FIRE, EMS & SAFETY LAW NEWSLETTER

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ITEMS COVERED IN THIS NEWSLETTER

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CE TRAINING OPPORTUNITIES

6/15 & 16/2017: National Fire Academy, Emmitsburg, Maryland – SOCIAL MEDIAL / LEGAL ISSUES (Host: Mike McCabe, Work: 301-447-1894);

6/20/2017: New Jasper Township Fire Department, Xenia, OH - MOCK TRIAL / IMPROVED EMS REPORT WRITING & SOCIAL MEDIAL / LEGAL ISSUES  (Host: Captain Garrett Sagraves, Cell 937-608-0044);

File – Chap. 2

**KS: FIREFIGHTER RULE – PD INJURED RESPONDING TO MVA - CAN’T SUΕ VEHICLE DRIVER WHO WAS DRUNK**

On April 14, 2017 in Juan A. Apodaca v. Mark Willmore & Ohio River Insurance Company, the Supreme Court of Kansas held (4 to 3) that the Firefighter’s Rule applies in Kansas not only to firefighters injured in line of duty, but also to police officers. Their sole remedy is Workers Comp. “The firefighter's rule prevents an injured firefighter from recovering when his or her injury was caused by the wrong that initially required his or her presence in an official capacity at the scene. *** More than 30 jurisdictions in the United States have adopted the firefighter's rule, overwhelmingly by court decision rather than by statute.”


Facts:

[From Court of Appeals decision] “At about 3:30 a.m. on October 18, 2009, in Riley County, Matthew Willmore was driving his father's 1998 Ford F-150 pickup north on K-177, which is a four-lane highway separated by a grassy median. Less than a mile north of Interstate 70, Willmore fell asleep at the wheel and rolled the pickup across the median. The truck eventually came to a stop on its wheels, blocking the southbound lanes of the highway. Willmore — who was 18 years old at the time of the accident — had drunk several beers at a friend's house earlier that night.

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David McGillis, who was also driving north, witnessed the accident and stopped to assist Willmore. After Willmore exited the pickup truck, he walked to the median where he spoke with McGillis. Willmore then attempted to move the truck but found that it would not start. Although it was dark outside and there were no lights illuminating the highway, Willmore turned off the truck's headlights. He called his parents to inform them of the accident and then began picking up debris from the highway.

In response to a 911 call from McGillis, a dispatcher for the Riley County Police Department (RCPD) advised officers Juan Apodaca and Jonathan Dulaney — who were patrolling together — about the traffic accident. The dispatcher told the officers that the location of the accident was north of Interstate 70 on K-177 and that the vehicle involved in the accident was in the southbound lanes of the highway. Officer Apodaca acknowledged to the dispatcher that the accident was north of Interstate 70. The dispatcher also informed the officers that nobody was injured in the accident.

Officer Apodaca drove to the accident scene —with Officer Dulaney in the passenger seat — at a high rate of speed with his emergency lights and sirens activated. Officer Apodaca saw the headlights and flashers from McGillis' vehicle — that was parked on the center -edge of the northbound lanes — from over a mile away, and he believed it was the scene of the accident. Officer Apodaca did not see the disabled pickup in the
southbound lanes and struck it while travelling 104 mph. The second accident occurred at 3:42 a.m.

Around 6 a.m., an evidentiary breath test revealed that Willmore's breath alcohol content was .103.”

Holding:

“The firefighter's rule prevents an injured firefighter from recovering when his or her injury was caused by the wrong that initially required his or her presence in an official capacity at the scene. It ‘prohibits firefighters from suing the person who was negligently responsible for causing the fire or other hazard for injuries they suffer in responding to and quelling that hazard, subject to several exceptions.

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It was not until 1985 that this court was called upon to address the firefighter's rule for the first time. *** Thus, when this court ultimately adopted the firefighter's rule in Calvert, 236 Kan. 570, it grounded its decision on public policy. Plaintiff Donald Calvert was among the firefighters to respond to an anhydrous ammonia leak at the Garvey Elevator complex in Seward. Once on the scene, Calvert attempted to rescue a man who had collapsed near the leak. Despite wearing a respirator, Calvert inhaled some of the fumes and suffered a heart attack as a result.

Calvert filed suit against Chevron Chemical, the owner of a storage tank the anhydrous ammonia had been stored in, and Garvey Elevators, seeking damages for his injuries. The district judge determined that the firefighter's rule should bar recovery because Calvert was discharging his duties as a firefighter at the time of his injury.

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The Calvert court also outlined three exceptions to the rule. First, a firefighter is not barred ‘from recovery for negligence or intentional acts of misconduct by a third party.’ 236 Kan. at 576. Second, a firefighter is not barred from recovery if the individual responsible for the firefighter's presence engages in a subsequent act of negligence after the firefighter arrives at the scene. 236 Kan. at 576. Third, a firefighter is not barred from recovery ‘if an individual fails to warn of known, hidden dangers on his premises or for misrepresenting the nature of the hazard where such misconduct causes the injury to the firefighter.’ 236 Kan. at 576. Ultimately, a firefighter ‘only assumes hazards which are known and can be reasonably anticipated at the site of the fire and are a part of firefighting.’ 236 Kan. at 576

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Since the Calvert decision, only one other Kansas Supreme Court case has addressed the firefighter's rule. In that case, McKernan v. General Motors Corp., 269 Kan. 131, 3 P.3d 1261 (2000), the court considered whether a firefighter who had been injured when a car hood strut exploded while he was attempting to extinguish a car fire could recover from the automobile manufacturer on a products liability theory. The court weighed the public policy bases for the firefighter's rule against the public policy bases for products liability claims and held that the manufacturer's negligence had not created the risk that had necessitated the firefighter's presence; thus allowing products liability claims would not frustrate the public policy underlying the firefighter's rule. Rather, it would ‘promote
the public policy of fixing responsibility for defective products on the party who introduces the product to the [marketplace]." 269 Kan. at 140-41.

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More than 30 jurisdictions in the United States have adopted the firefighter's rule, overwhelmingly by court decision rather than by statute…. The states adopting the rule include those such as Kansas and Alaska, which have relied on a public policy rationale…. Of the remaining states, Florida, Illinois, Massachusetts, Minnesota, New Jersey, and New York have abolished or severely limited the rule by statute.

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In our sister jurisdictions that have adopted the firefighter's rule, approximately 25 have extended it to police officers and in many cases, other public safety officers.

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It also is worth noting that the firefighter's rule adopted in Calvert is limited in other ways as well. It does not absolve third parties from liability. It would not, for example, preclude recovery from a party who negligently collided with a firetruck on its way to a fire.

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In sum, law enforcement officers, like firefighters, who suffer injuries as a result of discharging their duties at the scene of negligently caused hazards or conditions their jobs require them to mitigate and eliminate cannot recover from the person or persons responsible for the existence of the hazards or conditions, unless one of the three exceptions provided for in Calvert applies.”

Dissent:

JOHNSON, J., dissenting:

“I dissent from the majority's unjustified expansion of the singularly arbitrary, capricious, and constitutionally suspect firefighter's rule, which was summarily declared to be the public policy of Kansas in Calvert v. Garvey Elevators, Inc., 236 Kan. 570, 694 P.2d 433 (1985).

LEGAL LESSONS LEARNED: The Firefighter’s Rule is a matter of public policy in many states. But also see states such as New York that can “encourage” fire and building code compliance by creating an exception where a firefighter or police officer is injured because of a code violation.

File – Chap. 6

FL: GOVERNOR HAD AUTHORITY TO VETO STATE FIREFIGHTERS’ $2,000 PAY RAISE

On June 6, 2017, in IAFF Local S-20 v. State of Florida, the Florida Court of Appeals (2 to 1) held that the veto was lawful. The IAFF appealed “a decision of the Public Employees Relations
Commission dismissing an unfair labor charge against the Governor for vetoing a proviso in the General Appropriations Act (GAA). Had the proviso been approved, it would have given a raise to firefighters who work for the State. We affirm because the Governor has constitutional authority to veto specific appropriations of the GAA, and because the Legislature ultimately resolved the impasse by maintaining the status quo.”


Facts:

“This case involves the Governor's authority to review and veto public employee, collective bargaining-related matters in the GAA. The Legislature tried to resolve a wage-related impasse in this case by including a $2000 raise in a specific appropriation within the GAA. Because the GAA is not self-executing, however, the act went to the Governor for approval.

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The Florida Constitution clearly articulates the Governor's authority to veto the GAA, or specific appropriations therein. Id. It authorized him to veto the raise appropriation here. See Brown v. Firestone, 382 So. 2d 654 (Fla. 1980) (setting forth parameters regarding the exercise of the Governor's veto power). That Appellant's members possess constitutional collective bargaining rights does not alter the Governor's constitutional authority with respect to the GAA. See Fla. Police Benevolent Ass'n, 613 So. 2d at 418-19 (refusing to elevate the collective bargaining rights of public employees and thus alter 'years of strict adherence to the separation of powers doctrine'). The Governor's action in this case comported with his constitutional authority.

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A legislative override would have granted state firefighters the $2000 per employee raise they sought. But instead, the Legislature accepted the status quo. In fact, the Legislature enacted a separate act providing a catch-all impasse resolution provision that became law. Chapter 2015–223, § 1, Laws of Florida, provided for unaddressed impasses to be resolved ‘by otherwise maintaining the status quo under the language of the applicable current bargaining agreement.’ The Legislature effectively resolved the impasse by choosing not to override the Governor's veto and maintaining the status quo.”

Dissent:

“The State asserts that public employees, who accomplished a herculean task by convincing a majority of both houses of the Legislature to grant a positive ruling on an impasse, must then return to the Legislature and convince two-thirds of the membership to override the veto, in order to preserve the Legislature's resolution of the impasse. To impose such a requirement on public employees in essence holds that public employees have no effective constitutional right to collective bargaining, as they must in fact accomplish not simply a herculean task, but instead achieve a near-impossible feat of persuading the Legislature to exercise its override authority, an extremely rare occurrence, precisely because of the grave political ramifications an override necessarily causes between the Executive and Legislative branches.”

LEGAL LESSONS LEARNED: Under Florida state law, Governor’s veto controls, unless overridden by Legislature. See June 6, 2017 article on Gov. Rick Scott’s 2015 veto: “Scott’s
decision to veto the $1.57 million for state firefighters, including employees who fight forest fires, was controversial. At the time, Agriculture Commissioner Adam Putnam criticized Scott and pointed to raises that the governor approved for employees of the Department of Highway Safety and Motor Vehicles.”


File – Chap. 7

**NY: FEMALE APPLICANT NOT HIRED – FAILED TO PROVIDE MEDICAL CLEARANCE – NOT SEXUAL ORIENTATION**

On May 26, 2017, in Theresa Hannigan v. North Patchogue Fire Department, Supreme Court, State of New York, 2017 NY Slip Op 31148(U), a trial judge dismissed the lawsuit. “In 2010, plaintiff reapplied to the Department, and the essence of her claim is that the denial of her reinstatement was both discriminatory and retaliatory based upon her sexual orientation. As to plaintiff’s first cause of action, defendants have established that federal law does not prohibit discrimination based upon sexual orientation ([Dawson v Bumble and Bumble, 398 F 3d 211 [2d Cir 2005]; but see Hively v Ivy Tech Community College of Indiana, ___ F3d ___, 2017 WL 1230393 [7th Cir April 4, 2017]).”


Facts:

“Plaintiff Theresa Hannigan commenced this action to recover damages allegedly based upon discrimination and retaliation by defendants. Plaintiff's complaint alleges violations of, among other things, the Civil Rights Act, the Americans with Disabilities Act, and New York State Human Rights Law. It also alleges claims for intentional infliction of emotional distress and prima facie tort.

Plaintiff alleges that she was a member of the North Patchogue Fire Department as an EMT from 2002 through 2008, when she resigned due to injuries sustained in an unrelated motor vehicle accident which prevented her from performing her duties as an EMT.

In 2010, plaintiff reapplied to the Department, and the essence of her claim is that the denial of her reinstatement was both discriminatory and retaliatory based upon her sexual orientation. Issue has been joined, discovery is complete and a note of issue has been filed.

***

Plaintiff testified that she first joined the North Patchogue Fire Department in 2002 as a volunteer EMT. She was employed as a paid EMT with the Central Islip-Hauppauge Volunteer Ambulance Corps. Plaintiff testified she was married, divorced, is homosexual, and since 1998 she has been living with her partner. Plaintiff testified that in 2006 she sustained a spinal injury in a motor vehicle accident, underwent a laminectomy, and the injury prevented her from performing her duties as an EMT. In 2008, she resigned from the North Patchogue Fire Department.
Plaintiff further testified that in 2005 she was told by Jamie Cevone, a co-worker at the Central Islip-Hauppauge Volunteer Ambulance Corps, that Brad Tygar, a member of the North Patchogue Fire Department, stated that plaintiff was homosexual. Plaintiff testified that she was upset about the comment because she believed her homosexuality would bring shame to the fire department. Plaintiff testified that Bridget Volpi, a member of the North Patchogue Fire Department, expressed that she thought it was wrong for plaintiff not to bring her partner Patricia to an installation dinner. Plaintiff testified she was never told not to bring her partner to any function or to keep her sexual orientation secret. After 2005, plaintiff brought Patricia to firehouse functions and did so until her resignation from the North Patchogue Fire Department in 2008.

On October 17, 2005, plaintiff formally complained to Captain Dominick Thorn and Chief Volpe of the Fire Department about Mr. Tygar’s comment. Upon investigation, Jamie Cevone was unwilling to give a statement. Plaintiff testified she made no other complaints to the officers of the North Patchogue Fire Department.

In 2010, when plaintiff applied for reinstatement she did not provide the fire department with any documentation from her doctors that she was cleared to return to work. She testified that she believes her application was denied based upon her disability and her sexual orientation. She admits that the membership committee believed that she was unable to lift stretchers and perform the physical aspects of being an EMT. At the time of her interview she wore a leg brace, was being treated for an autoimmune condition, and since March 2011, is wheelchair bound. Plaintiff also admits she did not reapply for her paid position with the Central Islip-Hauppauge Volunteer Ambulance Corps because of her age and inability to handle the physical aspect of the job.

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Dennis Curry testified that he was Vice President of the North Patchogue Fire Department. He was present at plaintiff's membership interview, and prepared a denial letter. Curry testified he had a conversation with Kyle Logiudice, who told him he did not believe plaintiff was physically fit to perform the duties of an EMT due to her injuries from the car accident.”

Holding:

“**ORDERED** that the motion by the North Patchogue Fire Department and Dennis Curry for summary judgment in their favor dismissing the complaint is granted.

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As to plaintiff’s first cause of action, defendants have established that federal law does not prohibit discrimination based upon sexual orientation ([Dawson v Bumble and Bumble, 398 F 3d 211](https://www.federalcourtcases.org/) [2d Cir 2005]; but see Hively v Ivy Tech Community College of Indiana, ___ F3d ___, 2017 WL 1230393 [7th Cir April 4, 2017]). ‘The law is well-settled in this circuit ... that .... Title VII does not prohibit harassment or discrimination because of sexual orientation’ ([Simonton v Runyon, 232 F.3d 33](https://www.federalcourtcases.org/), 35 [2d Cir 2000]). ‘Thus, to the extent that she is alleging discrimination based upon her lesbianism, [the plaintiff] cannot satisfy the first element of a prima facie case under Title VII because the statute does not recognize homosexuals as a protected class’ ([Dawson v Bumble and Bumble, 398 F 3d 211](https://www.federalcourtcases.org/)).
Bumble, supra). Likewise, plaintiff's claim of retaliation under federal law is not viable, as plaintiff alleges one member of the fire department made a statement that plaintiff is homosexual. The statement is truthful and remote in time. Defendants have established that plaintiff was not engaged in a protected activity and that her 'employer' did not take an adverse 'employment' action against her (Mormol v Costco, 364 F. 3d 55 [2d Cir 2004]). In opposition, plaintiff fails to raise a triable issue of fact and does not address the federal statute, and therefore, does not oppose dismissal (see Breirly v Deer Park Sch. District., 359 F Supp 2d 275, 300 [ED NY 2005]; Taylor v City of N.Y., 269 F Supp 2d 68, 75 [ED NY 2003]).

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The uncontroverted affidavits of the Membership Committee members establish that they were not motivated by malice toward plaintiff. Further, a critical element of the cause of action for prima facie tort is that the plaintiff suffered specific, measurable loss, causing special damages (Freihofer v Hearst Corp., supra, 65 NY2d, at 143, 490 NYS2d 735; Curiano v Suozzi, supra, 63 NY2d, at 117, 480 NYS2d 466; ATI. Inc. v Ruder & Finn, 42 NY2d 454, 458, 398 NYS2d 864 [1977]). In opposition, plaintiff has failed to raise a triable issue of fact and has not shown any special damages. Plaintiff's conclusory statement that the evidence supports her claims, without more, is insufficient to create a material issue of fact that precludes summary judgment. Accordingly, the motion by the defendants is granted and the complaint is dismissed.

LEGAL LESSONS LEARNED: The FD had wisely documented reasons for not re-hiring the plaintiff. Note: The U.S. Supreme Court may eventually decide a case on whether sexual orientation is protected by Title VII of the Civil Rights Act of 1964. In 2016, the EEOC filed its first two lawsuits alleging sexual discrimination based on sexual orientation. https://www.eeoc.gov/eeoc/newsroom/release/3-1-16.cfm On April 4, 2017, the 7th Circuit held that Title VII includes sexual orientation. See the en banc decision (all 11 judges sitting; 8 to 3 decision). “For many years, the courts of appeals of this country understood the prohibition against sex discrimination to exclude discrimination on the basis of a person’s sexual orientation. The Supreme Court, however, has never spoken to that question. In this case, we have been asked to take a fresh look at our position in light of developments at the Supreme Court extending over two decades. We have done so, and we conclude today that discrimination on the basis of sexual orientation is a form of sex discrimination.” http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2017/D04-04/C:15-1720:J:Flaum:con:T:fnOp:N:1942256:S:0
CO: RECREATIONAL MARIJUANA – FED. COURTS REJECT INJUNCTION SOUGHT BY NEBRASKA & OKLAHOMA

On June 7, 2017, in Safe Street Alliance & Phillis & Michael Reilly v. John W. Hickenlooper, Governor of Colorado; Justin Smith, et al. v. Hickenlooper; State of Nebraska & State of Oklahoma, as intervenors, the U.S. Court of Appeals for the Tenth Circuit (Denver), held (3 to 0) that Nebraska and Oklahoma are not entitled to a federal injunction to stop Colorado’s recreational marijuana statute. “Those States claim that Amendment 64 injures their sovereign interests and those of their citizens, and that its enforcement is preempted by the CSA … but [we] cannot permit Nebraska and Oklahoma to intervene, or even confirm that they have a justiciable controversy that may be sufficient for intervention.” Likewise, two Colorado residents were not entitled to an injunction, nor were sheriffs and prosecutors from Colorado, Nebraska and Kansas.  

Facts – Two Colorado Residents:

“In Safe Streets Alliance, the plaintiffs are Michael P. Reilly, Phillis Windy Hope Reilly, and Safe Streets Alliance (‘Safe Streets’). Safe Streets is a ‘nonprofit organization devoted to reducing crime and illegal drug dealing,’ No. 16-1048, Aplt. App. at 51,3 ‘whose members are interested in law enforcement issues, particularly the enforcement of federal law prohibiting the cultivation, distribution, and possession of marijuana.’ Id. at 52. The Reillys [who own property in Pueblo, CO] are the only identified members of Safe Streets, and neither they nor their interest group asserted class or other claims on behalf of any other Coloradans.

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To the ‘west and immediately adjacent to the Reillys’ property’ is 6480 Pickney Road, id., the site of a recreational ‘marijuana grow’ operating out of a newly constructed building located ‘just a few feet from the Reillys’ property line.’ No. 16-1266, Aplt. App. at 129. The operation of the enterprise and the resultant noxious odors emanating from it are alleged to have caused harms of two general types.

First, the Reillys claim that the ‘publicly disclosed drug conspiracy’ itself has ‘injured the value of [their] property.’ Id. at 131. ‘People buy lots at the Meadows at Legacy Ranch because they want to keep horses or build homes in a pleasant residential area, and the Reillys’ land’ allegedly ‘is less suitable for those uses due to the 6480 Pickney Road marijuana grow.’ Id. For example, ‘the large quantity of drugs at marijuana grows’ purportedly ‘makes them targets for theft, and a prospective buyer of the Reillys’ land would reasonably worry that the 6480 Pickney Road marijuana grow increases crime in the area.’Id.

Second, the Reillys aver that ‘[s]ince construction of the facility was completed, its operation has repeatedly caused a distinctive and unpleasant marijuana smell to waft onto the Reillys’ property, with the smell strongest on the portion of [their] property that is closest to [the] marijuana cultivation facility.’ Id. at 130. ‘This noxious odor’
allegedly ‘makes the Reillys’ property less suitable for recreational and residential purposes, interferes with the Reillys’ use and enjoyment of their property, and diminishes the property’s value.’ Id

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According to the Reillys, the Marijuana Growers ‘all understood and agreed that the property’ adjacent to the Reillys’ land ‘would be used to grow recreational marijuana for sale at Alternative Holistic Healing’s Black Hawk store, among other places.’ Id. at 119. The Reillys therefore claim that 6480 Pickney, LLC and Alternative Holistic Healing, LLC are each unlawful enterprises.

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The district court dismissed these RICO [federal Racketeer Influenced and Corrupt Organizations Act] claims with prejudice, concluding that the Reillys had not pled a plausible injury to their property that was proximately caused by the Marijuana Growers’ activities in violation of the CSA. The district court recognized that the Reillys alleged a “noxious order [sic] emanat[es] from the ‘Marijuana Growers’ adjacent enterprise, which ‘permit[s] a reasonable inference that the value of their property is negatively impacted.’ Id. at 207. Yet the district court rejected that argument on the basis that the Reillys had ‘provide[d] no factual support to quantify or otherwise substantiate their inchoate concerns as to the diminution in value of their property.’ Id.

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The Reillys timely appealed, which is before us as No. 16-1266.

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In No. 16-1266, we reverse the district court’s order and its judgment dismissing the Reillys’ § 1964(c) claims against the Marijuana Growers, as pled in Counts I through VI of their Second Amended Complaint. We remand Safe Streets Alliance to the district court for further proceedings on the Reillys’ three plausibly alleged property injuries against each of the Marijuana Growers for conducting their association-in-fact enterprise in a manner that violates the CSA, and thus § 1962(c).

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[But no injunction against State of Colorado or County.] Here, however, no discerning inquiry is necessary because the Reillys and Safe Streets have never alleged that they have any substantive rights in § 903 or elsewhere in the CSA by which they can enforce the CSA’s preemptive effects. Where a federal statute ‘simply does not create substantive rights,’ the Supreme Court has explained that it is ‘unnecessary to address [any] remaining issues” about a private citizen’s ability to enforce that statute or obtain relief. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 11 (1981). *** Therefore, we conclude that the Reillys and Safe Streets’ preemption claims fail as a matter of law.”

Facts – Sheriffs / County Prosecutors

“In Smith, a group of county attorneys and sheriffs from Colorado, Kansas, and Nebraska brought a complaint against Colorado alleging distinct injuries but asserting substantively identical theories why the CSA preempts Amendment 64. The district court dismissed their claims. For the reasons just discussed, we likewise affirm.

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The Kansas and Nebraska Sheriffs assert that when they discover motorists in possession of marijuana, they ‘frequently learn’ that those drivers ‘purchased the marijuana in Colorado and were at the time of purchase in facial compliance with Amendment 64.’ Id. at 49. The Kansas and Nebraska Sheriffs complain of unspecified injuries to their individual ‘professional goals’ caused by this alleged influx of ‘Colorado-sourced marijuana’ into their respective counties. Id. at 51. They also claim that their respective offices have experienced ‘a marked increase in the costs’ of incarcerating ‘suspected and convicted felons’ following ‘arrests’ involving ‘Colorado-sourced marijuana,’ and that they now spend much more time on these particular law enforcement activities. Id. at 49–50.

The Kansas and Nebraska County Attorneys likewise claim that they have been forced to alter their individual professional aspirations and their offices’ prosecutorial priorities in light of the increased influx of ‘Colorado-sourced marijuana’ into their respective counties. Id. at 52

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The Law Enforcement Officers do not allege any specific substantive rights bestowed on them by the Supremacy Clause or the CSA that they seek to vindicate. More specifically, they concede that the Supremacy Clause creates no substantive rights and ‘does not give rise to a private right of action,’ mooting their first purported claim for relief. Id. at 95.

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Accordingly, in No. 16-1095, we affirm the district court’s order and its judgment dismissing the Smith case on the merits and with prejudice.”

Facts - States of Nebraska and Oklahoma

“One final wrinkle developed after these cases came before us. At the same time that the underlying actions were proceeding in the district court, Nebraska and Oklahoma filed an original complaint against Colorado in the Supreme Court of the United States, pursuant to the Court’s ‘original and exclusive jurisdiction of all controversies between two or more States.’ 28 U.S.C. § 1251(a).

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The Supreme Court exercised its discretion to decline to hear such inter-state actions and consequently denied Nebraska and Oklahoma’s motion for leave to file their complaint. Nebraska, 136 S. Ct. at 1034. Justice Thomas dissented, urging the Court to revisit its precedent holding that it has discretion to decline to hear cases and controversies over which Article III and § 1251(a) vest it with original and exclusive jurisdiction. Id. at 1034–36 (Thomas, J., dissenting).

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The States next moved to intervene on appeal in Safe Streets Alliance and Smith, urging us to exercise jurisdiction over their controversy with Colorado stemming from its implementation of Amendment 64.
However, Section 1251(a) of Title 28 of the United States Code states: ‘The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.’ … Section 1251(a) forbids us from deciding whether Nebraska or Oklahoma have any injuries from, claims against, or controversies with Colorado, which is what our extant order necessarily does. … we deny the States’ motions to intervene in Nos. 16-1048 and 16-1095.”

LEGAL LESSONS LEARNED: Fire & EMS departments should make it clear that drug-free workplace policies includes marijuana detected in a drug test, unless ordered by a physician in a state that has enacted a medical marijuana law. Ohio has enacted such a law: “House Bill 523, effective on September 8, 2016, legalizes medical marijuana in Ohio. The Ohio Medical Marijuana Control Program will allow people with certain medical conditions, upon the recommendation of an Ohio-licensed physician certified by the State Medical Board, to purchase and use medical marijuana. *** The only valid state ID cards will be issued by the State of Ohio Board of Pharmacy once the state's patient registry becomes available no later than September 2018. http://www.medicalmarijuana.ohio.gov/

File – Chap. 12

IL: NARCOTIC OVERDOSE - GOOD SAMARITAN STATUTE
WHEN CALLING 911 – DRIVER CAN BE PROSECUTED

On Nov. 17, 2016, in State of Illinois v. Valerie S. Teper, the Appellate Court of Illinois, Second District held (3 to 0) that “the officers’ probable cause was based on information they acquired before defendant obtained emergency medical assistance from them, and the evidence was not a direct result of defendant obtaining emergency medical assistance….We therefore conclude that the trial court did not err in denying defendant’s motion to dismiss the charges under section 414.” http://www.illinoiscourts.gov/Opinions/AppellateCourt/2016/2ndDistrict/2160063.pdf

Facts:

“On April 16, 2015, two people walked into the Park City police department and told an officer that a driver was slumped over in her car on Route 120. When officers arrived at the scene, they found defendant slumped over in the driver’s seat. She was unresponsive and had difficulty breathing. The officers believed that defendant had overdosed on heroin, and an officer injected her with Narcan, a medication that blocks the effects of opiates. Defendant then began to breathe at a normal rate and became conscious. After removing her from the car, the officers found about one gram of heroin and several hypodermic needles.

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On June 3, 2015, defendant was charged by indictment with unlawful possession of a controlled substance for unlawfully possessing less than 15 grams of heroin (720 ILCS 570/402(c) (West 2014)). She was also charged with unlawful possession of hypodermic syringes (720 ILCS 635/1(a) (West 2014)) for possessing two hypodermic syringes to inject controlled substances.
Defendant cited section 414, which is entitled “Overdose; limited immunity from prosecution” and provides, in relevant part:

‘(b) A person who, in good faith, seeks or obtains emergency medical assistance for someone experiencing an overdose shall not be charged or prosecuted for Class 4 felony possession of a controlled, counterfeit, or look-alike substance or a controlled substance analog if evidence for the Class 4 felony possession charge was acquired as a result of the person seeking or obtaining emergency medical assistance and providing the amount of substance recovered is within the amount identified in subsection (d) of this Section.

(c) A person who is experiencing an overdose shall not be charged or prosecuted for Class 4 felony possession of a controlled, counterfeit, or look-alike substance or a controlled substance analog if evidence for the Class 4 felony possession charge was acquired as a result of the person seeking or obtaining emergency medical assistance and providing the amount of substance recovered is within the amount identified in subsection (d) of this Section.

(d) For the purposes of subsections (b) and (c), the limited immunity shall only apply to a person possessing the following amount: (1) less than 3 grams of a substance containing heroin; * * *

(e) The limited immunity described in subsections (b) and (c) of this Section shall not be extended if law enforcement has reasonable suspicion or probable cause to detain, arrest, or search the person described in subsection (b) or (c) of this Section for criminal activity and the reasonable suspicion or probable cause is based on information obtained prior to or independent of the individual described in subsection (b) or (c) taking action to seek or obtain emergency medical assistance and not obtained as a direct result of the action of seeking or obtaining emergency medical assistance.

Nothing in this Section is intended to interfere with or prevent the investigation, arrest, or prosecution of any person for the delivery or distribution of cannabis, methamphetamine or other controlled substances, drug-induced homicide, or any other crime.” (Emphases added.) 720 ILCS 570/414 (West 2014).’

The trial court stated as follows. The statute was put in place to encourage everyone to seek medical attention for drug overdoses, and it provides immunity for possession of small amounts of drugs found in such situations. The statute also has a limiting provision that, if officers have probable cause or a reasonable articulable suspicion to detain or arrest a person, the statute’s immunity provision will not apply. Here, there was a stopped vehicle on a roadway and the police received information that the driver was unresponsive. Defendant took the position that it was clear from the officers’ initial observations that this was a drug overdose situation because she was unresponsive. However, there were a number of things that the police could have been considering, such as alcohol intoxication. The officers were not aware of why defendant was
unresponsive until they observed the drugs and paraphernalia in the vehicle, and based on their training, they then believed that she was likely overdosing. At that point, they administered Narcan to her. The ‘triggering fact’ for defendant obtaining emergency medical assistance did not occur until the officers noticed the drugs and paraphernalia, which gave them probable cause. The trial court therefore ruled that section 414 did not apply, and it denied defendant’s motion to dismiss.”

Holding:

“The broad purpose of good Samaritan statutes is to encourage the voluntary aid of others who are in imminent danger by removing the rescuer’s fear of liability…. Here, subsection 414(b) would clearly apply to a situation in which two friends are using drugs together, one person overdoses, and the friend calls for emergency assistance; the statute allows the friend to make the call without the fear that he or she will be charged for drug possession as a result, provided that the specific requirements of subsection 414(b) are met, including the small amounts of drugs. Section 414(b) does not apply in this particular case because defendant did not seek or obtain emergency medical assistance for another. Rather, she was a ‘person who [was] experiencing an overdose,’ which makes section 414(c) potentially applicable.”

LEGAL LESSONS LEARNED: Many states, including Ohio, have enacted Good Samaritan statutes for drug overdoses, to provide limited immunity for those seeking emergency medical assistance for themselves or for others. Ohio Rev. Code 2925.11.

File – Chap. 16

**OH: FF Conv. Sex. Conduct Minor - Garrity Warnings Not Req. Meeting with Minor’s Father & FF**

On June 5, 2017, in State of Ohio v. James J. Kuruc, the Ohio Court of Appeals for Ninth Judicial District (Medina County) held 3 to 0 that conviction of this former part-time firefighter for unlawful sexual conduct with a minor (son of a firefighter) is affirmed. “There was no evidence that anyone told him to tender his resignation, insinuated that he would be fired if he did not answer, or issued him any warnings or reprimands related to his employment. [link]

Facts:

“The court [denied motion to suppress] and found Kuruc guilty on both counts, sentenced him to three years of community control, and classified him as a Tier II Sexual Offender/Child Victim Offender.

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During the early morning hours of January 12, 2014, Kuruc met the victim in this matter, a fifteen-year old boy with whom he had communicated online. The two agreed that Kuruc would pick up the victim at his home after his parents went to bed. Kuruc then drove the victim to two places before bringing him back to Kuruc’s home. Once there, the two kissed and engaged in oral sex with one another before Kuruc had anal sex with
the victim. They then remained at Kuruc’s home for a few hours before Kuruc took the victim home.

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Several months later, the victim’s father learned that his son had snuck out in the middle of the night to meet Kuruc. The victim’s father also learned that Kuruc was a part-time firefighter for Granger Township. Because the victim’s father was also a firefighter, he was able to use his contacts to arrange a meeting between himself and Kuruc at the fire station. During the meeting, Kuruc acknowledged that he had met the victim and that they had ‘made out and fooled around * * *.” Following the meeting, the police became involved and interviewed both Kuruc and the victim. During his interview, the victim admitted that he and Kuruc had engaged in both oral sex and anal sex.

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The trial court found that, on the afternoon of March 24, 2014, Kuruc was employed as a paramedic/firefighter for the Granger Township Fire Department and was taking part in CPR training at the fire station. The court found that the victim’s father, a firefighter for another township, had contacted Kuruc’s Fire Chief before that day. The purpose for the father’s call was to notify the Fire Chief that Kuruc had been sexually involved with his 15-year-old son and to ask the Fire Chief to arrange a meeting between him and Kuruc.

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The victim’s father, K.H., and the Fire Chief all testified that the meeting consisted of a discussion between the victim’s father and Kuruc. The victim’s father and K.H. both testified that, at the start of the meeting, the victim’s father introduced himself to Kuruc as such and asked whether Kuruc would be willing to talk to him. Both men testified that Kuruc agreed to talk to the victim’s father.

The victim’s father, K.H., and the Fire Chief all denied that anyone ever threatened Kuruc during the meeting. K.H. testified that the meeting was held for the purpose of allowing the victim’s father to confront Kuruc and ask him questions. He stated that it was not his impression that Kuruc would suffer employment repercussions as a result of the meeting. He acknowledged that the victim’s father warned Kuruc to tell the truth because the meeting might result ‘in future action on his part.”

Holding:

“In his first assignment of error, Kuruc argues that the trial court erred when it denied his motion to suppress. He argues that the court should have suppressed statements he made during a meeting on March 24, 2014, because the statements were elicited in violation of his rights under Garrity v. New Jersey, 385 U.S. 493 (1967), and Miranda v. Arizona, 384 U.S. 436 (1966). We disagree.

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[Garrity applies to a] ‘threat of removal from office.’ Garrity, 385 U.S. at 500. ‘The option to lose [a person’s] means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent.’ Id. at 497. Thus, ‘when the [S]tate compels testimony by threatening [adverse employment action] unless [a
public employee] surrenders the constitutional privilege, the [S]tate obtains the testimony in violation of the Fifth Amendment, and it may not use that testimony against the [employee] in a subsequent criminal prosecution.’ State v. Graham, 136 Ohio St.3d 125, 2013-Ohio-2114, ¶ 21. If the State attempts to do so, the employee may seek the suppression of his statement(s) under Garrity. See id. at ¶ 24. See also State v. Jackson, 125 Ohio St.3d 218, 2010-Ohio-621. ‘[F]or a statement to be suppressed under Garrity, the employee claiming coercion must have believed that his or her statement was compelled on threat of job loss and this belief must have been objectively reasonable.’ Graham at ¶ 24.

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The trial court found that, during the meeting with Kuruc, no one expressly threatened him. Likewise, the court found that no one discussed the possibility of criminal charges against Kuruc, issued him any warnings regarding his employment, indicated that he should resign, or told him he would be fired. The court found that the victim’s father and Kuruc ‘did most of the talking’ and the victim’s father told Kuruc ‘to stay away from [his son].

Following the meeting, Kuruc returned to work.

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Having reviewed the record, we must conclude that the trial court’s factual findings are based on competent, credible evidence.

LEGAL LESSONS LEARNED: The defendant was not compelled to answer questions in meeting in Fire Chief’s office so no Garrity violation, and he was not in custody so no Miranda warnings required. The U.S. Supreme Court held in Garrity v. New Jersey (1967) that convictions of police officers for fixing traffic tickets must be reversed, because during the investigation by State Police they were warned they would be fired if they refused to answer questions. https://supreme.justia.com/cases/federal/us/385/493/case.html

See IAFF document on Garrity Rights:
http://www.iaff421.org/?zone=/unionactive/private_view_page.cfm&page=Know20Your20Rights21

File – Chap. 16

NY: FIRST AMEND. RIGHT FREE SPEECH – PD NOT PROTECTED FROM DISCIPLINE - SUBMITTING REPORT

On April 24, 2017, in Enid Santiago v. New York, New Jersey Port Authority, the U.S. Court of Appeals for Third Circuit (Philadelphia) held (3 to 0) [Not Precedential] that probationary Port Authority police officer cannot sue for breach of the First Amendment; she was terminated after submitting a report blaming a fellow officer for causing semi at Lincoln Tunnel to hit another
vehicle. [U.S. Supreme Court 2006 decision in Garcetti v. Ceballos] instructs that, “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”

http://www2.ca3.uscourts.gov/opinarch/162073np.pdf

Facts:

“Enid Santiago appeals from the grant of summary judgment against her on her claim that she was terminated from her job as a police officer with the Port Authority of New York and New Jersey in retaliation for exercising her First Amendment rights.

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Santiago had been hired by the Port Authority’s Public Safety Department as a police recruit in October of 2008 and, following graduation from the police academy, was sworn in as a probationary police officer in April of the next year. From that time until early October 2009, she served without incident.

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On October 6, 2009, Santiago was assigned to work outside the Lincoln Tunnel at Post 24, where she was responsible for directing vehicles too tall for the tunnel to turn around in a nearby parking lot. Prior to that date, she had successfully extricated at least ten over-height vehicles from the Tunnel’s entrance. Shortly after midnight, Santiago responded to an alarm that an over-height truck was heading toward the entrance of the Tunnel. While Santiago attempted to assist the truck driver in turning around the truck, Noa appeared and began to interfere by giving instructions to the driver. [Footnote 3: As a Tunnel and Bridge Agent, Noa was assigned to work in the emergency parking area at the entrance of the Lincoln Tunnel, adjacent to where Santiago was attempting to turn around the over-height truck. Since he was not a police officer with the Port Authority, he was not to assist in turning around over-height vehicles.] Santiago told Noa to stop interfering. She then went to stop incoming traffic so that the truck could complete the turnaround with her further guidance. At that time, she saw Noa gesturing to the driver in a manner that suggested the driver continue moving. Before she could give her instructions, the truck struck a parked vehicle belonging to a Tunnel and Bridge Agent. Santiago and Noa then got into an argument and Santiago called for additional police officers.

While Santiago was still ‘on post,’ she completed a motor vehicle accident report and another document described simply as a ‘handwritten report.’(App. at 521.)

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Santiago’s handwritten report complained of Noa’s interference with police operations, behavior which Santiago called ‘unacceptable and harmful to the public.’ (App. at 154.) After her shift, Santiago submitted the two reports to her commanding officer, Captain Burns.

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A six-month investigation ensued, which Santiago demeans as a sham. During the investigation, she gave several statements regarding what transpired, some of which varied as to her physical location relative to the truck during the accident. The investigation concluded that Santiago was responsible for the accident. It was further determined that Santiago had been dishonest during the investigation, and her probationary job was terminated. That firing occurred one day before her probationary period was set to end.”
Holding:

“The defendants moved for summary judgment, which the District Court granted on March 22, 2016. As to her First Amendment retaliation claim, the Court held that Santiago’s handwritten report concerned her workplace duties and was sent up the chain of command, making it ‘a classic example of a statement made pursuant to an employee’s official duties.’

***

The only issue on appeal is whether the District Court properly granted summary judgment to the defendants on Santiago’s First Amendment retaliation claim. Santiago argues that the Court misapplied Garcetti v. Ceballos, 547 U.S. 410 (2006), in determining that her handwritten report was not protected by the First Amendment. But Garcetti instructs that, ‘when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.’ Id. at 421. Such protection applies to a public employee’s statement only ‘when (1) in making it, the employee spoke as a citizen, (2) the statement involved a matter of public concern, and (3) the government employer did not have ‘an adequate justification for treating the employee differently from any other member of the general public’ as a result of the statement he made.’

***

Santiago repeatedly argues that filing the handwritten report was protected speech because it was not ‘required.’ But the filing of the report is still properly seen as being within her ordinary duties, even if it was not mandatory. In Garcetti itself, the plaintiff sent an internal memorandum to his supervisors that was pursuant to his job responsibilities, but not strictly required. Garcetti, 547 U.S. at 421-22.”

LEGAL LESSONS LEARNED: Public employees, including firefighters, EMS and police are not protected under First Amendment from discipline if they submit a report as part of their ordinary duties that is found to be false, inaccurate or incomplete.
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