

Paramedics Are Exempt Under 207(k), Although They 'Rarely' Fight Fires

Paramedics at a city fire department who rarely were called to fire scenes and were never required to wear protective firefighting gear nevertheless qualified as employees "engaged in fire protection" under the Fair Labor Standards Act (FLSA), a federal appeals court has ruled. As a result, the paramedics qualify for a partial overtime exemption for law enforcement and fire protection employees.

Paramedics "may have a 'responsibility to engage in fire suppression' [and thus qualify as fire protection employees] without ever actually engaging in fire suppression themselves," the 11th U.S. Circuit Court of Appeals ruled in *Gonzalez v. City of Deerfield Beach, Fla.*

The *Gonzalez* ruling is the most recent in a string of recent rulings that have addressed whether paramedics are eligible for the §207(k) exemption for police and firefighters (see ¶620 of the *Guide*; see July 2008 newsletter, p. 11). But "the *Gonzalez* opinion signifies the beginning of the end of this type of

See *Paramedics*, p. 7

Paramedics (continued from p. 1)

litigation," said Stuart R. Michelson, who represented the city in *Gonzalez*. "There's been a split in the circuits for years" on this issue, but "the majority of [federal] courts will coalesce around *Gonzalez*," Michelson predicted.

While there is no "bright line" test to determine whether a paramedic has such a responsibility, "a key factor that has emerged from [*Gonzalez* and similar] cases is whether the paramedic can be ordered to perform fire suppression and can be disciplined for disobeying the order," said Brian P. Walter, a partner at Liebert Cassidy Whitmore's Los Angeles office. The *Gonzalez* court specifically noted that the paramedics involved had fire suppression training and could be called upon to engage in fire suppression, and be disciplined if they refused.

Unless and until the split in the courts is resolved by the U.S. Supreme Court (see story, p. 6), employers can protect themselves by emphasizing in their policies and job descriptions that their paramedics have the obligation to engage in fire suppression if ordered to do so, advised Walter. "In addition, courts will consider the purpose for which paramedics are dispatched to a fire scene and are much more likely to find 'responsibility' if paramedics are dispatched at times to perform fire suppression duties," Walter added.

'Responsibility' Key to Exemption

The *responsibility* to engage in fire suppression is a key prerequisite for the partial overtime exemption available for fire protection employees under Section 207(k).

See *Paramedics*, p. 8

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Under the FLSA, employers generally must pay their nonexempt employees no less than the federal minimum wage of \$6.55 for each hour worked, as well as time and one-half their regular rates of pay for hours worked over 40 in a seven-day workweek.

However, the act (at 29 U.S.C. §207(k)) provides a partial exemption from these overtime requirements for “law enforcement” and “fire protection” employees who meet certain criteria. These workers are able to work more hours over a longer period of time — seven to 28 days — before they are eligible to receive overtime pay. Paramedics may qualify for this partial exemption if they qualify as “fire protection” employees.

An amendment to the FLSA enacted in December 1999 (29 U.S.C. §203(y)) defines a “fire protection” employee as one who:

- (1) is trained in fire suppression, has the legal authority and *responsibility* to engage in fire suppression, and is employed by a fire department of a municipality, county, fire district, or State; and
- (2) is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk. (Emphasis added.)

The 11th Circuit's Ruling

The plaintiffs, 12 current and former Firefighters/Emergency Medical Technicians and Rescue Supervisors, brought suit against the Fire and Rescue Department of the City of Deerfield Beach, Fla., alleging failure to provide overtime pay for overtime hours worked. The city

argued they qualified for the §207(k) exemption. The U.S. District Court for the Southern District of Florida found for the defendants, and the plaintiffs appealed.

The plaintiffs argued that they did not qualify as “fire protection” employees, as defined under §203(y), because they did not have a “responsibility to engage in fire suppression.”

Although a commanding officer could, in theory, order them to engage in fire protection, and they would be subject to disciplinary action if they refused to obey, the paramedics claimed they did not, “as a practical matter,” hold this responsibility for several reasons.

First, they claimed they did not have a responsibility to fight fires because they “rarely, if ever, [were] called upon” to engage in firefighting. But the 11th Circuit ruled that the frequency with which the paramedics responded to fires is irrelevant. Citing an earlier 11th Circuit ruling, *Huff v. Dekalb County* (516 F.3d 1273 (2008)) (see May 2008 newsletter, p. 1), the appeals court noted that “nothing in *Huff* turned on how frequently an employee might be called to a fire scene.”

Second, they claimed they did not have the requisite responsibility to fight fires because they had not received “advanced” firefighting training. But §203(y) requires only that an employee be “trained in fire suppression,” not that the training be *advanced*, the 11th Circuit stated.

Third, they claimed they lacked responsibility to fight fires because they wore their protective gear *only* when called to accident scenes with broken glass and never when responding to fire calls. Since they cannot fight fires without the gear, they argued they could never actually be called upon to fight fires. Although the paramedics’ lack of gear makes it *unlikely* they would ever be called upon to fight a fire, “these arrangements might always be changed to make their participation in fire suppression more likely,” the 11th Circuit observed.

Conclusion

“The 11th Circuit explained that although the factors brought up by the plaintiffs might reduce the possibility that the employees would engage in fire suppression, they did not eliminate that possibility,” said Brian P. Walter, a partner at Liebert Cassidy Whitmore’s Los Angeles office.

Ultimately, because it was “undisputed that the plaintiffs could be required to help suppress a fire, and that they would be subject to discipline for refusing to do so,” the 11th Circuit found the paramedics qualified as fire protection employees. (*Gonzalez v. City of Deerfield Beach, Fla.*, 11th Circuit, No. 07-11280, 2008 WL 4964696, Nov. 24, 2008) ¶