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# Sept. 2023 – FIRE & EMS LAW NEWSLETTER

**[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE.]**

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- **NEWSLETTERS:** If you would like to be added to UC Fire Science listserv, just send him an e-mail. View current and past newsletters via the Fire Science webpage.
- **TEXTBOOK:** Updating 18 chapters of my textbook (2018 to current). FIRE SERVICE LAW (SECOND EDITION), Jan. 2017: View textbook via Waveland site.

## 9 NEW CASES – added to ONLINE LIBRARY (case summaries 2018 - present):

View cases via Scholar@UC.

File: Chap. 1 - American Legal System, incl. Fire Code, Fire Invest.

# AR: HOMELESS MAN CONV. – CAMPFIRE BURNED HALF ACRE - RANGER TESTIFY ORIGIN & CAUSE - LAY WITNESS

On Aug. 21, 2023, in United States of America v. Joseph Ronnie Weathington, Unites States District Court for District of Arizona, U.S. Magistrate Judge Camille D. Bibles, after a two-day bench trial [no jury] found the defendant guilty of not extinguishing his campfire, that led to the "Schoolhouse" wildland fire on July 4, 2022 in Coconino National Forest. Prior to trial, defense counsel objected to the testimony of Fire Protection Specialist Andrew Hostad because the government didn't identify or qualify him as an expert witness. The Magistrate held the Fire Protection Specialist, with 13 years' experience, may testify about cause and origin as a lay witness under Rule 701, Opinion Testimony by Lay Witnesses, based on his observations at wildland fire.

> "T]he Court concluded Hostad's testimony was admissible under Rule 701, provided a proper foundation for the testimony was established. The Court qualified this ruling with the provision that Hostad could not opine regarding the fire's origin or source based on speculation, hearsay, or redefining the obvious. The Court also concluded Hostad's testimony related to personally-observed facts and was not intended solely to implicate Defendant. Additionally, the Court determined Hostad's testimony was credible and reliable."

FACTS:

> "Defendant was alleged to have started a campfire at this location and left camp without properly extinguishing the fire, and the unextinguished campfire was alleged to have caused a wildland fire (the 'Schoolhouse Fire') which ultimately burned a half-acre of forest land. Defendant was alleged to have been residing on the Coconino National Forest near Walnut Canyon National Monument near FR 303 from approximately January 2, 2023, through March 24, 2023.
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> The Schoolhouse fire was contained in approximately 1.5 hours, and in three days the fire was fully controlled, i.e., no longer emitting heat or smoke. The Schoolhouse fire burned 0.5 acre of land.
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> The Schoolhouse Fire was investigated by Andrew Hostad, who has worked for the NFS for 13 years. Hostad was one of the firefighters suppressing the fire as well as a specialist investigating the cause of the fire. At that time Hostad was a Forest Protection Officer and Fire Prevention Technician.
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> He also took photos in all cardinal directions and marked fire burn indicators which showed the angle of char in the area. A campsite was located within the area of the fire. The campsite was located on an exposed bench and was not insulated from the wind… Burn patterns and charred ground extended eastward from a hot campfire ring located in the campsite. This pattern was in a V-shape. The campfire was located at the 'heel' of the V-pattern.

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Defendant admitted being at his camp that morning and starting a campfire to make food and coffee, stating it was the third fire he'd started at this location. He stated that he poured water on the campfire and stayed in camp for another three hours after dousing the fire with water. During that time Defendant was cleaning and taking the baskets off his bicycle. Defendant stated he then left camp on his bicycle for approximately 40 minutes. He returned to the area after seeing several fire trucks and USFS trucks heading towards his camp…. Defendant acknowledged there was a fire at his camp. He stated, 'How did the fire ... did you guys ... was someone out there and saw how many acres I burned?' He further stated: 'You caught mine fast,' alluding to the fire."

**Legal Lesson Learned: Fire investigators may offer their opinion on origin and cause based on their observations at the scene, as lay witness under Rule 70.**

## Note:

Rule 701. Opinion Testimony by Lay Witnesses;

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: **(a)** rationally based on the witness's perception; **(b)** helpful to clearly understanding the witness's testimony or to determining a fact in issue; and **(c)** not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Rule 702. Testimony by Expert Witnesses;

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: **(a)** the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; **(b)** the testimony is based on sufficient facts or data; **(c)** the testimony is the product of reliable principles and methods; and **(d)** the expert has reliably applied the principles and methods to the facts of the case.

Chap. 2. Line Of Duty Death / Safety

File: Chap. 3 - Homeland Security, incl. Active Shooter, Cybersecurity

# IL: AFTER TRIAL FBI PAID CONFIDENTIAL SOURCE $50,000 BONUS – COURT HEARING - NO REVERSAL CONVICTIONS

On Aug. 18, 2023, in United States of America v, Joseph D. Jones and Edward Schimenti, the U.S. Court of Appeals for 7th Circuit (Chicago) held (3 to 0) that trial court properly denied defense motion for a new trial. The evidence providing material support to the terrorist organization ISIS by two defendants was so strong, the 7th Circuit concluded that the disclosure at trial of the planned or contemplated post-trial bonus payment would not have resulted in the jury acquitting the defendants.

The Court of Appeals held: "We likewise agree with the district court's denial of Jones and Schimenti's motion for a new trial based on a revelation that emerged after trial regarding a substantial payment the government made to a confidential source shortly after the jury convicted both defendants. What happened raises many questions, but, like

the district court, we cannot conclude an earlier disclosure of a planned or contemplated post-trial payment would have resulted in the jury acquitting Jones or Schimenti. All of this leads us to affirm."

FACTS:

"A jury convicted Joseph Jones and Edward Schimenti of providing material support to the terrorist organization ISIS. In returning guilty verdicts, the jury rejected an entrapment defense advanced by Jones.

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On direct and cross examination, Muhamed acknowledged his potential biases, testifying that the FBI paid him living expenses for fuel, a cheap car, parking, and moving costs, with the Bureau also assisting him with his green card application. He insisted that he neither expected nor sought further compensation from the FBI for his cooperation, however. Agent Carnright offered consistent testimony and estimated these expense payments to Muhamed totaled $16,000.

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What transpired after trial is what most concerns Jones and Schimenti. About one month after the jury returned guilty verdicts, the FBI paid Muhamed a $50,000 bonus. More than three months later, in October 2019, the government disclosed this payment to Jones and Schimenti-a revelation that took them, and the district court, by surprise.

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Recognizing the gravity of the government's post-trial disclosure, the district court granted Jones and Schimenti's motion for an evidentiary hearing and ordered discovery. Agent Carnright supplied an affidavit and testified at the hearing. She stated that the FBI had contemplated making a bonus payment before the arrests in 2017 but decided based upon a pretrial discussion she had with an Assistant United States Attorney to postpone any payment until after trial. Agent Carnright insisted that she shared none of this information, including the prospect of a future payment, with Muhamed.

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The district court did not mince its words in describing its reaction to learning of these post-trial developments, making plain that it found "the Government's belated and at times contradictory disclosures regarding the FBI's payments to Muhamed troubling." In the end, however, the district court determined that any disclosure shortcomings did not rise to the level of meeting Rule 33's demanding standard for a new trial. What mattered most to the district court was the strength of the government's case against Jones and Schimenti. Seeing no likelihood of acquittal, the district court denied the motion for a new trial.

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On this record, and in full alignment with the district court, we find it unlikely that any pretrial disclosure about a planned or contemplated payment of a $50,000 bonus to Muhamed would have changed the jury's ultimate guilt determinations."

**Legal Lesson Learned: Bonus payments to a confidential source after trial can lead to post-trial hearings.**

File: Chap. 4 -Incident Command, incl Training, Drones

# MD: 46-YR OLD RECRUIT – TERMINATED AT END OF RECRUIT CLASS – POOR PERFORMANCE DOCUMENTED

On Aug. 17, 2023, in Robert D. Whittaker v. Howard County, Maryland, Chief U.S. Magistrate Judge Beth P. Gesner granted summary judgment to the County, holding that the FD provided detailed training records showing that the 46-year old FF was not meeting legitimate performance expectations. The plaintiff failed to prove the FD discriminated against him on the basis of age.

> The Magistrate wrote:
> "Defendant, on the other hand, offers Student Counseling/Status Report Forms and contemporaneous email exchanges between Academy trainers as evidence that plaintiff was not meeting the Department's legitimate expectations at the time of his termination. (ECF Nos. 25-8 to 25-18). Specifically, defendant identifies numerous examples of plaintiff's poor performance.
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> ***
> Several members of Academy staff produced recommendations in support of plaintiff's termination based upon plaintiff's deficiencies in a number of areas. (ECF Nos. 25-11 at 3, 25-17, 25-18, 25-19). Plaintiff's own belief that he was performing effectively and the opinion of his fellow trainees are insufficient to call into question defendant's reasons for terminating plaintiff. In sum, plaintiff has failed to establish that his age was the 'but-for cause' of his termination and that defendant's stated, non-discriminatory reasons for plaintiff's termination were a pretext for discrimination. *See Gross,* 557 U.S. at 176 (plaintiff has to show 'by a preponderance of the evidence,' that age was the 'but-for cause' of his discharge). Thus, plaintiff has failed to offer evidence to create a genuine factual dispute as to whether his employer discriminated against him on the basis of age."

FACTS:

> "In 2018, at age 46, Robert Whittaker ('plaintiff') applied for a firefighter position with the Howard County Department of Fire and Rescue Service (the 'Department'). (ECF No. 31 at 1). Plaintiff successfully passed all disqualifiers, a written test, a Candidate Physical Agility Test, a panel interview, a background check, a psychological examination, and a physical examination, and was selected for the Department's Training Academy, Training Class 30 (the 'Academy'). *(Id.* at 5-6). Plaintiff began his employment as a trainee with the Department on January 28, 2018.

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On April 19, 2018, plaintiff suffered a knee contusion while training and was placed on desk duty.

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On May 18, 2018, trainers from the Academy recommended that plaintiff be terminated from his probationary employment as a result of his failure to meet the standards required of Department trainees. *(Id.* at 9). On May 24, 2018, plaintiff was formally terminated by the Fire Chief.

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First, plaintiff received a Student Counseling/Status Report Form regarding his performance on April 13, 2018, in which plaintiff was unable to complete a ladder climbing scenario and requested permission to evacuate into the interior of the structure because he was unable to descend on the ladder. (ECF No. 25-6).

Second, Captain Smeltzer sent an internal memorandum to Captain Welsh regarding plaintiff's performance on April 17, 2018, in which plaintiff struggled to climb a 28-foot extension ladder in his gear, was unable to transition to the 'fly section' of the ladder, and was unwilling to perform a 'leg lock' as required. (ECF No. 257). Plaintiff concedes that he did not pass the first ladder exam, but maintains that he "thereafter passed every ladder drill and successfully performed on ladders." (ECF No. 35-1 at ¶ 20-21).

Third, Captain Redd sent an internal memorandum to Captain Welsh on April 17, 2018, stating that plaintiff was unable to complete a maze evolution and 'became disoriented at two locations within the maze' before requesting a 'MAYDAY.' (ECF No. 25-8). Plaintiff states that it was common for trainees to struggle with mazes and while he did not pass the maze on his first attempt, he was not nervous, did not have anxiety, and did not become subordinate, and thereafter passed the maze and all subsequent mazes. (ECF No. 35-1 at | 6).

Fourth, plaintiff received a Student Counseling/Status Report Form on May 3, 2018, regarding plaintiff's failed first attempt of the Firefighter 1 practical exam when he was unable to ascend to the roof of a building. (ECF No. 2514). Plaintiff was able to complete the task on the second attempt. (*Id.*)

Fifth, Captain Redd sent Captain Welsh an internal memorandum regarding incidents on May 16, 2018 and May 17, 2018 in which plaintiff forgot to attach his Self-Contained Breathing Apparatus (SCBA) twice before entering a burning structure. (ECF No. 25-15). Plaintiff states that he did not fail to attach his breathing apparatus but rather 'self-corrected before entering the interior of the building' without his mask on, followed protocol for when to connect the breathing apparatus, and received no counseling on his failure to attach the breathing apparatus. (ECF No. 35-1 at ¶¶ 4-5).

Sixth, Instructor Paul sent an internal memorandum to Captain Welsh regarding an incident on May 17, 2018, in which plaintiff made several critical errors during an evolution, including that he was (1) unable to open the bale of a hose nozzle, (2) had the

improper nozzle pattern selected, (3) was unable to maintain orientation in the structure, (4) was unable to follow directions, and (5) was unable to locate fire in the structure.

(ECF No. 25-16). Plaintiff objects to defendant's characterization of events and suggests that he was not the 'nozzle person,' and therefore, should never have been asked to enter the building and assume control over the nozzle, because to do so was against his training and a danger to his safety and the safety of the other trainees. (ECF No. 35-1 at ¶ 7-11).

Finally, on multiple occasions throughout the course of the Academy, trainers commented on plaintiff's tendency to become flustered, quit tasks, display extreme anxiety, and behave insubordinately when faced with a stressful task or given critical feedback. (ECF Nos. 258, 25-9, 25-14, 25-16, 25-17, 25-18, 25-19). Plaintiff asserts simply that he "was not 'insubordinate' with the training staff." (ECF No. 35-1 at | 22)."

**Legal Lesson Learned: The FD thoroughly documented the FF's training deficiencies.**

File: Chap. 5 - Emergency Vehicle Operations

## TX: EMER. RUN – HEAVY TRAFFIC - BACKING UP ENGINE SIDE-SWIPED SUV – OFFICIAL IMMUNITY FOR FF & CITY

On Aug. 22, 2023, in City of Houston v. Emmitt Wilson, the Court of Appeals of Texas, Fourteenth District, reversed the trial court judge and ordered the lawsuit dismissed. The firefighters were responding to an accident with 18-wheeler and a sedan, and because of heavy traffic the engine had to slowly back up with a spotter on passenger side. The engine side-swiped Mr. Wilson's vehicle when he suddenly stopped backing up.

The Court held:

"[Firefighter Jason] Carroll testified that when he determined he would need to back up on Wayside, he used his individual judgment to leave his emergency lights engaged but disengaged the siren so that he could hear his spotter's radio transmissions. Carroll also explained that his back up signals would sound. Wilson did not dispute that these alarms were operating at the time of the accident and admits that 'Mr. Carroll and all the [City's] agents were responding to an emergency' at the time of the accident.

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Because the evidence was uncontroverted that Carrol was operating Engine 43 in the course of an emergency response to a vehicle accident, and Carroll's affidavit illustrates the various decisions he made in the course of driving Engine 43 leading up to the collision-including determining the proper route to the accident, whether to keep the emergency siren and lights engaged while backing up, whether and how many spotters he should have while performing the reverse maneuver-we conclude that the Carrol was performing *discretionary duties* at the time of the incident. *See id*. Thus, to the extent the trial court's denial of summary judgment was based on a finding that the City failed to

conclusively establish that Carrol's acts were discretionary duties at the time of the collision, such finding was erroneous. We next consider the trial court's implicit finding that the City failed to conclusively establish that Carrol was acting in good faith at the time of the incident.

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On this record, the City satisfied its burden to prove conclusively that Carroll was acting in good faith at the time in question…. The fact that Carroll had turned off his siren or that he had chosen only one spotter is unconvincing in light of the circumstances described in Carroll's affidavit, and thus the cases Wilson has cited are not germane to this case."

FACTS:

"On April 26, 2019, Wilson, traveling southbound on Wayside came upon Engine 43 at the intersection of Angus and Wayside. Engine 43 had been dispatched to respond to an 18-wheeler-sedan collision on the northbound side of Wayside, north of Angus. Jason Carroll, the fire engine operator driving Engine 43, concluded he needed to back up the engine to negotiate the heavy traffic conditions in route. When Engine 43 began backing up with his spotter guiding, so did Wilson. But when Wilson ran out of room he had to stop before colliding with a vehicle behind him. Engine 43 continued and collided into Wilson's vehicle.

In his affidavit, Carroll explained that while he and the Houston Fire Department (HFD) normally use wo spotters for backing up engines, Carroll exercised his judgment to use one, because 'the second spotter would have been completely exposed and vulnerable to being hit by an inattentive motorist.' 'Stevenson [the spotter] was positioned on the passenger side of Engine 43 for his own safety during this maneuver; if any inattentive motorists had ignored our efforts, Stevenson could dart behind Engine 43 for protection.' Carroll also made the judgment call to disengage the siren so that he could hear his spotter's radio transmissions but left his emergency lights engaged. Carroll explained that the engine was also equipped with backup alarms. It was undisputed that these alarms were operating at the time of the accident here. As soon as Carroll put Engine 43 in reverse, the backup alarm also sounded.

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Carroll testified that he then heard a horn sound and his spotter Stevenson radioed for Carroll to stop Engine 43 from backing up and that he immediately stopped. When he looked out the driver's side window, he saw Wilson's SUV 'within 500 feet of the rear of Engine 43.' Carroll's affidavit shows that when he noticed the SUV backing up, he reasoned that he had sufficient room to back Engine 43 into position. Carroll then resumed backing up and looked to his passenger side mirror 'so I could observe Stevenson's instructions.' Without sounding his horn or otherwise warning Carroll or the spotter, Wilson suddenly stopped backing up. According to Carroll's affidavit that is when Engine 43 and Wilson's SUV made contact."

**Legal Lesson Learned: Official immunity under Texas law protects the City and the apparatus operator from liability.**

File: Chap. 6, Employment Litigation

File: Chap. 7, Sexual Harassment

File: Chap. 8, Race Discrimination

File: Chap. 9 - Americans With Disabilities Act

# ME: CAPTAIN ENLARGED AORTA – CITY DOCTOR LIMITED MAX 75 LBS – JURY HELD FOR FD - REQ. 100 LBS LIFTING

On Aug. 15, 2023, in Brian K. Smith v. City of Sanford, the Supreme Court of Maine held (6 to 0) that the jury properly held the City did not discriminate against him because of a disability under the Maine Human Rights Act. The FD requires all firefighters be able to lift 100 pounds; the Captain saw two cardiologists; when first imposed 40 pound limit, he then saw second who imposed no limit. Given the two conflicting limits, the City sent him to their occupational health doctor limited him to 75 pounds. The trial court judge refused a request by the Captain's attorney to instruct jury that "[i]t is illegal as a matter of law for any employer to impose a 100% healed or 100% fit policy on any applicants for employment or any employees."

> The Supreme Court of Maine:
> "[B]ecause the evidence and the parties' arguments at trial focused on the required individualized assessment, we conclude that it would have been misleading or confusing for the jury to receive Smith's proposed instruction as written."

FACTS:

> "Smith started working for the Sanford Fire Department in 1981, becoming a captain in 1993. In 2014, Smith's heart rate dropped during a colonoscopy. He followed up with his primary care doctor, who discovered that Smith has a slight dilation of his aorta. The primary care doctor referred Smith to Shabbir Reza, a cardiologist, who confirmed that Smith has an enlarged, dilated aorta. Reza prescribed Smith a medication to control his blood pressure and heart rate. At Smith's six-month follow-up visit, Reza concluded that Smith's aorta had not changed in size and recommended that he continue with the prescribed medication and follow up on his condition annually.
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> In February 2015, Smith went to the hospital after experiencing chest pain. A scan revealed that his ascending aorta was enlarged. When Smith followed up with Reza a few weeks later, Reza confirmed that Smith's aorta was larger than previously measured and advised him to avoid heavy lifting.

After learning of Smith's trip to the hospital, the chief of the fire department, Steven Benotti, requested that Smith provide him with a return-to-work note. Reza thereafter provided Benotti with a note stating that Smith could work so long as he did not lift more than forty pounds. Benotti told Smith he could not return to work with such a restriction. Smith sought a second opinion from another cardiologist, Mylan Cohen. Cohen determined that Smith had a mildly dilated ascending aorta, but that given Smith's body type, the size of his aorta could be normal or just over the limit of normal. Cohen did not place Smith on any work restrictions but advised him to avoid repetitive heavy lifting. Cohen sent Benotti a note stating that Smith could return to work with no restrictions. Because the City received two differing work notes, it required Smith to see the City's occupational health doctor, Paul Upham. Benotti informed Upham that all firefighters must be able to lift 100 pounds to return to work. After evaluating Smith, Upham issued a report placing him on a seventy-five-pound lifting restriction.

In June 2015, Smith met with Benotti, the assistant chief, and the director of human resources because his lifting restriction prevented him from returning to work. Smith learned for the first time during that meeting of the City's requirement that all firefighters be able to lift 100 pounds. Four months later, the City sent Smith a letter terminating his employment because he was 'unable to perform the required duties of [his] position as Fire Captain."

**Legal Lesson Learned: FDs may properly require personnel to meet physical lifting requirements; they should be published.**

Chap. 10. Family Medical Leave Act, incl. Military Leave

File: Chap. 11 - Fair Labor Standards Act

## NY: FDNY EMS - 15 MIN PREP TIME – "CITYTIME" DIDN'T RECORD – JURY WILLFUL VIOL. – $17.7M - 2nd CIR UPHOLDS

On Aug. 25, 2023, in Chaz Perry, et al. v. City of New York, New York Fire Department, the U.S. Court of Appeals for Second Circuit (NYC) held (3 to 0) that jury, after a 12-day trial (six and half years after lawsuit was filed), properly found a willful violation of the FLSA in a class action by 2,519 EMS. The City required EMS to work 8-hour shifts, and earn overtime after 40 hours, but City did not pay them for pre-shift or post-shift time unless EMS specifically requested this (not done 99% of time). During the trial, two senior FDNY supervisors testified that plaintiffs were not permitted to request overtime for such pre-shift work as checking PPE and equipment. The plaintiffs calculated unpaid overtime damages as 15 minutes per shift. Court rejected the City's argument on appeal that time pre-shift and post-shift work was "de minimis" and thus not worthy of compensation. The $17,780.063 verdict is allocated as follows – backpay $7,238,513; same amount in liquidated damages for willful violation of FLSA; $3,303,037 in attorneys' fee.

The Court held:

"The City's principal argument on appeal is that it cannot be held liable for the unpaid overtime because it affords an opportunity to report overtime work and, since the plaintiffs failed to report the work at issue, the City did not know that any plaintiff was being short-changed. But an employer must pay for all work it knows about or requires, even if the employee does not specifically request compensation for it. Whether an employee reports overtime work will often be relevant to an employer's knowledge of the work—but allowing, or even requiring, an employee to report overtime work does not absolve employers of the obligation to compensate for work they suffer or permit.

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[W]e have long recognized that an employee's failure to report work the employer in fact knew about or required does not protect the employer from FLSA liability… In any wage-and-hour regulatory scheme, somebody must bear ultimate responsibility for recording time worked and for ensuring that payment is made.

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In sum, there is trial evidence that the City created a job that requires significant preparation to be done properly; it then also required that plaintiffs be ready to go as soon as possible after the start of their shift. The City issued formal regulations and enforced informal expectations to that effect. Testimony showed that it was essentially impossible to comply with the City's demands without starting work before the paid shift. Considering the evidence in the light most favorable to the plaintiffs, the jury had a legally sufficient evidentiary basis for concluding that the City maintained a policy or practice of 'requiring' plaintiffs to perform compensable, pre-shift work for which they were not automatically paid."

FACTS:

"Preparation is needed before EMTs can set out with an ambulance. In order to respond to calls effectively and safely, each EMT has a set of personal protective equipment ("PPE"), including helmet, gloves, pants, coat, and a respirator. Before an EMT can log on to her ambulance, she must retrieve this PPE from her locker and inspect it to make sure it is in order. The same goes for gear, including a radio, radio holster, stethoscope, shears, and a duty belt. An EMT also carries a 'Technician's Bag' with additional first aid materials, which (like the other equipment) must be retrieved and inspected. Finally, once the outgoing shift has returned with the ambulance, EMTs must perform a thorough inspection of the vehicle before being able to log on as available to respond to a call. There is a similar sequence at the end of a shift. After returning to the station, plaintiffs: exchange certain equipment with the oncoming shift, noting the exchange in a logbook; inform the oncoming shift of pertinent information, such as hospital capacity, special events in the city, or issues with the ambulance; and secure and store their PPE and personal gear in the appropriate lockers.

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The City's electronic timekeeping and payroll system, CityTime, utilizes a 'pay to schedule' approach. J.A. 2920. Under that system, employees are automatically paid only for time during their shift, not for time at the station performing work before or

afterward. CityTime registers presence at the station to the minute using scanners located by the entrance of each stationhouse. So, if an EMT scans in to CityTime ten minutes before the shift and scans out ten minutes after it ends, she will automatically be paid for the eight hours during the shift but not for the ten-minute intervals before and after, chunks of time the parties call 'slivers.' See, e.g., id. Per City policy, an EMT who performs work during a sliver must submit an overtime request in order to be paid. Plaintiffs regularly requested overtime pay, including sometimes for pre-shift work. J.A. 2459. But plaintiffs did not request overtime pay on 99 percent of the occasions they scanned in before their shifts.4 J.A. 2410."

**Legal Lesson Learned: FDs should provide in their FLSA policy or CBA what pre-shift and post-shift activities will be compensated and have a time keeping system that implements that policy.**

File: Chap. 12, Drug-Free Workplace

File: Chap. 13, EMS

File: Chap. 14, Physical Fitness

File: Chap. 15 CISM, incl. Peer Support, Mental Health

File: Chap. 16 – Discipline

## CA: BORDER PATROL SUPERVISOR ARRESTED AT BAR - FALSELY TOLD EMS DIABETIC 1 – FIRED LACK CANDOR

On Aug. 18, 2023, in Nick Santos v. Department of Homeland Security, the United States of America Merit Systems Protection Board (2 to 0) reversed Administrative Law Judge and upheld the termination of the Agent for lack of candor.

The Board held:

"In this case, the agency has provided evidence that the appellant's off-duty conduct adversely affected its trust and confidence in the appellant's ability to serve as a Supervisory Border Patrol Agent. *** We have considered relevant mitigating factors, including the appellant's length of service, his record of performance-based awards, and the rehabilitative potential evidenced by his willingness to admit to conduct unbecoming. However, considering that the sustained charge of lack of candor could potentially result in the appellant's *Giglio* impairment [footnote 4] it is doubtful that an alternative sanction, such as a suspension or demotion to a nonsupervisory law enforcement position, would be a viable option in this case. We find that the penalty of removal is within the bounds of reasonableness, and we therefore sustain it.

Footnote 4: In *Giglio v. United States*, 405 U.S. 150, 154 (1972), the Supreme Court held that the Government must disclose evidence affecting the credibility of Government witnesses. Subsequent case law has extended this rule to require Government agencies to review the personnel files of Government witnesses and disclose material that could cast

doubt on their credibility or potential for bias. *See United States v. Henthorn*, 931 F.2d 29, 30-31 (9th Cir. 1991)."

FACTS:

"On September 2, 2018, while off-duty [at a bar], the San Diego Police Department (SDPD) found you uncooperative, argumentative, and you appeared to be intoxicated. SDPD detained and transported you to McAlister Institute Inebriate Reception Center (MHRC). You admitted to Customs and Border Patrol (CBP) Office of Professional Responsibility (OPR) investigators you had consumed approximately seven (7) alcoholic beverages throughout the day. IAF, Tab 7 at 73. The appellant does not dispute this charge, and acknowledges that he engaged in conduct unbecoming a supervisor. Hearing Transcript (HT) at 174.

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On September 2, 2018, while off-duty, you were examined by Emergency Medical Services (EMS). SDPD arrived at the scene and told EMS that if EMS cleared you, then you would be going with SDPD. Shortly thereafter, an EMS employee asked you if you had any pertinent health history that you should know about. You said you were a type (1) diabetic. In your interview with CPB OPR investigators, you stated you were not diabetic.

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The agency has provided the SDPD officer's body camera footage from the incident, which records the following dialog between the appellant and one of the EMS paramedics:

Paramedic: Do you have any pertinent past medical history we should know about, like say, diabetes, high blood pressure?
Appellant: Diabetes, high blood pressure.
Paramedic: You are a diabetic?
Appellant: Yes.
Paramedic: What type of diabetic are you?
Appellant: Type 1.
Paramedic: What do you take, [what] medicine?
Appellant: Nothing.
Paramedic: So you're a type 1 diabetic who takes no medication whatsoever?
Appellant: Correct.
Paramedic: I don't think I've ever met anyone who does that. Do you know any medications that you're supposed to be taking?
Appellant: Uh, metformin.
Paramedic: Okay, type 1 diabetics don't usually take metformin."

**Legal Lesson Learned: Under the U.S. Supreme Court's decision in Giglio v. United States. if this Supervisor Agent testifies in a criminal case the Government may need to disclose the "lack of candor" administrative charge.**

Note: In Giglio v. United States, 405 U.S. 150 (1972), the U.S. Supreme Court reversed the conviction of passing forged money orders, and ordered a new trial. While appeal was pending in the Court of Appeals, defense counsel discovered new evidence indicating that the Government had failed to disclose an alleged promise made to its key witness [bank teller who gave defendant one of the bank's customer signature cards] that he would not be prosecuted if he testified for the Government.

File: Chap. 16 - Discipline

## TX: SIX FFs FIRED – OUTSIDE INVEST. THEY HARRASED CO-WORKERS – NOT RETALIATION UNION REQ. CHANGE SHIFT

On Aug. 15, 2023, in Stan Kozlowsi, et al. v. William Buck, individually and in his official capacity as Fire Chief, et al., the U.S. Court of Appeals for 5th Circuit (New Orleans), held (3 to 0) that the U.S. District Court judge properly dismissed their lawsuit. The FD used an outside investigator to investigate allegations of harassment. There was no proof of retaliation because union officers pushed for a shift change; the discipline was imposed nine months after Fire Chief approved union request for shift change.

> Court of Appeals held: "The firefighters insist they were disciplined because of their union activities. But their claims rest on speculation and hearsay. Because that is not enough to establish a genuine dispute of material fact as to causation, we AFFIRM."

FACTS:

> "In March 2020, a subordinate, Robert Jones, accused the firefighters of harassment. He said the firefighters made derogatory remarks about an injury he sustained while in the military, asked him to 'prove' it existed, and flashed their genitalia at him. To escape the bullying, Jones transferred to another department.
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> Another employee, Dennis Andrejczak, corroborated these allegations. He also revealed that the firefighters were hazing junior employees. In one instance, the firefighters coerced two subordinates to tape various objects to their head and groin, hold metal spoons, and stand on a boat while the firefighters mocked them. Both employees eventually quit, as did '[c]ountless' others over the years.
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> One is the timing. The firefighters were disciplined nine months after they ceased advocating for the shift change. That is not suspiciously close in time, *see Newbury v. City of Windcrest*, 991 F.3d 672, 679 (5th Cir. 2021), especially because they spent four years advocating for the change without reprisal. *See Benfield v. Magee*, 945 F.3d 333, 338 (5th Cir. 2019) (declining to infer retaliation when the harassment "did not begin soon enough after" the speech)."

**Legal Lesson Learned: FD may retain an outside investigator to review complaints of harassment.**

File: Chap. 17 - Arbitration, incl. Mediation, Labor Relations

# RI: UNDER CBA - TOWN / UNION SELECTED NEUTRAL 3rd PARTY PHYSICIAN - CHEST PAINS NOT JOB RELATED

On Aug. 21, 2023, in Fred Melnyk v, Town of Little Compton, the U.S. Court of Appeals for First District (Boston) held (3 to 0; unpublished decision) that trial court judge granted Town's motion for summary judgment. The FF was put on Administrative Leave for chest pains from April 13, 2028 until termination in March, 2019. There was no breach of the Collective Bargaining Agreement since the CBA provides that when FF's physician, and Town's physician disagree on cause of a firefighter's medical issue, the Town and the Union shall select a neutral 3rd physician whose decision is binding. That 3rd physician concluded chest pain not caused by the job.

> The Court held:
> "Melnyk appears to take issue with the form of the opinion rendered by the Town's physician, highlighting how the physician's treatment notes from Melnyk's exam say nothing about whether Melnyk's ailment was job-related. The MOA, however, does not dictate the form of the physician's opinion or prohibit the Town's physician from rendering his opinion after, rather than contemporaneously with, Melnyk's office visit. Moreover, both the Town and the Union agreed that the note from the Town's physician was satisfactory and triggered the need for a third opinion. At bottom, Melnyk has not put forth any evidence to show that the note from the Town's physician did not mean what it said -- his 'opinion is that [Melnyk's injury] [was] not job-related.' As such, there is no genuine issue of material fact as to whether the defendants breached the MOA by not obtaining an opinion from the Town's physician.
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> ***
> A third physician was selected by the Town and the Union, and he opined that Melnyk's condition was not job-related. Consequently, Melnyk was assessed sick time for time missed. In March 2019, having exhausted his remaining leave time and being unable to return to his duties, Melnyk was terminated."

FACTS:

> "In March 2019, Fred Melnyk, Jr., was terminated from his position as a firefighter with the Town of Little Compton (the 'Town'). His termination followed a series of disputes with his employers and co-workers and a nearly nine-month period of administrative leave.
>
> Melnyk's disputes relating to this lawsuit began in fall 2017 when he was passed over for a promotion to lieutenant. Melnyk filed two grievances relating to the promotion process, asserting that the interview process did not comport with the collective bargaining agreement (the 'CBA') between Melnyk's union -- the International Association of Fire Fighters, AFL-CIO, Local 3957 (the 'Union') -- and the Town. The Town's Fire Chief, Richard Petrin, opted to reconduct the interview process to correct any flaws in the promotion process, but Melnyk still was not selected for a promotion to lieutenant at the Town Council's meeting in February 2018.

About a month later, Melnyk was involved in a confrontation and physical altercation with another firefighter. In response, Melnyk pressed charges against his fellow firefighter for simple assault and battery. A few days later, while at work, two other firefighters confronted Melnyk for pressing charges, and, shortly after the confrontation, Melnyk experienced chest pains and was taken to the hospital. After discharge, Melnyk's physician advised the Town that Melnyk could not return to work. On April 13, 2018, Melnyk was put on administrative leave.

**Legal Lesson Learned: Selection by Town and Union of a neutral third physician was consistent with CBA.**