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NEW CASES COVERED:

Chap. 1 – Am. Legal System: GA: Expert Witness - Opinion that TV cause of fire inadmissible since no reliable proof;
Chap. 3 – Homeland Security: OH: Bomb Threat – Sentenced to max; Judge not bound by prosecutor’s plea deal;
3rd Cir: Terrorism – Deportation of alien on hold until more proof his political organ. supports terrorism;
Chap. 6 – Employment Lit: NJ: Volunteer FF Voted off FD - Not employee, whistleblower statute does not protect him;
LA: Fire Chief Fired – Entitled due process if proves he is civil service employee, not volunteer;
NC: Fire Inspector Fired – Social Media, wins jury verdict as whistleblower, about poor cond. of city building;
Chap. 12 – Drug Free Work: AK: Zero Tolerance Policy – FF termination upheld, even though good reputation;
Chap. 13 – EMS: OH: Patient Suicide In Hospital By Hanging –“Apology Statute” - Doctor’s comments to family members excluded from jury.

CONTINUING EDUCATION OPPORTUNITIES

• Oct. 8, 2017 – Vincent, OH – Social Media & Fire Service; Mock Trial / Improved EMS Report Writing – Washington County EMS Conference; Host: David Ankrom, MedFlight of Ohio; Cell 740-350-5538;
GA: EXPERT WITNESS – OPINION NOT ADMISSIBLE – NO RELIABLE PROOF TV CAUSED HOUSE FIRE

On Sept. 8, 2017, in Cash v. LG Electronics, the Court of Appeals of Georgia held (3 to 0) that the trial court judge properly excluded the expert's testimony, finding that the expert's opinion was not based on sufficient facts or reliable principles and methods, as required by Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U. S. 579 (113 SCt 2786, 125 LE2d 469) (1993). Fire investigators agree that the origin of the fire was somewhere in the entertainment center, but they did not specifically identify the television.


Facts:

“This case involves a tragic fire at the home of appellant Debbie Cash, which resulted in the death of Cash's husband and son. Cash and her surviving daughter filed suit against LG Electronics, Inc. alleging, among other claims, strict liability and negligence. Cash claims that the LG television in her living room was the cause of the fire, and in support she submitted the expert testimony of an engineer who attempted to recreate the origin of the fire.

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The evidence in this case shows that, on the morning of July 6, 2011, Cash's son woke up and went into the living room to watch TV. He then came into Cash's room and told Cash and her husband that the house was on fire. When Cash looked in the living room, she saw green-black smoke and that the entire entertainment center was on fire. When she and her husband were unable to extinguish the fire, Cash exited the house. Believing that her husband and son had already escaped, Cash went to a window and pulled her daughter out. Once Cash realized her husband and son were trapped in the house, the fire was too extensive for her to rescue them. Mr. Cash died in the house. Fire fighters pulled Cash's son from the house, but he subsequently died at the hospital.

Following an investigation, the Gwinnett County fire department determined that the fire started in the vicinity of the entertainment center, but they were unable to determine the
exact origin of the fire. Cash's expert opined that an internal component in the television's power supply board failed due to a manufacturing defect or mechanical damage, triggering a chain reaction that caused a fire.

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Footnote 2: Fire investigators agree that the origin of the fire was somewhere in the entertainment center, but they did not specifically identify the television.

Footnote 3: Cash contends that the trial court gave too much weight to the expert's alleged failure to comply with the Georgia Firefighter Standards and Training Examination Preparation and Prerequisites, NFPA 921, a standard that provides methodology for fire investigations. Cash contends that this document is merely a guide and not a legal standard. We note that federal courts have routinely accepted NFPA 921 as an appropriate standard for experts. United Fire & Cas. Co., supra, 704 F3d at 1341 (II) (A). Regardless of whether the expert complied with NFPA 921, however, the trial court did not abuse its discretion in rejecting the expert's testimony as unreliable for the reasons discussed herein.

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Cash's expert opined that the fire was caused by a series of events, beginning with one of two internal components called capacitors located in the power supply board of the TV. Specifically, the expert stated that “Capacitor C612” failed due to a manufacturing defect or mechanical damage, and as a result, pressure increased inside Capacitor C612, causing the vented end of the capacitor to extend outward, like ‘wings,’ and make contact with an adjacent component called the heat sink. He contended that this contact created a “rather violent’ electrical arc that was sufficient to ignite vapors and/or other materials inside the television. He then opined that the resulting flame burned the gasses as they escaped from Capacitor C612, igniting either a plastic sleeve surrounding the capacitor or a paper component in the power supply board. This ignition then caused flammable materials to drip and engulf components of the speaker located in the bottom right hand corner of the TV. This fire, he claimed, eventually ignited the remainder of the plastic base of the TV, and spread beyond the television. To prove this hypothesis, the expert designed a protocol to reverse engineer the cause of the fire. Problematically, however, the expert's methodology required repeated manipulation to achieve his desired results.

Specifically, the expert testified that, to complete the first step of his hypothesis, it was critical to establish that the ‘wings’ from Capacitor C612 made contact with the neighboring heat vent component. At the outset, the expert manipulated the experiment in a way that did not reflect the conditions in existence on the day of the fire because he removed a safety fuse from the TV to trigger the venting of Capacitor C612's wings. However, there was no evidence that the safety fuse was missing from the LG TV at issue at the time of the fire. Moreover, in conducting this experiment, he used a different brand of capacitor than the one in the LG television.”
Holding:

“OCGA § 24-7-702 governs the admissibility of expert testimony, and it requires that the trial court act as ‘gatekeeper to ensure the relevance and reliability of expert testimony.’ (Citation and punctuation omitted.) Scapa Dryer Fabrics, Inc., supra, 299 Ga. at 289. The statute specifically provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if: (1) The testimony is based upon sufficient facts or data; (2) The testimony is the product of reliable principles and methods; and (3) The witness has applied the principles and methods reliably to the facts of the case which have been or will be admitted into evidence before the trier of fact.

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Cash argues that the expert's methodology was sound because investigators agreed that the origin of the fire was in the entertainment system, and the expert used process of elimination to determine that the television was the source. Although process of elimination can be a reliable means of ascertaining the source of a fire, such eliminations must be made through reliable scientific investigation and testing, which the trial court found was not done in this case. See Michigan Millers Mut. Ins. Corp. v. Benfield, 140 F3d 915, 921 (II) (A) (11th Cir. 1998). For the reasons explained above, we find no abuse of discretion in the trial court's analysis.

Finally, Cash argues that the trial court's concerns about the expert's testing go to weight and credibility rather than admissibility. See Seamon v. Remington Arms Co., LLC, 813 F3d 983, 990 (III) (A) (2) (2016). We do not agree. The issue is not whether the expert's opinion about the source of the fire is correct, but rather whether the methodology he employed to reach that conclusion is reliable. Where, as here, the analytical gap between the data and the expert's opinion is too remote, the trial court does not abuse its discretion by excluding the expert's testimony. Joiner, supra, 522 U. S. at 146 (III).”

Legal Lessons Learned: Expert testimony must be based on “sound” methodology. “Junk science” has been focus of attention in arson investigations. [link](https://theintercept.com/2017/05/02/texas-prosecutor-in-junk-science-execution-case-stands-trial-for-misconduct/)

File – Chap. 3, Homeland Security

**OH: BOMB THREAT TO ELEMENTARY SCHOOL – 14 YEARS IN PRISON – JUDGE NOT BOUND PLEA DEAL**

On Sept. 5, 2017, in State of Ohio v. Danny Lee Wise, Jr., the Ohio Court of Appeals for Seventh District (Belmont County) held 3 to 0, that the trial court judge did not have to follow
the prosecutor’s recommendation of a “less than maximum sentence” in return for defendant’s plea of guilty to inducing panic for making a bomb threat to elementary school in session. The maximum sentence of 8 years was appropriate given the emergency response required for the threat, and the defendant’s extensive criminal history.


Facts:

“On November 4, 2015, during school hours, an unidentified male called the Bridgeport Elementary School and made a threat that there was a bomb in the building. The school was evacuated. No bomb was found. Police later arrested appellant for the crime.

On December 3, 2015, a Belmont County Grand Jury indicted appellant on one count of inducing panic, a second-degree felony in violation of R.C. 2917.31(A)(1)(C)(5). When the public place involved in inducing panic is a school, the offense is a second-degree felony. Appellant initially entered a not guilty plea.

Appellant later changed his plea to guilty to the crime charged. In exchange for his plea, plaintiff-appellee, the State of Ohio, agreed to recommend a less-than-maximum entence. The trial court conducted a change-of-plea colloquy with appellant where it advised him of the rights he was giving up and advised him that it was not bound to follow any sentencing recommendations. Appellant indicated that he understood these things.”

Holding:

“A court is not bound to accept the state's recommended sentence as part of a negotiated plea agreement.

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At the sentencing hearing, the trial court gave a detailed explanation for its maximum sentence. The court cited appellant’s extensive criminal history, which it stated included reckless operation, six counts of domestic violence, three counts of violation of a protection order, ‘boat docking requirements’, three counts of theft, misuse of credit cards, attempted theft, failure to comply, felony theft, felony receiving stolen property, receiving stolen property, drug paraphernalia, two counts of driving under suspension, failure to reinstate, failure to control, assured clear distance, and delivery of a Schedule III substance. (Sentencing Tr. 10). The court stated that appellant has continued to commit crimes, including felonies, for over a decade.

The trial court also emphasized the harm appellant caused to the community. It noted that because of appellant’s actions, responding to the school were eight Belmont County Sheriff’s Deputies, the chief and an officer from the Bridgeport Police Department, a K-9 bomb unit from Wheeling, West Virginia, the Belmont County Emergency Management Agency, the Wolfhurst Fire Department, two fire engines, an ambulance, and a utility vehicle. (Sentencing Tr. 11-12). The court went on to describe how the parents of the school children and the community were terrified at the time.”
Legal Lessons Learned: Plea agreements do not bind the trial judge unless the Court agrees in advance.

File – Chap. 3, Homeland Security

3rd CIRCUIT: TERRORISM - DEPORTATION ON HOLD – NEED PROOF LEADERS OF POL. ORG. SUPPORTED TERRORISM

On Sept. 6, 2017, in Joshim Uddin v. Attorney General of United States, the U.S. Court of Appeals for 3rd Circuit (Philadelphia; 3 to 0) imposed a higher threshold for deporting illegal alien for being a member of a terrorist organization. Under U.S. Code, the “terrorism bar” will normally not allow an alien, who is a member of a terrorist organization to remain in USA, even if there is fear of harm if returned to his home country. He is a member of the Bangladesh National Party (BNP), a major political party, and INS deemed this a Tier III terrorist organization. Third Circuit holds that he cannot be deported until INS “finds that party leaders authorized terrorist activity committed by its members.”

Facts:

“The so-called ‘terrorism bar’ precludes aliens who are members of ‘terrorist organizations’ from seeking several forms of relief, including withholding of removal. See 8 U.S.C. §§ 1182(a)(3)(B)(i), (vi); 1227(a)(4)(B); 1158(b)(2)(A)(v); 31(b)(3)(B)(iv). The INA, in turn, establishes three different kinds of terrorist organizations [Tier I, Tier II, Tier III].

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“Uddin joined the BNP in February 2008, when the group was no longer in power. Soon after, he was promoted to general secretary for his district. In this position, he distributed posters and recruited college students.

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Uddin claims that on several occasions, members of the Awami League [AL - opposition political party in power] persecuted him on account of his political beliefs. *** He claims that in March 2009, AL members broke his leg with a hockey stick. Third, Uddin asserted that AL members threatened to kill him in October 2009 if he did Finally, Uddin alleged that on July 15, 2011, between ten and fifteen AL members broke into his home and burned it down. Uddin had escaped through the back door. In October 2011, Uddin fled Bangladesh.

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After traveling through more than a half-dozen countries, Uddin entered the United States illegally in 2013. He eventually settled in Brooklyn, New York. In 2015, he attended
‘about one or two’ meetings of BNP members in the United States. AR155. Later in 2015, Uddin was arrested in New Jersey for charges that were eventually dismissed in state court, including selling untaxed cigarettes and possession of marijuana, drug paraphernalia, and a weapon (brass knuckles). After he posted bail, immigration officers arrested him on January 28, 2016, and served him with a Notice to Appear charging him with removability under 8 U.S.C. § 1182(a)(6)(A)(i) (alien present in United States without having been admitted or paroled by an immigration officer).

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He argued that because of his affiliation with the BNP, he would face persecution if returned to Bangladesh on account of his political beliefs. The IJ [Immigration Judge] denied Uddin’s application for relief. He found that Uddin was ineligible for withholding of removal because he was a knowing member of a Tier III terrorist organization, the BNP. The IJ found ‘abundant [record] evidence from reliable sources that the BNP has used violence for political purposes in the past.’ AR 71.

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Finally, and most importantly, the IJ found evidence that BNP activists resorted to ‘massive violence including the torching of dozens of polling centers’ during the 2013-2014 election cycle. AR 72 (citation omitted). The IJ emphasized that the BNP’s leader, Khaleda Zia, had ‘announced the party would hold a series of general strikes and traffic blockades halting transport links to the capital.’

***

We note, however, that evidence of RAB’s violence conduct that predated Uddin’s membership in the BNP is not relevant to the determination of the BNP’s Tier III status while he was a member. The BNP has not controlled the RAB since approximately two years before Uddin even joined the party. In fact, the Human Rights Watch Report states that since the BNP has been a minority party, the government has actually authorized.”

Holding:

“The so-called ‘terrorism bar’ precludes aliens who are members of ‘terrorist organizations’ from seeking several forms of relief, including withholding of removal. See 8 U.S.C. §§ 1182(a)(3)(B)(i), (vi); 1227(a)(4)(B); 1158(b)(2)(A)(v); 31(b)(3)(B)(iv). The INA, in turn, establishes three different kinds of terrorist organizations [Tier I, Tier II, Tier III].

Tier III terrorist organizations, the groups at issue in this case, are groups ‘of two or more individuals, whether organized or not, which engage[] in, or [have] a subgroup which engages in,’ terrorist activity. 8 U.S.C. § 1182(a)(3)(B)(vi)(III). Terrorist activity is defined broadly by the statute as conduct ‘unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State)’ and which involves one of
several enumerated actions, including the ‘highjacking or sabotage of any conveyance,’
’an assassination,’ use of any ‘biological agent, chemical agent, or nuclear weapon or
device, or [ ] explosive, firearm, or other weapon or dangerous device (other than for
mere personal monetary gain), with intent to endanger, directly or indirectly, the safety
of one or more individuals or to cause substantial damage to property,’ or a ‘threat,

There is no official register of Tier III organizations; instead, groups are adjudicated as
Tier III organizations on a case-by-case basis.”

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Today, we hold that absent such a finding regarding authorization by a group’s leaders,
Tier III status cannot be assigned to a group. We will thus remand for the Board to
address this issue.

We find support for our ruling in the statutory text, the Board’s own rulings and those of
the Seventh Circuit, and common sense. To start, the relevant statute defines a Tier III
terrorist organization as a ‘group of two or more individuals’ that engages in terrorist
activity, or a group that ‘has a subgroup’ that engages in terrorist activity. 8 U.S.C. §

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Because neither the IJ nor the Board in this case addressed whether the terrorist activity
was authorized by party leadership, we will grant the petition on the withholding of
removal claim and remand. On remand, the Board should determine whether the BNP’s
leadership has authorized its members to engage in the referenced terrorist activity.”

Legal Lessons Learned: Immigration is “hot issue.” The U.S. Supreme Court has agreed
to hear arguments on Oct. 10, 2017 of the Trump Administration appeal of 9th Circuit
decision regarding refugees from six Muslim nations. On Sept. 11, 2017, Supreme Court
Justice Kennedy issued an order temporarily banning 9th Circuit’s decision broadened the
number of people with exemptions to the ban to include grandparents, aunts, uncles and
immigration/supreme-court-justice-temporarily-preserves-trump-refugee-ban-
idUSKCN1BM24Q

File – Chap. 6, Employment Litigation

NJ: VOL. FF – VOTED OFF FD - NOT PROTECTED UNDER NJ
WHISTLEBLOWER STATUTE, NOT AN EMPLOYEE

Court of New Jersey, Appellate Division held (3 to 0, in unpublished opinion) that a volunteer
firefighter for 20 years is not an “employee” of the fire department, and therefore is not protected
as a whistleblower under the New Jersey “Conscientious Employee Protection Act.” The New Jersey Conscientious Employee Protection Act, N.J.S.A. §§ 34:19-1 – 34:19-8 (“CEPA”), prohibits all public and private employers from retaliating against employees who disclose, object to, or refuse to participate in certain actions that the employees reasonably believe are either illegal or in violation of public policy.


Facts:

“The essential facts are undisputed. Colts Neck’s fire department consists of two all-volunteer companies, Colts Neck Volunteer Fire Company No. 1 and Fire Company No. 2, overseen by an Executive Fire Council made up of representatives from each company and members or designees of the Township Committee.

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Plaintiff was a life member of Fire Company No. 2, having joined when he was in high school and served for over twenty years until 2013, when he was voted out by the general membership. His LOSAP [Length Of Service Award] account contained $5871.71 as of the motion date, which he will be eligible to receive when he turns fifty-five, several years from now. At all times relevant to this litigation, plaintiff has been a full-time employee of the Monmouth County Sheriff's Office.

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It is fair to say that plaintiff's relations with Fire Company No. 2 over his twenty-year tenure were not always harmonious. This is his second CEPA action against the fire company. He first sued the fire company in 2004 after it suspended him for eighteen months. Plaintiff claimed the suspension was in retaliation for his complaints about the bid process for renovations to the company's fire hall after his brother was denied the contract. Although that suit was eventually settled for $10,000, inclusive of plaintiff's attorney's fees, plaintiff continued to believe the fire company ‘owed’ him another seven or eight thousand dollars to make him ‘whole’ for his fees in that suit.

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Several years after that settlement, plaintiff again raised the issue of his legal fees with various members of Fire Company No. 2. In response to plaintiff's request, the general membership voted to reimburse him for what remained of his fees from the first suit. The fire company, however, subsequently got legal advice that doing so would jeopardize its 501(c)(3) tax status and so advised plaintiff. As a consequence, the company declined to make any further payment to him.

At about the same time as these events, Fire Company No. 2 discovered after the death of its long-time treasurer that he had embezzled approximately $300,000 from its accounts. The company subsequently made a claim under its fidelity policy for the loss. After the fire company notified plaintiff it would not reimburse his fees, he wrote to the fire company's fidelity carrier claiming the company's 2011 proof of loss for the defalcation was fraudulent. The alleged fraud was failing to disclose a letter plaintiff had written to the Monmouth County Prosecutor in 2003 in connection with the complaints he made in his first suit, which that office investigated and found did not warrant further action. The member who submitted the claim on behalf of the fire company is a lawyer, and the first person to have questioned the legality of the fire company reimbursing plaintiff for his attorneys' fees.
Following his letter to the company's fidelity carrier, plaintiff reported to the Executive Fire Council that Fire Company No. 2 was permitting members to dispose of their household trash in the fire company's dumpster, something plaintiff himself admitted doing on occasion. Plaintiff, employing the advice the fire company got about not reimbursing his fees, asked that the Executive Council obtain a legal opinion that members using the dumpster did not threaten the fire department's 501(c)(3) status by conferring a financial benefit on insiders.

Days later, several members of Fire Company No. 2, including plaintiff's brother, signed a letter to the president and the membership committee lodging a formal complaint against plaintiff... The membership committee took the matter under advisement and made the decision to terminate plaintiff's membership in Fire Company No. 2.

The membership committee rescinded the termination and suspended plaintiff pending investigation and presentation of the matter to the membership. The committee subsequently sustained each of the charges against plaintiff and again determined to terminate his membership. Plaintiff appealed its decision to the general membership, which voted fourteen to eight against reinstatement.

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Plaintiff filed suit in the Law Division alleging violations of CEPA, the Law Against Discrimination (LAD), N.J.S.A.10:5-1 to -49, and defamation. After discovery, defendants moved for summary judgment on all counts. Plaintiff withdrew his LAD claim at argument, and Judge Gummer granted summary judgment dismissing the remainder of the complaint in an opinion from the bench.”

Holding:

“On appeal, plaintiff argues the [trial] court erred in finding he was not an employee as defined in CEPA and in relying on unpublished decisions and other cases with no precedential value to reach its decision. Alternatively, plaintiff contends ‘public policy dictates’ we should expand CEPA, as ‘the [LAD] has [been expanded],’ to permit plaintiff to pursue a CEPA claim against the fire company. We reject those arguments.

***

Although plaintiff concedes he does not perform services for Fire Company No. 2 for wages, he asserts his receipt of LOSAP benefits constitutes sufficient remuneration to bring him within the definition of an employee under the statute. We disagree.

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The LOSAP benefits available to volunteer firefighters in Colts Neck nowhere near approximate the actual monetary value of the services those firefighters provide. Although plaintiff could earn points toward an annual LOSAP award through his participation in drills, calls or training, the program does not consider or treat those activities as remunerated tasks.
None of plaintiff's alleged ‘whistleblowing’ activities posed the least threat to his livelihood for the simple reason that he was not "employed" as a volunteer firefighter.

Footnote 5: The point is easily made by considering how different a case this would be had plaintiff made similar allegations against his employer, the Monmouth County Sheriff's Office, and been fired for them. ‘Blowing the whistle’ on the leadership of a membership organization to which one belongs obviously carries none of the financial risk of doing so in the workplace, the only venue where CEPA applies.”

Legal Lessons Learned: State legislatures, when drafting statutes protecting whistleblowers, should clearly define those protected from retaliation. Some states, such as Ohio, would allow lawsuits by volunteer FF for breach of a “clear public policy” – where other statutes protect you from retaliation. For example, the Ohio statute prohibiting retaliation for filing a workers comp claim. See Ohio Supreme Court decision in Sutton v. Tomco Machining, Inc., 129 Ohio St.3d 153, 2011-Ohio-2723.

LA: LAWSUIT BY FIRED FIRE CHIEF TO PROCEED – MUST PROVE HAS “CIVIL SERVICE” STATUS, NOT VOLUNTEER

On Sept. 5, 2017, in David S. Maurer v. Independence Town, et al., the U.S. Court of Appeals for 5th Circuit held (3 to 0) that lawsuit by the former Fire Chief should be remanded to trial court to review the contract between the District and ten volunteer fire departments. “With the contract considered as part of the summary judgment record, the evidence is thus sufficient to preclude summary judgment on the question whether Maurer was a member of the Louisiana civil service and entitled to due process before losing his job.”
http://www.ca5.uscourts.gov/opinions/pub/16/16-30673-CV0.pdf

Facts:

“David S. Maurer served a contentious seven months as fire chief in Independence, Louisiana, before he was fired. He contends he was entitled to notice and an opportunity to respond before that termination. Whether the Due Process Clause affords him that right turns on whether he had a property interest in his employment. And that depends on whether he was a civil service employee under Louisiana law. He may have been a civil service employee, so we reverse the district court’s grant of summary judgment and remand for further proceedings.

Independence closed its town fire department at the end of 2012. The Tangipahoa Parish Rural Fire Protection District Number 2 (the District), a political subdivision of the
parish, took over fire protection services for the town and surrounding areas. The District divided its jurisdiction into service areas and contracted with ten volunteer fire departments to provide fire protection services in defined areas. For Independence, that department was the Independence Volunteer Fire Department (the Volunteer Department).

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The contract also mandates that volunteer department members comply with District policies and states that, if they do not, the District has the authority to require the volunteer department to fire the member:

If an individual Fire Department does not take timely action against its members and/or volunteers who have violated the [District’s] adopted policies and procedures, the violation(s) shall be immediately reported to the Administrator [of the District] and forwarded to the Board of Commissioners of the District. After an investigation has been completed, the District board will render a final decision, which shall be binding upon all Fire Departments.

In accordance with the new arrangement, Independence terminated its firefighters at the end of 2012, and the Volunteer Department hired them. Around this time, Maurer, who previously worked for Independence’s fire department, became fire chief of the Volunteer Department. There is some dispute about how he was hired. But taking the facts in the light most favorable to Maurer, Defendant Dennis Crocker, the previous fire chief for Independence and incoming administrator for the District, selected him, and both the District’s Board of Commissioners and the Board of Directors of the Volunteer Fire Department reviewed and approved the hire.

***

During his tenure Maurer had numerous disagreements with Crocker. For example, Crocker recommended that Maurer fire a firefighter, but Maurer did not do so. Maurer changed the way medical calls were handled in a way that displeased Crocker. Maurer also sent firefighters for training in a different program than the one Crocker preferred. They also disagreed about whether Maurer should hire Crocker’s son, despite an opinion from the Louisiana Board of Ethics that doing so would be improper. Maurer also described an instance when Crocker publicly criticized him for failing to get fire marshal approval for a fireworks show. At his deposition, Maurer said he suffered no negative repercussions for disregarding Crocker’s input because Crocker was not his boss.

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But after seven months, following an investigation by Crocker, the Board of the Volunteer Department voted to terminate Maurer’s employment. The record is vague about the details of the process for removing Maurer, but there is some evidence indicating that the District was involved. The Independence town clerk stated that shortly before Maurer’s removal, at Crocker’s behest and with input from a member of the District’s Board of Commissioners, she wrote a letter to the District listing complaints about Maurer’s behavior and threatening to withhold payments to the District in the amount of Maurer’s salary if Maurer was not removed.”

Holding:

“Maurer’s entitlement to process thus depends on whether he had a property interest
in continued employment. Property interests ‘are not created by the Constitution’ but ‘are created and their dimensions are defined’ by an independent source such as contract or state law. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538 (1985).

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All fire protection districts operating a ‘regularly paid fire department’ must establish a classified civil service system. LA. CONST. art 0 § 16; see also LA. R.S. § 33:2535 (creating in each ‘fire protection district, a classified civil service embracing the positions of employment, the officers, and employees of ... fire protection districts’). A fire chief is a civil service position if ‘the right of employee selection, appointment, supervision, and discharge’ is vested in the fire protection district or in an officer or employee of the district. LA. R.S. § 33:2541(A).

Footnote 3: Maurer claims his property interest also derives from the contract between the District and the Volunteer Department and from Louisiana’s Firefighter Bill of Rights. LA. R.S. § 33:2181. As we conclude summary judgment is inappropriate because of factual issues regarding whether Maurer was employed in a civil service position, we do not address whether those sources create a property interest protected by the Due Process Clause.”

Legal Lessons Learned: Due process rights include notice of charges, a pre-disciplinary meeting, and a hearing.

NC: SOCIAL MEDIA - FIRE INSPECTOR FIRED - WINS WHISTLEBLOWER CASE, POOR CONDITION CITY BUILDING

On Aug. 23, 2017, in Crystal Eschert v. City of Charlotte, Chief U.S. District Court Judge Frank D. Whitney issued an order denying the City’s motion for a new trial, but reducing the jury’s $1.5 million verdict to $464,538 (jury awarded damages on four claims, which all related to her termination). On Sept. 1, 2017, the Court ordered the city to pay plaintiff’s attorney fees and costs of $628,019.30, plus ordered City to pay interest on her compensatory damages.

Facts:

“In the interests of judicial economy, the Court declines to provide a thorough recitation of the testimony, evidence, and arguments presented at the six-day trial before a jury in this matter. In sum, the causes of action centered on Defendant’s termination of Plaintiff, a fire investigator for the Charlotte Fire Department (‘CFD’). Defendant contended it terminated Plaintiff because she violated its social media policy by posting two racially inflammatory comments on Facebook (‘Facebook Posts’). Plaintiff, on the other hand,
claimed Defendant actually fired her because she complained to her father-in-law and City Councilwoman Claire Fallon about health and safety issues in a new CFD building and about Defendant’s mismanagement of money related to that building (‘Building Complaints’).

***

At the close of evidence and upon Defendant’s motion, the Court granted a directed verdict in favor of Defendant on Plaintiff’s Title VII retaliation claim and her federal and State Constitution free speech claims based on the Facebook Posts. The Court ruled the Facebook Posts were not protected by the First Amendment because Plaintiff failed to establish that her interest in that speech outweighed Defendant’s interest in providing effective and efficient services to the public. (Doc. No. 91-1, pp. 28-31). The Court submitted the six remaining issues to the jury.

After a full day of deliberation, the jury returned a verdict in favor of Plaintiff on her First Amendment and State Constitution claims — Questions One and Two on the verdict form finding:

(a) Plaintiff’s Building Complaints were a motivating factor in Defendant’s decision to terminate her employment; (b) Defendant would not have terminated Plaintiff’s employment in the absence of the Building Complaints; and (c) Plaintiff was entitled to $309,692 on the First Amendment claim and $309,692 on the State Constitution claim. The jury also returned a verdict in favor of Plaintiff on her two state law claims under REDA [NC Retaliatory Employment Discrimination Act] — Questions Three and Four — and awarded her $464,538 for each of those two claims. (Id. at 3). The jury did not find Defendant liable for gender discrimination. In sum, the jury found Defendant wrongfully terminated Plaintiff because of her Building Complaints in violation of the First Amendment, public policy under the North Carolina Constitution, REDA, and North Carolina’s public policy expressed in REDA.

***

Here, although Plaintiff did not file a formal claim under OSHA, she did more than merely complain to an internal supervisor. Evidence at trial showed that Plaintiff complained externally about health and safety concerns in a public building to her father-in-law, Ray Eschert, and to City Councilwoman Claire Fallon. As a result of Plaintiff’s complaints, City Councilwoman Fallon toured the building with the Charlotte Mayor, City Manager, Fire Chief, and Deputy Fire Chief. At the least, then, in the light most favorable to Plaintiff, Plaintiff’s Building Complaints initiated an inquiry, investigation, inspection, proceeding or other action or provided information to a person with respect to OSHA. N.C. Gen. Stat. § 95-241(a). Therefore, the Building Complaints constituted protected activity under REDA.

FACEBOOK Screenshots

“Next, Defendant argues the Court erroneously admitted screenshots of Facebook posts allegedly made by other fire department or city employees. Plaintiff sought to introduce
these screenshots to demonstrate that other employees similarly situated to Plaintiff made comments on Facebook that were equally as inappropriate as Plaintiff’s Facebook Posts but that those employees faced little or no discipline. There were two groups of screenshots: one group found by Jason Eschert, Plaintiff’s husband, and one group e-mailed to Plaintiff and her husband as well as Defendant from an ‘Antique Fire Trucks’ email address.

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Moreover, a fire investigator, Andrew Bennett, testified that some of the Facebook posts were, in fact, his personal Facebook posts.

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Defendant also summarily argues the screenshots constituted inadmissible hearsay; however, the Court admitted the content of the screenshots to show that allegedly similarly situated individuals posted public statements akin to Plaintiff’s Facebook Posts with little or no disciplinary action. The Court did not admit them for the truth of the matter asserted and, therefore, they were not hearsay.”

Jury damages reduced

“For all four claims, the protected activity at issue was Plaintiff’s Building Complaints, and her injury was termination in retaliation for that speech. In other words, Plaintiff did not argue for any damages for any conduct other than her termination for making her Building Complaints. She has, therefore, inextricably intertwined the damage awards for all four claims, and the Court has no basis from which to conclude that the damages sought in Questions One, Two, Three, or Four were based on anything other than the effect of her termination in retaliation for her Building Complaints.

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Plaintiff must agree to remit damages in excess of $464,538 upon the condition that the Court will grant a new trial on the issue of damages if she fails to do so. In other words, Plaintiff has the option of submitting to a new trial on the issue of damages or accepting $464,538.

AK: ZERO TOLERANCE POLICY – FF TEST POSITIVE - FIRING UPHELD, DESPITE GOOD REPUTATION

On Aug. 30, 2017, in City of Little Rock v. Chris Muncy, the Arkansas Court of Appeals held (3 to 0) that a judge on the Pulaski County Circuit Court wrongfully ordered the firefighter reinstated, after a third-day suspension. The Court of Appeals upheld the “zero tolerance” policy, holding that “Muncy, despite his good reputation, clearly violated the policy. We are thus left with a definite and firm conviction that a mistake has been made … and we therefore reverse the circuit court’s reversal of Muncy’s termination.”

Facts:

“In 2012, the LRFD issued a policy memorandum declaring that any uniformed employee of the LRFD who tested positive for illegal or controlled drugs would be terminated. Specifically, the policy provided as follows:

Uniformed members of the Little Rock Fire Department can most easily describe this policy statement as the standard regarding the use of alcohol or illegal or controlled drugs. Illegal or controlled drugs include but are not limited to: anabolic steroids, amphetamines, barbiturates, benzodiazepine, metabolites, cocaine metabolite, methadone, methaqualone, opiates, PCP, propoxyphene and THC metabolite. *This list is not all inclusive; employees may be screened for additional substances as determined by the Fire Chief and could include drugs designated as controlled substances in the Arkansas Criminal Code as may be amended from time to time.

A uniformed Little Rock Fire Department employee with a verified positive drug result confirmed by a Medical Review Officer (MRO) shall be terminated. (Emphases in original.)

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Each month, the LRFD chooses seventeen employees at random to be drug-screened. The selected employees each provide a urine sample.

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On July 22, 2014, Muncy was randomly selected to be drug-tested. On the initial test, his urine sample was positive for amphetamine and methamphetamine, with a result of 222.

Because of the positive result, the LRFD followed its protocol and requested a confirmatory screening by GC/MS test. The GC/MS testing of Muncy’s urine sample
indicated a methamphetamine concentration of 17,138 nanograms per milliliter (ng/ml) and an amphetamine concentration of 2,894 ng/ml.

Because of that positive result, an isomer test was conducted to determine the ratio of D-methamphetamine to L-methamphetamine. Muncy’s sample was 85% D-form and 15% L-form. Based on the results of Muncy’s drug screen, the LRFD terminated his employment.

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Muncy, who denied ever taking methamphetamine, subsequently sought additional testing at his own expense. His independent test, however, was also positive for methamphetamine.

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Muncy appealed his termination to the Commission, which voted to uphold Muncy’s termination. Muncy then appealed the Commission’s decision to the Pulaski County Circuit Court pursuant to Arkansas Code Annotated section 14-51-308(e)(1) (Repl. 2013).

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The LRFD presented evidence of the reasons for its drug policy. Gregory Summers, fire chief of the LRFD since 2009, explained that the reason for the policy was due to the ‘safety sensitive work’ of the LRFD, stating that ‘we definitely don’t want anybody operating our equipment that’s under the influence of any type of drug.’ Summers further noted that firefighters ‘have a responsibility not only to the citizens that they’re there to protect, but also to their co-workers. . . . Other firefighters need to be able to trust each other with their lives.’ Summers also testified that he would be uncomfortable reinstating a firefighter who had tested positive for drug use. He stated that it would ‘send a bad message to every other firefighter. . . . If an exception is made for Mr. Muncy, it destroys the policy, and if that’s the case, then we shouldn’t even have one.’

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Similarly, [Brent Staggs, a medical review officer] noted that Muncy had a prescription for Adderall, which could show up on a drug test as amphetamine. Staggs opined that this would explain Muncy’s positive result for amphetamine; he testified, however, that although methamphetamine can break down into amphetamine, ‘amphetamine can never turn into methamphetamine. Staggs said he was unable to find any medical explanation for Muncy’s results.

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In response to this testimony, Muncy presented the testimony of Dr. Alex Pappas. . . . Dr. Pappas opined that the supplements Muncy used to increase his sex drive would ‘probably not be something he could have ordered on the internet that has a derivative of methamphetamine in it.’
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His coworkers testified that they had never seen him do anything or behave in any way that caused them to fear for their safety. Even Assistant Chief Coney agreed that Muncy was a good firefighter, and Chief Summers acknowledged that he had been shocked when he heard that Muncy had tested positive and said that he had no indication from Muncy’s behavior or demeanor that he was on methamphetamine."

Trial judge

“At the conclusion of the trial, the court ruled from the bench that Muncy’s positive drug test was ‘pretty obvious and it’s conclusive.’ The court questioned, however, whether the ‘situation [was] so severe . . . that the zero tolerance policy is justified.’ The court stated that it understood the purpose of the policy, but given Muncy’s history and good character, it concluded that the sanction of termination was too severe. The court therefore determined that a thirty-day suspension and demotion from the rank of apparatus engineer to that of firefighter would be appropriate.”

Holding:

“The LRFD has the authority to govern and regulate its employees. Ark. Code Ann. § 14-51-302. The LRFD provided legitimate public-policy reasons behind its zero-tolerance policy on drug usage and the necessity for consistency in the application of that policy. Muncy, Despite his good reputation, clearly violated the policy. We are thus left with a definite and firm conviction that a mistake has been made … and we therefore reverse the circuit court’s reversal of Muncy’s termination.”

Legal Lessons Learned: Zero tolerance policies can be effective, but another approach is to provide one-time exception, requiring the employee who tested policy to get help from Employee Assistance Program. EAPs can save firefighter careers, and also family members lives.

File – Chap. 13, EMS

OH: PATIENT SUICIDE – DOCTOR’S COMMENTS OF REGRET NOT ADMISSIBLE – PROTECTED BY “APOLOGY STATUTE”

On Sept. 12, 2017, in Stewart v. Vivian, the Ohio Supreme Court held (5 to 2) that the admitting physician’s statement, after a patient committed suicide at Mercy Hospital Clermont was properly not admissible in evidence in civil trial, even if it contains an admission about patient care. “We hold that for purposes of R.C. 2317.43(A), a “statement[] *** expressing apology” is a statement that expresses a feeling of regret for an unanticipated outcome of the patient’s medical care and may include an acknowledgment that the patient’s medical care fell below the standard of care.”
Facts:

“In the early evening of February 19, 2010, Michelle Stewart attempted suicide. She was transported to the emergency department of Mt. Orab MediCenter. Around midnight, she was transferred to the psychiatric unit at Mercy Hospital Clermont. Appellee, Rodney E. Vivian, M.D., was the admitting physician.

Leslie Wiggs, a registered nurse, conducted an initial assessment of Michelle upon admission to the psychiatric unit. After completing the assessment, Wiggs conferred with Dr. Vivian.

After this discussion, Dr. Vivian ordered that a staff member of the psychiatric unit visually observe Michelle every 15 minutes. This order remained unchanged during her stay in the psychiatric unit.

At approximately 6:00 p.m. the next day, Michelle’s husband, appellant, Dennis Stewart, arrived at the psychiatric unit to visit her. Upon entering her room, he found her unconscious as a result of hanging. Thereafter, she was transferred to the intensive-care unit (‘ICU’) and placed on life support.

Two days later, Dr. Vivian went to Michelle’s ICU room to speak with her family. After Dr. Vivian briefly spoke to several family members in the room, one of them asked him to leave, which he did.

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On February 23, 2010, a neurologist informed Dennis that neurological testing indicated that Michelle would not recover. The following day, Dennis directed that life support be discontinued. A couple of hours later, Michelle died.”

Lawsuit

“On February 17, 2011, Dennis, individually and as administrator of Michelle’s estate, filed suit against Dr. Vivian and Mercy Hospital Clermont.

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One of Dr. Vivian’s motions in limine sought to exclude statements he made to Michelle’s family in her ICU room. Dr. Vivian argued that the statements were inadmissible pursuant to R.C. 2317.43, also known as the apology statute, because the statements had been ‘intended to express commiseration, condolence, or sympathy.’ In response, Dennis argued that Dr. Vivian’s statements were admissible because they were not ‘pure expression[s] of apology, sympathy, commiseration, condolence, compassion, or a general sense of benevolence.’

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[Michelle’s sister testified] Dr. Vivian just walked in through the door … and walked over to—toward the end of Michelle’s bed, and kind of stood for a moment and then just said, so what do you think happened here? And I believe Dennis responded and ex—and
said, well, obviously she tried to kill herself. And [Dr. Vivian] said, yeah, she said she was going to do that. She told me she would keep trying.

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Michelle’s husband testified: ‘I just remember [Dr. Vivian] saying that he didn’t know how it happened; it was a terrible situation, but she had just told him that she still wanted to be dead, that she wanted to kill herself.

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Dr. Vivian testified: ‘What I remember is walking in and being at—at bedside and telling the family I’m sorry this has happened. And what I remember is some—someone was screaming at me telling me this is my fault, and I said I was sorry, and I left.’ However, when questioned earlier about the ICU visit during his deposition, Dr. Vivian had answered, ‘I made a statement, but I don’t remember what I said.’ While the trial court did not ‘think [Dr. Vivian] was lying’ when he testified at the hearing on his motion in limine, it found Dr. Vivian’s deposition testimony ‘to be the more credible version.’

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And the court found that Dr. Vivian’s statements were an ‘attempt at commiseration’ and therefore inadmissible under the apology statute. Accordingly, the court granted the motion in limine and excluded Dr. Vivian’s statements.

The matter proceeded to trial. The jury returned a verdict in favor of Dr. Vivian, concluding that he was not negligent in his assessment, care, or treatment of Michelle.”

Holding:

Ohio’s apology statute, R.C. 2317.43, provides:

In any civil action brought by an alleged victim of an unanticipated outcome of medical care * * * any and all statements, affirmations, gestures, or conduct expressing apology, sympathy, commiseration, condolence, compassion, or a general sense of benevolence that are made by a health care provider * * * to the alleged victim, a relative of the alleged victim, or a representative of the alleged victim, and that relate to the discomfort, pain, suffering, injury, or death of the alleged victim as the result of the unanticipated outcome of medical care are inadmissible as evidence of an admission of liability or as evidence of an admission against interest.

We hold that R.C. 2317.43(A) is unambiguous. Applying the plain and ordinary meaning of the term ‘apology,’ for purposes of R.C. 2317.43(A), a ‘statement[] * * * expressing apology’ is a statement that expresses a feeling of regret for an unanticipated outcome of the patient’s medical care and may include an acknowledgment that the patient’s medical care fell below the standard of care.”

Dissent (2 Justices):
“Dr. Vivian’s statements were not an apology nor did they express regret or a type of shared sadness associated with sympathy or commiseration. Dr. Vivian’s recitation of Michelle’s prior statements certainly does not fall within the statute. “What do you think happened here?” is a question, not an expression of Dr. Vivian’s regret or sympathy. Dr. Vivian’s statement that he ‘didn’t know how it happened’ similarly is not an apology.”

Legal Lessons Learned: This Ohio “Apology Statute” applies to “health care providers” and should also protect EMS comments to patients and family members. Words matter – so use care when talking to patients. See Ohio Rev. Code 2317.43, “Medical liability action - defendant's expression of sympathy for victim inadmissible.” Health care providers is broadly defined as: “a hospital, ambulatory care facility, long-term care facility, pharmacy, emergency facility, or health care practitioner.”

http://codes.ohio.gov/orc/2317.02

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