

Fifty Ways to Leave your Lawyer

Now that I have your attention, this article will outline some of the issues that keep Fire Chiefs and fire departments extremely close to their attorneys in the attempt to mitigate those prickly legal issues. Many of these examples have been culled from the Fire Service Court Radio shows outlining the numerous legal issues facing our fire services today. I have attempted to place them in order of importance so your organization can use it as a check list to determine how to “leave your attorney”. Now for you attorneys out there, we know that many of our department audiences will not pay attention to this article or our radio show and that is what keeps us in business. Stay strong my attorney brothers and sisters. There will be plenty of work for you in spite of this article.

Personnel Issues. One of the largest litigated areas of the fire service is occurring between your firefighters, your fire officers and your municipalities or Districts. Lawyers are making a bundle of money from these lawsuits involving your firefighters and staff. These are mostly based on discrimination claims including age, race and gender; failure to supervise or manage your firefighters during inter-personnel conflict, failure to adhere to your department policies on discrimination, harassment, hazing or bullying and other such failures of leadership. Several recent cases have brought to light the permissive behavior on the part of the fire department and the “culture of silence” so rampant in our industry – not calling out those firefighters who harass, haze, bully or discriminate against your co-workers. Some of these claims are in the millions of dollars and it takes a very long time for the firefighters and fire department to recover from the polarization of the department these issues create.

Failing to Follow Federal Laws. There is a plethora of federal laws that will jam up a fire department if they are ignored or wrongfully interpreted. The important laws include: protecting employees over 40 years of age under ADEA; gender discrimination under the Civil Rights Act of 1964; Disabilities under the ADA; Religious Discrimination; Family Leave under FMLA; returning military veterans under USERRA; wage issues under FLSA; pregnant firefighters under the Pregnancy Discrimination Act; numerous health and safety laws under OSHA and your state’s Labor and Industry Division. Also included are the Health Care Initiatives under the Affordable Care Act and several other standards to include NIMS, applicable standards under NFPA, HIPAA and the various laws and standards affecting your volunteer firefighters. It takes vigilance on the part of the fire chief and their retained counsel to stay current with those laws and create department policies using the federal and state law as the basis of Policy.

Policy. Policies are a description of standards you expect your firefighters to operate when they are on shift. These are the “law of the fire department” and can be used in a court room if you violate those policies. In spite of that factor, you will still need some type of written guidelines and those can be created under Standard Operating Guidelines or Best Practices. We create policies for all of the wrong reasons. They are generally created due to one firefighter doing something wrong and they cannot be disciplined as there is no policy prohibiting that behavior. The policies needed by the department should be focused on the current Federal and State laws

protecting the employees and the department. Possibly grooming, fitness, uniforms, driving and other activities of a firefighter can be placed into a Best Practices or Standard Operating Guidelines for application by members of the department. A department cannot create a policy for every single event which may occur in the department. If you hit the big issues through a policy, you will be generally covered and it will provide a solid knowledge base for your firefighters when they are wondering if some contemplated action is “against policy”.

Hiring Practices. Hiring a firefighter is a time consuming and complicated process and has provided many legal problems for numerous departments when challenged by disadvantaged candidates. There are several cities who have been sued by candidate firefighters passed over or simply not hired. Look to *United States, et al. v City of New York (recently resolved to the tune of \$98 million; Lewis v. Chicago and the recent legal action in Austin (Tx) Fire Department* as prime but complicated examples of alleged discrimination in the hiring procedures. Hiring procedures should be fair, equitable and non discriminatory. Sounds simple but it is not. From the application, written examination, physical capacity test, oral boards to the offer of employment with subsequent medical and psychological testing are all potential minefields for fire departments. A well planned hiring process will eliminate most but not all of the potential issues with your hiring practices. One of the big issues is the lack of a competent background checks and comprehensive psychological evaluation. Many firefighters you hire now create many problems in the future if these two important evaluations are not performed. My advice is to do them, make sure they are thorough and you may have to outsource the back ground checks to a professional service. Take the time to conduct a legally proper hiring process.

Officer Promotions. Qualified candidates are being passed over for many reasons, mostly based on bias, balancing the racial mix of a community, not enough candidates of a certain color, nationality or gender. Look to the recent court decision in *Buffalo (NY)* where the firefighters sued the city in 2007, claiming the fire department illegally allowed promotional lists with their names on them to expire so they could promote African-American firefighters instead: also *Ricci v. DeStefano* a 2009 case which was a hotly contested decision by the US Supreme Court concerning racially discriminatory employment practices by New Haven Connecticut Fire Department. The litigation was based on the fact New Haven officials invalidated the test results because none of the African American firefighters who passed the exam had scored high enough to be considered for the positions. There are numerous other examples where discrimination of the candidates during the promotional process was the catalyst for litigation. It is important that the promotional process is carefully planned out and attempts to eliminate any bias towards a certain candidate. The best advice is to create an effective but neutral promotional testing process and promote the best qualified candidate. Look to the *Ricci v. DeStefano* case to see where too much social engineering in this promotional process derailed the promotion of qualified candidates and it took years to resolve.

Discipline and Termination is one of those areas of frequent and costly litigation. Quite frankly we do not discipline or terminate our firefighters very well. Many times the Fire Chief or City Manager pulls the termination trigger without adequate investigation and due process. Look at the story of *Erie Firefighter Wins Lawsuit Against City*¹, terminated and sues to get her job back. She wins as the city failed to understand her rights under the American with Disabilities Act (ADA). In addition to not understanding the federal or state laws protecting your employees

against discrimination, many firefighter terminations are the result of: fabricated charges, insufficient investigations, no current policy in place prohibiting such behavior, lack of witnesses, bias on part of the fire chief towards the offending employee, failure to apply a due process standard and several more violations. These firefighters will sue to get their jobs back and if the department did a horrible job of proving their case, they will return to work with a lot of money in their pockets. Make sure your department has a set of policies applicable to your department and an ironclad policy on investigations, due process and termination.

Training Safety is an area of concern as fire department training events kills several firefighters per year and injures about 7,000 firefighters annually. Associated with these deaths and injuries are lawsuits related to the failure to adhere to safety policies and practices. In one case, NFPA 1403, *Standards for Live Fire Training Evolutions* was cited during the criminal trial of a fire training officer in upstate New York in 2001. There are also other fatal incidents to include: the fall from a ladder truck drill in Kilgore, Texas and a Florida firefighter was killed during a wildland fire training when a tree fell on him. All of these tragedies could have been prevented with preplanning and adherence to the established training guidelines. All of these events and many more training deaths and injuries have been litigated with large settlements. Many of these cases settle out of court and the awards are confidential, but the ones brought to court and the testimony and the evidence has demonstrated numerous violations of established safety standards, published guidelines and best practices. We have an opportunity to provide a safe training environment for our firefighters and not commit fratricide during those events by providing well trained Training Officers, Safety Officers and creating a safe training ground.

Fiscal Accountability. Stealing from your department seems to be on the increase most notably in volunteer departments but also found in some combination or fully paid organizations. It is actually easy to steal from your organization and while not willing to offer any insider secrets, I can offer some preventative tips: Do a background check on the person who manages your money; have two signature checks for any amount over \$500.00; have your accounts audited annually by an independent 3rd party and make it a surprise date; annually check out all of vendors to ensure they are legitimate businesses and not dummy businesses set up by your treasurer to pas their pockets; watch for signs of imbalances in your accounts and finally if your treasurer (or money manager) is living beyond their means, pull the accounts from their control and audit those accounts. Simple steps so often overlooked by many departments.

Open Public Meetings Act. Every state has some form of Open Public Meetings and Public Records Act indicating that government is required to follow. The **Open Public Meetings Act** is to provide transparency related to government activities. As it deals with your fire departments or municipalities, the public has a right to attend and to express their opinions. There are limited exceptions to this, whereas the elected officials have the right to move to executive sessions to discuss personnel issues, bids for property, consider matters affecting national security, consider the selection of a site or the acquisition of real estate by lease or purchase when public knowledge regarding such consideration would cause a likelihood of increased price, review negotiations on the performance of publicly bid contracts when public knowledge regarding such consideration would cause a likelihood of increased costs; receive and evaluate complaints or charges brought against a public officer or employee, evaluate the qualifications of an applicant for public employment or to review the performance of a public employee and any action

discussed with legal counsel. There are a number of additional conditions and the reader should look at their applicable state law. You must comply with those rules related to open public meetings.

Public Records Act. Every record created by government is available to the public for review unless there are applied limitations. The purpose of this act is to provide records created by government to satisfy the public's right to know how their elected officials are conducting the business of the public. There are certain requirements to obtain this information and some records are not available for public prevue as outlined in your state statutes. Email and other correspondence are available to the public which not only includes your elected officials but your employees – if they create emails or documents in the course of conducting their business. It is important the department has a Records Management Officer who can review the public requests for department records. This position needs to be well versed in the Public Disclosure laws for your state. If there is a problematic request, you should run that by your legal counsel for an opinion and possible letter to the requestor indicating the reasons for denial

Ethics and Code of Conduct. Ethics are defined as moral principles that govern a person's or group's behavior. As a fire department, there are not enough policies to cover on and off duty behavior. A well written and posted code of ethics provides that governance of behavior when there are questions posed by the firefighters. A model code of ethics can be found in the USFA website.² Likewise a Code of Conduct guides firefighters on and off duty conduct meeting the standards of the department and the community. Look at Glass Mountain Fire Department Code of Conduct for an excellent Code of Conduct.³

Although the fire department does not need an attorney on every emergency response or at every municipal council or district commissioner meeting, it is imperative the department use the services of a competent attorney who understand the complex issues of agencies providing essential emergency services and the nuances of fire department or fire district law. Many departments only call an attorney when they are needed and mostly only AFTER a problem is dropped on your doorstep. Retaining the services of an attorney is all in the timing. My free advice (for what it is worth) is to bring in legal counsel prior to making critical decisions affecting the department to include elections, referendums, funding or levy issues, purchasing property or equipment, personnel issues, contract negotiations or if the department is sued for any reason; have your attorney educate the fire chief and staff as to those critical issues affecting your department and finally when necessary retain competent counsel to assist you out of your legal troubles.

Endnotes

1. [http://www.goerie.com/article/20120207/NEWS02/302079964/Former-Erie-firefighter-wins-lawsuit-against-city-\(Updated%3A-5%3A30-pm\)](http://www.goerie.com/article/20120207/NEWS02/302079964/Former-Erie-firefighter-wins-lawsuit-against-city-(Updated%3A-5%3A30-pm))
2. http://www.usfa.fema.gov/downloads/pdf/code_of_ethics.pdf
3. <http://www.gmfd.net/gmfdcodeofconduct.htm>

JOHN K. MURPHY JD, MS. PA-C, EFO, Deputy Fire Chief (Ret), has been a member of the career fire service since 1974, beginning his career as a firefighter & paramedic and retiring in 2007 as a deputy fire chief and chief training officer. He is a licensed attorney in Washington State since 2002 and in New York since 2012. Mr. Murphy consults with fire departments and other public and private entities on operational risk management, response litigation, employment policy and practices liability, personal management, labor contracts, internal investigations and discipline, and personal injury litigation. He serves as an subject matter expert witness involving fire department litigation and has been involved in numerous cases across the country. He is a frequent legal contributor to Fire Engineering Magazine, participant in Fire Service Court Blog Radio, host of Fire Engineering's Fire Service Legal Minute and a national speaker on fire and EMS legal issues.