



Cumberland County Fire Chief's Association
Minutes of December 19, 2011 Monthly Meeting



The meeting was hosted by the Cumberland County Sheriff's Department. We thank Sheriff Butler and his staff for their hospitality.

Opening Prayer: Ronnie Mitchell provided the opening prayer.

Roll Call: Roll call was conducted with 21 departments and 6 associate members present.

Members Absent: Stedman

Associate Members Absent: Christian Firefighters, County Commissioner, SBI, Lifelink, FTCC, Fort Bragg EMS

Approval of Minutes: Minutes from the November 2011 were approved as presented.

Guests: Cary Kiger, with Second Chance Wildlife presented all of the Fire Departments with oxygen masks designed for animal use.
Rita Cox, Cumberland County Assistant DA requested support for the next open seat for District Court Judge.

Vendors Present: None.

Treasurer's Report: None.

Meeting Point of interests:

Next Chief's Meeting will be January 23, 2012 at EMS Base. This will be a Chief's only meeting.

- President Johnson distributed packages containing legal briefs and thank you information.
- President Johnson discussed that the Executive Committee positions were up for election in January 2012. Nominations from the floor will take place at this meeting.
- President Johnson advised the members of a webcast training session on "Iamresponding". The webcast is set for December 20, 2011 at 7:30 pm.
- President Johnson advised that the Stoney Point Fire Department (1361) will pick up air truck coverage and duties in January 2012.

- President Johnson welcomed Chief Roddy Bullard back from his medical treatments and asked that everyone please keep Archie Cox and his family in your thoughts and prayers.
- President Johnson advised the members of Chief Blackburn's retirement luncheon on January 13, 2012 at the Pope Community Center.
- Chief Blackburn addressed the members and thanked them for their support and relationships during the past 30 years. Chief Blackburn announced that Mark Melvin has been promoted to the position of Fire Chief for Fort Bragg Fire and Emergency Services
- Chief TJ McLamb announced Jason Williams as the new Assistant Fire Chief for the Town of Spring Lake Fire Department

OLD BUSINESS

- All departments wishing to contribute to the Make a Wish program, please contact President Johnson by December 31, 2011 – Make Checks payable to Stoney Point and SPFD will write a combined check -

NEW BUSINESS:

- None

COMMITTEE REPORTS:

ID CARD COMMITTEE Lt. Tara Whitman (Stoney Point) Chairperson

- **FYI.** Fire Chiefs are required to send a signed letter or memo with a firefighter requesting an ID Card. For any questions or an appointment contact 424-0694 or e-mail at tara@stoneypointfire.com

FIRE PREVENTION/EDUCATION COMMITTEE Retired Chief J.F. Hall, Chairperson

- No report.

COMMUNICATIONS COMMITTEE Chief B. Bullard (Stedman) Chairperson

- No report.

STANDARDS & POLICY COMMITTEE Chief K. Hall (Cumberland Road) Chairperson

- No report.

MEMORIAL COMMITTEE Chief R. Marley (Pearce's Mill) Chairperson

- No report.

AUTOMATIC AID/MUTUAL AID COMMITTEE Chief Ake (Beaver Dam) Chairperson

- No report.

FINANCE COMMITTEE Deputy Chief Freddy Johnson Jr. (Stoney Point) Chairperson

- No report.

RESCUE COMMITTEE Deputy Chief Hank Harris (Cotton FD) Chairperson

- No report.

BULK PURCHASE COMMITTEE Chief Pierce (EMS) Chairperson

- No report.

ASSOCIATE MEMBERS REPORT

EMERGENCY SERVICES DIRECTOR/ ECC-911 Kenny Currie, Director

- Director Currie announced that Stoney Point Fire Department was recommended for their national accreditation thru the Center of Public Safety Excellence (CPSE).

EMS DIRECTOR: Brian Pearce, Director

- No report.

HAZMAT BC Brian Mims, FFD - POC telephone for HAZMAT is 433-1729

- No report.

FORESTRY DISTRICT Andrew Synder, County Ranger

- No report.

FTCC Ernest Ward, Director

- No report.

SHERIFF'S OFFICE Sheriff Butler

- No report.

HIGHWAY PATROL

- No report.

CHRISTIAN FIREFIGHTERS Chaplain Cassanova

- No report.

COUNTY COMMISSIONERS Fire Commissioner Ed Melvin

- No report.

FOR THE GOOD OF THE ASSOCIATION:

- None

ADJOURNMENT: A motion was made to adjourn by Chief Harris, seconded by Chief K. Hall. The meeting was adjourned at 2020 hours.

Respectfully Submitted By:

Freddy L. Johnson

Freddy L. Johnson Sr. CFO
Fire Chief / President

Mark A. Melvin

Mark Melvin, CFO
Fire Chief / Secretary

4 Enclosures

1. Roll call form
2. Legal briefs
3. Scroggins family thank you
4. Pager information

**CUMBERLAND COUNTY FIRE CHIEF'S ASSOCIATION
ROLL CALL 2011**

MEMBERS PRESENT (22)	17	20	20	22	20	20	16	20	19	19	21	21
ASSOCIATES PRESENT (12)	7	7	7	7	4	6	8	5	7	8	6	6
CC Fire Chiefs DEPARTMENT ORGANIZATION * Chief's Only Meeting	24-JAN-11 *	28-FEB-11	28-Mar-11	25-Apr-11 *	23-May-11	27-June-11	25-Jul-11	22-Aug-11	26-Sep-11	24-Oct-11	28-Nov-11	19-Dec-11
MEMBERS												
BEAVER DAM STA 26	P	P	P	P	P	P	P	P	P	P	P	P
BETHANY STA 12	P	P	P	P	P	P	A	P	P	P	P	P
CEDAR CREEK STA 8	P	P	P	P	P	P	P	P	A	P	P	P
COTTON STA 4	P	P	P	P	P	P	P	P	P	P	P	P
CUMBERLAND ROAD STA 5	P	P	A	P	P	P	A	P	A	A	P	P
EASTOVER STA 1	E	P	P	P	P	P	A	A	P	A	P	P
EMS EMERGENCY MEDICAL SERVICES	P	A	P	P	P	A	P	A	P	P	P	P
FAYETTEVILLE FIRE DEPT	P	P	P	P	P	P	P	P	P	P	P	P
FORT BRAGG FIRE DEPT	P	P	P	P	P	P	P	P	P	P	P	P
GODWIN - FALCON STA 17	P	P	P	P	P	P	P	P	P	P	P	P
GRAYS CREEK STA 18	P	P	P	P	P	P	P	P	P	P	P	P
GRAYS CREEK STA 24	A	P	P	P	P	P	P	P	P	P	P	P
HOPE MILLS STA 21	A	P	P	P	A	P	A	P	P	A	P	P
PEARCE'S MILL STA 3	P	P	P	P	P	P	P	P	P	P	P	P
SPRING LAKE STA 22	A	A	A	P	A	A	A	P	P	P	P	P
STEDMAN STA 23	P	P	P	P	P	P	P	P	P	P	P	A
STONE POINT STA 13	P	P	P	P	P	P	P	P	P	P	P	P
STONE POINT STA 19	P	P	P	P	P	P	P	P	P	P	P	P
VANDER STA 2	P	P	P	P	P	P	P	P	A	P	P	P
WADE STA 16	P	P	P	P	P	P	P	P	P	P	P	P
WESTAREA STA 15	A	P	P	P	P	P	A	P	P	P	A	P
WESTAREA STA 20	P	P	P	P	P	P	P	P	P	P	P	P
ASSOCIATE MEMBERS												
HAZMAT	P	E	P	P	P	P	P	P	A	P	A	P
SHERIFF'S OFFICE	A	P	P	A	A	P	P	A	A	P	P	P
HIGHWAY PATROL	P	P	P	P	P	A	A	P	P	P	P	P
CC EMERGENCY SERVICES	P	P	P	P	P	P	P	P	P	P	P	P
FORESTRY	P	P	P	P	A	A	P	P	P	A	A	P
FTCC	A	P	A	A	A	A	A	A	A	P	A	A
COUNTY COMMISSIONERS	P	P	P	P	P	P	P	A	P	P	P	A
CHRISTIAN FIREFIGHTERS	A	A	A	P	A	A	P	A	A	A	A	A
LIFE LINK	P	A	P	P	A	A	P	A	P	P	P	A
SBI	A	A	A	A	A	A	A	A	A	A	A	A
HOPE MILLS POLICE	A	A	A	A	A	P	A	P	P	A	A	P
FORT BRAGG EMS	P	P	A	A	A	P	P	A	P	P	P	A

Special Notes:

CODES: (P) - Present (A)-Absent (E) - Excused

Legal Briefings for Fire Chiefs

How fire chiefs, fire commissioners, and other fire service officers use the law to protect their communities... their departments... their officers... and themselves.

Vol. 24, No. 12

FireChiefLaw.com

December 2011

In This Issue

Terminated - Eyesight – Appealed Under Veterans Preference Act

The civil service commission reversed the city's decision, and the city appealed. The former firefighter points to the Veterans Preference Act which, he claimed, requires a 15-day statute of limitation. However, the VPA is silent on employer's appeal.Page 2

Age Discrimination – Disciplined for Spreading Rumors about the Chief

The employee manual specifically states that such activities would be subject to disciplinary measures. The claimant alleged that his sanction was all about age, but he failed to provide sufficient direct and circumstantial evidence.Page 3

Volunteer Fire Station Inspection Warrant Denied

The commissioner of labor intended to conduct an inspection after seeing evidence of unsafe activities. However, she was denied entrance to the fire station. The subsequent warrant was also denied. Is the fire company a political subdivision?Page 4

Promotions – Disparate Impact of Examination

This is an anticipated case evolving from the *Ricci v DeStefano* reverse discrimination Supreme Court decision. Although the claimant does not wish to disturb the *Ricci* decision, she maintains that certifying the exam scores results in disparate impact on minority candidates.Page 5

Files for Bankruptcy Without Reporting \$1 Million Judgment Against City

The trustee quickly revoked the bankruptcy decision and reopened the case. The trustee demanded that the city pay the former firefighter creditors. The city claims that the trustee should be estopped from making such a claim.Page 6

Female Candidates Challenge Physical Abilities Test

A recently filed lawsuit could have major ramifications for fire departments who use the Physical Abilities Test as opposed to the Candidate Physical Ability Test which is recommended by the IAFF. Female candidates allege that too much emphasis is placed on strength rather than firefighter skills. The city denies any liability.Page 7

Index 2011 Cases

Human resource issues ... drug testing ... progressive discipline...hiring/promotions... diversity...unionsPage 8

In The Next Issue

Union Challenge – Minimum Manning of Equipment

The village says, "No!" The firefighters union disagrees. The case is heard by an arbitrator who sides with the union, and the village appeals, contending that minimum manning has no relation to terms and conditions of employment.

Legal Briefings for Fire Chiefs

Publisher

EDM Publishing

Robert S Faulkner

Editors & Writers

E. Michael Quinlan, Esq.

Shannon M. Quinlan, Esq.

Manager of Information Services

Lorie D. Faulkner

FireChiefLaw

A Division of EDM Publishing

PO Box 411

Abington, MA 02351

877-588-0048

Fax 1-781-934-6644

info@firechieflaw.com

Subscription Price \$169

(ISSN 1931-602X)

Copyright © 2010

If you are missing an issue or have any questions about your subscription, please call:

877-588-0048

All of the content of this newsletter and all other related materials published by EDM Publishing and related entities are copyrighted by the publisher and may not be copied, faxed, or duplicated in any way without permission by the publisher.

Veterans Preference Act – Disabled Firefighter Terminated

Was the appeal timely?

Editor's Note: When a statute is silent on an issue regarding an appeal by an employer, and another statute clearly and unambiguously states the employer's time frame for filing an appeal, the other statute applies.

William Eldredge ("Respondent") was hired as a firefighter with the City of Saint Paul, Minnesota ("City") in 1994. An honorably discharged veteran of the United States Armed Forces, Respondent was placed on light duty due to a medical condition related to his eyesight in 2004.

By 2006, Respondent's condition apparently did not improve, and City officials notified him that he was to be terminated because he was deemed to be unable to perform the duties of a firefighter.

As a veteran, Respondent is entitled to the protections and procedures of the Veterans Preference Act ("VPA") which was codified into the applicable state statute. He demanded a hearing before the Saint Paul Civil Service Commission ("Commission") pursuant to the terms of the VPA.

Respondent testified at the hearing and conceded that he had difficulty reading, but his condition would not negatively impact his ability to chop, pull, search for victims and perform other important firefighter duties.

The Commission finally decided that Respondent's testimony was not sufficient to change the City's opinion that he could not perform the duties of a firefighter. He demanded another hearing. The Commission then decided to overturn the City's decision.

The City brought this action in the district court demanding that the Commission's decision be reviewed. The City's petition was brought within the 60-day statute of limitations as mandated by another statute.

Respondent filed a motion to dismiss because the VPA provides a 15-day statute of limitation, with which the City did not comply. The district court dismissed the City's claim, agreeing that the City's appeal was not filed within the VPA 15-day statute of limitations. *Southern Minnesota Municipal Power Agency v. Schrader*, 394 N.W.2d 796 (1986).

The City appealed by filing a writ of certiorari to the State Supreme Court, arguing that the VPA only applies to veteran's appeals. Rather, another statute (*Section 484.1*) applying to the City allows a 60-day statute of limitation for filing an appeal.

The court of appeals reversed, siding with the City. *City of St. Paul v. Eldredge*, 788 N.W.2d 522 (2010).

Respondent brought this appeal.

Decision: Affirmed.

A careful reading of the VPA shows no reference to a statute of limitations for the City. Rather, the VPA addresses the rights of veterans only. The VPA is silent on the issue of an employer's right to appeal. Thus, one may not read into a statute a provision that *does not exist*.

Section 484.01 grants jurisdiction to the district court to review an appeal. *Subdivision 2 of 484.01* is not ambiguous and provides the City 60 days to secure a writ of certiorari in appealing a decision of the

Continued on the next page ➤

Commission.

The City's appeal was timely.

Citation: City of Saint Paul v. Eldredge, et al., A10-0528, State of Minnesota in Supreme Court (2011).

Progressive Discipline – Spreading Rumors

Termination – claims age discrimination

Editor's Note: If a firefighter or former firefighter claims age discrimination based on circumstantial evidence, courts generally point to McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), which provides that the claimant must establish a prima facie case of age discrimination by showing he was: (1) a member of the protected class; (2) qualified for his current position; (3) subject to adverse employment action, and (3) treated less favorable than any younger, similarly situated firefighter. Once the firefighter has established a prima facie case, the employer (i.e. fire department) must offer a legitimate, nondiscriminatory reasons for the employment action. If the employer does so, then the burden shifts back to the claimant who must then demonstrate that the employer's proffered reason are a pretext for discrimination.

Mark East ("East") was hired by Clayton County, Georgia ("County") in 1988 and reached the rank of lieutenant. By 2008, East was the highest ranking officer at his station where he supervised five other firefighters, including Sergeant Rodney Hakeem and Firefighter Duel Lee.

East was placed on unpaid administrative leave after it was alleged that he started rumors that Fire Chief Alex Cohilas ("Cohilas") had mishandled funds and that the Assistant Fire Chief Hood ("Hood") had been charged with driving while under the influence of alcohol ("DUI").

East sued the County. Cohilas and named officials ("Defendants") in federal court alleging he was the victim of age discrimination. In support of East's allegations, he claimed that he provided direct evidence in the form of affidavits from other firefighters indicating that Cohilas was biased against older firefighters. He also contended that there is sufficient circumstantial evidence that met the prima facie case of age discrimination by providing evidence that younger firefighters and employees were treated more favorably than he was.

Why bring the case in federal court? East reasoned that state court remedies are inadequate because he is also pursuing a §1983 procedural due process claim in federal court.

The source of the rumor allegations go back to January 2008, when Hakeem stated that East approached him and asked if he "heard about the Chiefs yet?" Hakeem claimed he walked away and engaged Firefighter Lee in conversation. East then walked over to them and shared that Chief Cohilas was about to be fired for misusing funds and that Assistant Chief Hood was facing a DUI charge.

These statements reached Chief Cohilas who ordered an investigation of East's actions. An investigation followed and Cohilas found East's response to be "evasive and contradictory."

Continued on the next page ➤

Mission Statement

Our intention is to report legal matters and the outcomes of lawsuits to fire service officers in order that they learn from the experiences of their colleagues. We do not give legal or any other professional advice, nor do we guarantee the accuracy of our content. Rather, we strongly urge subscribers to have access to competent, experienced attorneys. We hope that this information will help you avoid needless litigation; successfully defend against legal claims that are unavoidable; and use the law to protect your community.

Laws and court decisions are frequently changed, and what you may read in this and other publications might not pertain to all jurisdictions and may have been superseded by new laws, a more current decision, or a different interpretation of the law. Case law and statutes change without notice. Thus, you should not rely on this or other services without first seeking advice from your attorney.

Your service will continue until you tell us to cancel. If you desire, we can time your renewal notice to coincide with the last month of your subscription of the fiscal year. We will also send advance renewal notices prior to price increases. You are under no obligation to take any action on any of these or regular renewal notices. We intend to earn your business and hope your renewal will indicate your satisfaction.

Privacy Statement

We respect your privacy. Your email address and fax number will not be given out to any third party. If you do not want your name used for future mailings by us or third parties, please inform us of all variations of your name and title and we will make every effort to remove them from our lists.

From the Docket

Settlement - \$230,000 – Sexual Harassment

Reasons why local governments choose to settle rather than litigate

Generally, local governments opt to settle a contentious lawsuit for either one of two reasons. The ultimate costs of litigation far exceed the ability of the local government to pay, even if the chances of a successful outcome are great.

Alternatively, if the evidence in the case indicates that the fire department and local government might be exposed to even more liability if the case gets to a jury, the motivation to settle the case will be intensified.

Each year, we report over one hundred lawsuits that have been actually litigated, appealed, and, in many cases, appealed, yet again. In most of these cases, the legal bills alone reach well into the six figures.

However, for every fire service related lawsuit that we report hundreds of others never reach the court house. Indeed, many are settled with each opposing party assuming no liability after agreeing to the terms of the agreement.

Unfortunately for fire departments, to the casual observer, a settled case often times reflects poorly on the fire department and the local community.

This dilemma cannot be helped because one of the most frequent provisions of a settlement agreement is that neither party will be allowed to discuss the details of the agreement.

Thus, the allegations are out there in the local media, but the actual fact analysis and the veracity of allegations are kept from public scrutiny.

In financially challenging times of reduced fire department budgets, we are observing more and more settlements. We will report these

(Continued on next page)

Defendants filed a motion for summary judgment, which was granted. East appealed.

Decision: Affirmed.

The federal due process claim failed because there are state court remedies, such as a writ of mandamus that East should have pursued *before* going to federal court. *Cotton v. Jackson*, 216 F.3d 1328 (2000).

East provided no direct evidence of age discrimination. At no time during the investigation of the rumors did Cohilas or any senior officer mention anything related to age. Rather, the focus was on the spreading of unsupported rumors. Here, the employee manual specifically provides that “no member of the department shall knowingly or carelessly slander, make false accusations about or repeat unsubstantiated rumors about individuals...”

Defendants continue to maintain that there was a legitimate reason for placing East on administrative leave.

Further, East failed to provide sufficient circumstantial evidence of age discrimination. He did not establish that similarly situated, younger firefighters were treated in a more favorable manner. Thus, there is *no causal link* between East’s leave and his age.

Citation: East v. Clayton County, et al., No. 10-15749, D.C. Docket No. 1:09-cv-00260-RWS, U.S. Court of Appeals for the Eleventh Circuit (2011).

Volunteer Fire Company – Effort to Inspect Fire Station for OSHA Compliance Denied

Commissioner applies for warrant to inspect

Editor’s Note: The applicable statute is clear and unambiguous as to whether the volunteer fire company is a political subdivision. Careful drafting of this statute might well have prevented this lawsuit.

The Goshen Volunteer Fire Company (“Fire Company”) is a nonprofit, non-stock membership corporation that has been hired by the Town of Goshen (“Town”), for the purpose of fire suppression. Each of its members is a volunteer and receives no compensation other than workers’ compensation benefits if injured during an emergency response or other Fire Company operations.

As with many volunteer fire departments, the Fire Company had its own bylaws and constitution wherein it elects its own officers. The Town takes no part in such matters or any of the Fire Company operations.

The Fire Company has an oral contract with the Town which may be terminated within sixty days. The Fire Company donated its land and the station house to the Town, which leased it back to the Fire Company for \$1 per year. The Fire Company’s vehicles are financed by the Town, and some of these funds come from independent fundraisers.

This case involves an attempt by the Commissioner of Labor, Patricia Mayfield, to inspect the fire station building to ensure that it was in compliance with safety and health requirements. When the Commissioner arrived at the building to conduct the inspection, she was denied access. She

Continued on the next page ►

then filed an application for a warrant, which was submitted to the Superior Court. The supporting documents of the warrant stated that there was a videotape of a live burn at the station during a training exercise and that some of the firefighters were not wearing protective gear which was mandated under the respiratory protection standards of the Connecticut Occupational Safety and Health Act ("Act").

The Commissioner alleged that this evidence provided probable cause to believe that conditions in the fire station posed a threat to health or safety.

The Fire Company filed a motion to dismiss the warrant application, contending that the court did not have jurisdiction.

The trial court granted the motion, reasoning that the Fire Company was not a unit of government, nor is it a political subdivision. Rather, it is an independent corporation under the Act.

The Commissioner appealed, continuing to argue that the Fire Company is a political subdivision of the Town. She pointed to the "functional equivalent" test. Here, the mission of the Fire Company is to suppress fires and respond to emergency calls within the Town. Further, the volunteer firefighters are entitled to workers' compensation if injured during one of these emergency calls.

Decision: Affirmed.

The applicable statutes do not support the position of the Commissioner. It is clear and unambiguous that the Fire Company cannot be considered a political subdivision of the Town. "Courts may not by construction supply omissions ... or add exceptions merely because it appears that good reasons exist for adding them... it is axiomatic that the court itself cannot rewrite a statute to accomplish a particular result." *Greco v. United Technologies Corp.*, 890 A.2d 1269 (2006).

Citation: Mayfield, Commissioner of Labor v. Goshen Volunteer Fire Company, Inc., SC 18378, Supreme Court of Connecticut (2011).

Promotions – Race Discrimination

Did the exam have a disparate impact on race?

Editor's Note: This case is the predicted outcome of Ricci v. DeStefano, 129 S.Ct. 2658 (2009), wherein eighteen white firefighters with the City of New Haven challenged promotion practices. They successfully argued that they scored higher than minority candidates, but they were denied promotion because of unlawful reverse discrimination.

Michael Briscoe ("Briscoe"), an African-American firefighter with the City of New Haven, Connecticut ("City"), brought this action against the City alleging that the firefighter promotion examination that was certified had a disparate impact on minority candidates.

The New Haven Civil Service Board ("Board") administers firefighter promotion examinations for the City. In 2003, both the Board and the City became concerned that if the results of the promotion examination were certified, white candidates would significantly outperform minority candidates, which would trigger possible disparate-impact liability under *Title VII of the Civil Rights Act of 1964*

Continued on the next page ➤

Around the Nation

agreements but have chosen not to name the parties because of the lack of any final resolution.

It is far more informative and useful to see how a contentious case has been settled, rather than to name the parties and to inevitably bring more negative publicity and embarrassment to the parties involved.

In a recent case, a career firefighter, hired in 2004, who reached the rank of lieutenant, filed a lawsuit against the city and her fire chief, alleging that numerous instances of sexual harassment and gender discrimination has resulted in a hostile work environment.

What followed was a two-year legal confrontation that proved costly to both sides. In the end, the city council and the female firefighter agreed to settle the case.

As with most such agreements, there are several provisions of the settlement that will not be made available to the local media.

However, it has been reported that the former firefighter will receive \$230,000 with the stipulation that she will not seek employment with the city in any capacity.

Settlement – 32 Year Fire Chief to Resign

**Will receive \$325,000 before
retirement benefits start**

We live in an era of tight or reduced public safety budgets, local fire departments are coming up with creative ways to continue providing quality fire prevention and suppression services.

One county was considering consolidation of fire districts. Consolidation only works if there is a reduction in labor costs, starting from the top.

(Continued on next page)

Around the Nation

In this instance, a fire chief at the end of a 32-year tenure, has recently reached a settlement with the county to retire and receive \$92,000+ over the next three and one half years.

From that date forward, the former fire chief will receive his pension of \$92,000 and health benefits.

The issue of naming the chief of the consolidated departments has inevitably caused considerable angst and acrimony among firefighters and staff of both districts.

The negative feelings have extended to the relationship with this long tenured fire chief and the members of the board of commissioners.

In the end, talks about consolidating the two fire districts have broken down. Now, a regional fire authority is being considered. At this writing, property tax revenues are decreasing and the problem is only getting worse.

County commissioners, firefighter union officials, and fire service officers are attempting to work out a solution.

Whistleblower

Claimed Retaliation

Reported safety problems with firefighter equipment

A 911 dispatcher made frequent complaints about allegedly malfunctioning 911 dispatcher telecommunications equipment.

She claimed that the faulty equipment caused computers to inadvertently shut down resulting in lost emergency 911 calls and the untimely interruption of important communications between fire service officers and firefighters out in the field responding to emergencies.

The dispatcher claims that she has been making complaints about the malfunctioning equipment, but the problems have not been corrected to

(Continued on next page)

(“Title VII”).

In the end, the Board did not certify the examination results, the *Ricci* case followed wherein eighteen firefighters (seventeen white and one Hispanic) claimed they were victims of illegal *reverse* discrimination. As we now know, the U.S. Supreme Court agreed.

Briscoe claims that the weighting of the written and oral sections of the test (60% written and 40% oral) mandated by the current collective bargaining agreement, is arbitrary and unrelated to job requirements. Briscoe further asserted that the proper ratio should be 30% written and 70% oral.

Briscoe demanded that the City be enjoined from using the 60/40 weighting and that he and other impacted candidates be eligible for promotion with retroactive back-pay and benefits. He also made it clear he did not want to displace the *Ricci* plaintiffs who were promoted.

The City filed a motion to dismiss Briscoe’s claim, arguing that it was precluded by the *Ricci* ruling. The federal district court granted the motion, and Briscoe appealed. Here, the district court reasoned that Briscoe could have intervened in the *Ricci* case.

The City now argues that it had a strong basis in evidence that it was facing disparate-treatment liability if it certified the examination results. The City also claimed that the disparate-treatment claim applies equally to the disparate-impact claim brought by Briscoe.

Decision: Reversed and remanded.

Briscoe’s claim is not precluded by the *Ricci* decision. Thus, it should not have been dismissed. Further, the *Ricci* decision did not have any significant impact on the *Title VII* disparate-impact litigation. In fact, Briscoe’s claim does not seek to change the limitations of the *Ricci* decision.

Citation: Briscoe v. City of New Haven, Docket No. 10-1975-cv, U.S. Court of Appeals for the Second Circuit (2011).

Former Firefighter Filed for Bankruptcy – Won Judgment Against City

Award not mentioned in bankruptcy filing – case re-opened

Editor’s Note: former firefighter who won a Family Medical Leave Act decision of over \$1 million from his city may lose it all to his creditors because he failed to disclose the judgment as an asset when he filed for bankruptcy.

Former firefighter (“Plaintiff”) sued the City of Arlington, Texas (“City”) pursuant to the Family Medical Leave Act (“FMLA”) and was awarded a judgment of over one million dollars. The City appealed the decision.

Prior to a decision for the appeal being made, Plaintiff and his wife filed for bankruptcy under *Chapter 7*.

Continued on the next page ➤

However, the bankruptcy filings make no mention of the FMLA judgment and award, nor was there any mention of the associated legal fees, which would be a liability of the estate.

Plaintiff did not inform his attorney, Roger Hurlbut ("Hurlbut") who represented him in the FMLA case, and Plaintiff and his wife received a no-asset discharge and their bankruptcy case was closed.

The FMLA judgment was affirmed on appeal, and it was sent back to the federal district court for a recalculation of damages. *Lubke v. City of Arlington*, 455 F.3d 489 (2006). When the City made an offer to Plaintiff, Attorney Hurlbut learned of the bankruptcy filing, he then immediately notified the trustee of the bankruptcy filing, Diane Reed ("Trustee").

The Trustee wasted no time in re-opening the Plaintiff's bankruptcy case, and the discharge was revoked.

The Trustee then substituted herself in the FMLA litigation as a real party of interest. She sent the City a letter of acceptance of the City's offer of judgment, with the intention of distributing the recovered asset (the FMLA judgment) to Plaintiff's creditors.

The City asked the court for an order that Plaintiff should be judicially *estopped* (prevented) from collecting the FMLA judgment due to his failure to disclose the judgment when he filed for bankruptcy.

In the end, the court determined that the Trustee should not be estopped from pursuing Plaintiff's FMLA judgment so as to preserve the assets of Plaintiff's innocent creditors.

Citation: Reed v. City of Arlington, No. 08-11098, U.S. Court of Appeals for the Fifth Circuit (2011).

Female Candidates to Challenge Physical Abilities Test

The City of Chicago has adopted the Physical Abilities Test for screening firefighter candidates. This test is different from the Candidate Physical Ability Test which has been recommended by the International Association of Fire Fighter Unions.

A federal lawsuit has been filed alleging that the Physical Abilities Test results in unfair results for female candidates. Here, it is claimed that too much emphasis is placed on raw strength rather than firefighting skills.

It is also alleged that those who take the test have no idea what the passing criteria is or how to train for it.

Among the features of the Physical Abilities Test demands a candidate to drag a standard size fire hose 70 feet. Candidates must also take an arm endurance test.

The Candidate Physical Ability Test includes a phase where a candidate must climb stairs while weighted down with heavy equipment in addition to dragging a hose for a distance of fifty feet.

The City denies any liability and contends that the more rigid Physical Abilities Test is a better gauge of the rigors successful candidates will face while enrolled in the firefighter academy.

The recently filed lawsuit is still in the initial stages. Plaintiffs are attempting to establish a class action.

Around the Nation

her satisfaction.

Recently, the dispatcher elected to go over the heads of her immediate supervisors and bring the matter to the attention of the city's public safety commissioner.

Here, the dispatcher sent to the commissioner an email suggesting that she could conduct bake sales, car washes, or other activities in an effort to find the funds for upgrading and repairing her equipment in the event the city did not have the funds available.

A short while after sending this email, the dispatcher received a written reprimand based on the results of an audit of her work, which revealed, it is alleged, that she had refused too many 911 emergency calls, which were rolled over to another dispatcher resulting in an unnecessarily long delay in response.

The named dispatcher alleges in her lawsuit that this reprimand was in retaliation for having complained about her equipment.

The dispatcher further alleges that there is a definite pattern of selective enforcement of this type of punishment. She also noted that an accumulation of such reprimands could result in her ultimate termination.

Email Communications are Memorialized - Forever!

We have frequently advised—and warned that every fire department should have a very strict written policy statement about the use of publicly owned computers for either non-business related internet searches and email communication. This policy statement should come from your attorney and be signed by each fire department employment. Equally important, the policy must be consistently enforced.

Legal Briefings for Fire Chiefs: Index January—December 2011

Accident		Workers' comp – knee injury	June 6
Firefighter killed at scene	Sept 2	Drug test	
Fire truck – fatality	July 2	Random	Mar 3
Fire truck	Feb 8	Fire response	
Fire truck – during response	May 4	Negligence charge – fatal fire	July 4
Fire truck	Aug 4	Harassment	
Training	July 5	Sexual – settlement	Aug 8
Benefits		Hiring	
Accidental disability benefits	May 6	Discrimination	Oct 5
Conflicting medical opinions	Aug 3	Military veterans	Aug 2
Death benefits – volunteer	May 5	Injuries	
Death benefits – leukemia	Mar 8	Firefighter injured at scene	Oct 8
Disability retirement	June 5	Fell through floor at fire scene	May 6
Heart disease – presumption	Feb 2	Immunity	
Reduced – light work	Oct 7	Fatal fire – negligence	July 4
Civil rights claim		Fatal fire truck accident	July 2
Due process violation	Mar 2	Fire truck accident	Feb 8
Due process violation	Oct 3	Fire truck accident	Aug 4
Discipline		Former firefighter sues	Jan 3
Abuse of leave	Jan 3	Wrongful death – training accident	July 5
Accidental disability	June 3	Layoffs	
Allow child on ladder	Apr 6	Union challenge	May 2
Demands reinstatement	July 3	Paramedic – EMTs	
Disability retirement benefits	June 5	Assaulted by patient	Apr 7
Email - improper usage	Aug 7	Termination – open meeting	Mar 4
Falsified documents	June 2	Termination improper treatment	Jan 2
Prior knowledge of examinations	Apr 2	Pension	
Suspension	Apr 6	Coerced into signing?	Apr 5
Suspension	Mar 2	Line of duty disability	July 7
Suspension	Feb 3	Probationary firefighters	
Suspension	Oct 3	Overtime demand	Mar 6
Termination	Mar 5	Promotions	
Termination	Feb 7	Prior knowledge of exam info	Apr 2
Termination	Sept	Racial discrimination	Apr 3
Termination	Jan 4	Reverse discrimination	May 3
Whistleblower	Jan 6	Termination	
Discrimination		Demands reinstatement	July 3
Hiring – gender and national origin	Oct 5	Drug test results	Mar 3
Race – examinations	Apr 3	EMT	Feb 4
Sex – bathroom facilities	May 7	Email – improper usage	Aug 7
Reverse discrimination promotions	May 3	Falsifying documents	June 2
Reverse discrimination termination	Oct 2	False statements	Sept 7
Disability		Layoffs	May 2
Colon cancer – compensable?	Sept 3	Off duty misconduct	Feb 5
Conflicting medical testimony	Aug 3	Off duty misconduct	Jan 3
Harassment – disability	Apr 4	Paramedic	Mar 3
Heart disease	July 7	Positions eliminated	Aug 5
Heart disease	July 8	Retaliation	Feb 7
Heart disease light duty	Oct 7	Reverse discrimination	Oct 2
Heart disease – presumption	Feb 2	Termination – wrongful?	Mar 5
Heavy smoker	July 7	Union – free speech	Oct 4
Hip replacement – return to work	Sept 5	Whistleblower	Sept 8
Injured during basketball game	June 8	Union	
Knee injury	June 6	First Amendment	Apr 4
Leukemia	Mar 8	Layoffs challenged	May 2
Misconduct off duty	Feb 5		

The family of
Robert Scoggins

acknowledges with grateful appreciation

your kind expression of sympathy

United Communications Corporation

We buy Minitor 3, 4 & 5's

Email us with the type of pagers you want to sell and we will make you an offer.

Please provide as much information as possible, such as:

Type of pager (Minitor 3, 4 or 5?)

frequency of pager? (if known)

1 or 2 frequency pager?

Stored voice or non-stored voice?

Number of chargers?

working or non-working condition.

(non-working pagers are still eligible for purchase!)

United Communications is Motorola's Largest paging distributor.

We have a \$65 flat rate repair on all Minitor Pagers

Including Minitor 2, 3, 4 and 5 pagers.

All repairs come with a 90 day FULL warranty.

We sell refurbished Minitor pagers and manufacture Minitor plastics.

Call or email us today!

Brien Murphy

888-763-7550 x103

www.uccwireless.com



Moving to Narrowband? Great News! YOU DO NOT HAVE TO BUY NEW PAGERS!

\$\$\$ Save THOUSANDS! \$\$\$

**UCC will upgrade your Minitor II, III or IV
to work in a narrowband system!**

Guaranteed or your \$ back!

Call UCC for Details!

(888) 763-7550

.....
" Already bought
" new pagers?
" We buy excess
" Inventory!
".....

.....
" Great for Junior
" Firefighters!
" Keep spares on
" hand!
".....

**\$65 flat rate repair
on all Minitors...**

Narrow Band Upgrade

With Repair \$30.00

Without Repair \$65.00

United Communications Corporation

PHONE (888)763-7550 * FAX (888) 763-7549

62 Jason Court St. Charles, MO 63304 www.uccwireless.com

If you do not wish to receive future fax correspondence please call 888-763-7550, fax 888-763-7549 or email your request to sales@uccwireless.com with the fax numbers you want removed.
Failure to comply with your request within 30 days is unlawful.