to the Cloverleaf—qualifies under the Stafford Act’s discretionary function exception.”

“Under the first prong of the *Berkovitz* test [U.S. Supreme Court’s decision in *Berkovitz v. United States*, 486 U.S. 531 (1988)], plaintiffs fail to identify any specific, nondiscretionary function or duty that does not involve an element of judgment or choice. To the contrary, plaintiffs cite a large number of NRP provisions that contain generalized, precatory, or aspirational language that is too general to prescribe a specific course of action for an agency or employee to follow.”

The 5th Circuit also held that the plaintiffs can not sue under Federal Tort Claims Act, since the FTCA “excepts discretionary functions and duties from the waiver of sovereign immunity.”

Likewise, the government is immune from liability for the breach of the water levy. Congress in the Flood Control Act of 1938, while authorizing federal dams and other flood controls, provided in the Act: “No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place.”

The 5th Circuit concluded with these sobering observations:

“The tragedies that gave rise to this litigation were compounded by the well-documented inability at all level of government to provide timely relief to hurricane victims. The federal government has publicly admitted that it made mistakes; however, even if those mistakes caused decedent’s deaths, which we are presently in no position to determine, the federal government’s negligence does not give rise to tort liability absent the U.S. Government’s express waiver of sovereign immunity.”

Legal Lessons Learned: We have all learned from the Katrina response issues. The good news is that this decision is consistent with many court cases, holding that Incident Commanders and other officials who exercise discretion at emergency scenes are generally not personally liable for their good faith conduct.



Lawrence T. Bennett, Esq.
Deputy Director
Fire Science Department
CEAS - Applied Science
2220 Victory parkway
Cincinnati, OH 45206

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

lawrence.bennett@uc.edu