



FIRE, EMS & SAFETY LAW NEWSLETTER

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Larry Bennett, Esq. is the author of this newsletter, and the new textbook: **FIRE SERVICE LAW (Second Edition)**, Jan. 2017 (ISBN 978-1-4786-3397-6); Waveland Press; publisher Neil Rowe njr@waveland.com. Larry is Program Chair, UC Fire Science & Emergency Management at University of Cincinnati (see bio, last page). lawrence.bennett@uc.edu; Cell 513-470-2744

ITEMS COVERED IN THIS NEWSLETTER

- **New Textbook** – FIRE SERVICE LAW (Second Edition), Feb. 2017
- **UC Course:** Drones – Unmanned Aerial Vehicles For Emergency Responders
- **UC Course:** Community Paramedicine – Quick Response Teams, drug overdose visits
- **Continuing Education opportunities**
 - Jan. 9, 2017: **Ohio Fire Academy** – Executive Fire Officer III / IV – LEGAL ISSUES (Host: Scott Pascu, Cell 330-607-3012);
 - Jan. 27, 2017: **Ohio Township Association**, Annual Winter Meeting – GIS, DRONES (Host: Heidi Fought, Cell 614-863-0046);
 - Feb. 22, 2017: **Ohio Fire Academy** – Executive Fire Officer III / IV – LEGAL ISSUES (Host: Scott Pascu, Cell 330-607-3012);
 - Feb. 28, 2017: **Campus Fire Safety Expo** – USING DRONES FOR EMER. RESPONSE AND FIRE CODE ENFORCEMENT (Host: Randy Hormann, 614-416-8077)
 - March 11, 2017: **Highland County Firefighter's Association** – EMS Conference – COMMUNITY PARAMEDICINE (Host: Scott Miller, Cell 937-403-3121);
 - March 12, 2017: **Ohio Fire Academy** – New Fire Chief's Symposium – LEGAL ISSUES (Host: Steve Goheen, Superintendent, Work 614-644-0523);
 - March 16, 2017: **Colerain Township** – Seminar / Panel Discussion – Community Paramedic Quick Response Team - Narcotic Overdose Patients (Host: Assistant Fire Chief Will Mueller; Cell 513-473-5427);
 - March 18, 2017: **Coshocton County EMS** – EMS Conference, Zanesville, OH – EMS LEGAL ISSUES / ETHICS (Host: Assistant Chief Bill Barks, Work 740-622-4294);
 - April 18, 2017: **Veteran Apothecaries Assoc. of Cincinnati** – SOCIAL MEDIA ISSUES FOR PHARMACISTS (Host: Jim Liebetau, 859-750-3506);
 - June 15 & 16, 2017: **National Fire Academy** – National Professional Development Symposium – SOCIAL MEDIA / LEGAL ISSUES (Host: Mike McCabe, Cell 859-402-7857);
 - June 20, 2017: **New Jasper Township FD**, CE Training – LEGAL ISSUES (Host: Captain Garrett Sagraves, Cell 937-608-0044).

- **RECENT CASES / STATUTES**

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TEXTBOOK - FIRE SERVICE LAW (SECOND EDITION)

Author of this newsletter is proud to announce that *Fire Service Law, Second Edition* (ISBN 978-1-4786-3397-6), Jan. 2017: \$47.95; Neil Rowe, Publisher, Waveland Press, Inc., Long Grove, IL 60047-9580; Phone, 847-634-0081; Fax, 847-634-9501; njr@waveland.com; www.waveland.com

DRONES - FOR EMERGENCY RESPONDERS

May 1-5, 2017: UC residency course - Unmanned Aerial Vehicles For Emergency Responders: <http://ceas.uc.edu/aerospace/FireScience/uav.html>; see also videos / PowerPoints from our Aug. 10, 2016 seminar (160+ attended from all over USA).

COMMUNITY PARAMEDICINE – HOME VISITS OF NARCOTIC OVERDOSES

March 13-17, 2017: UC residency course - Foundations Of EMS / Community Paramedicine: <http://ceas.uc.edu/aerospace/FireScience/community-paramedicine-seminars.html>. On March 16 (am) will be open to public, at Colerain Township, OH – presenting on their Quick Response Team: <http://www.watchustrive.org/colerain.aspx>

File: Chap. 1 – American Legal System

U.S. SUPREME COURT: HURRICANE KATRINA INSURANCE FRAUD - WHISTLEBLOWER LAWSUIT MAY PROCEED, EVEN LEAKED TO PRESS

On Dec. 6, 2016, in State Farm Fire & Casualty Co. v. United States ex rel. Rigby et al., the Court held (8 to 0) that former claims adjusters may proceed with their lawsuit, which alleged that Hurricane Katrina victim's claims were being changed from flood damage (insurance company responsible) to wind damage (federal government responsible). The qui tam lawsuit was filed under seal so U.S. Attorney's Office could secretly investigate, and decide whether to take over the case; but attorney for adjusters improperly told several news outlets. Court unanimously held in opinion by Justice Kennedy that lawsuit may proceed.

https://www.supremecourt.gov/opinions/16pdf/15-513_43j7.pdf

Facts:

“Petitioner State Farm is an insurance company. In the years before Hurricane Katrina, petitioner issued two types of homeowner-insurance policies that are relevant in this case: (1) Federal Government-backed flood insurance policies and (2) petitioner's own general homeowner insurance policies. The practical effect for homeowners who were affected by Hurricane Katrina and who purchased both policies was that petitioner would be responsible for paying for wind damage, while the Government would pay for flood damage.

Respondents Cori and Kerri Rigsby are former claims adjusters for one of petitioner's contractors, E. A. Renfroe & Co. Together with other adjusters, they were responsible for visiting the damaged homes of petitioner's customers to determine the extent to which a homeowner was entitled to an insurance payout. According to respondents, petitioner instructed them and other adjusters to misclassify wind damage as flood damage in order to shift petitioner's insurance liability to the Government.

In the months before the seal was lifted in part, respondents' then-attorney, one Dickie Scruggs, e-mailed a sealed evidentiary filing that disclosed the complaint's existence to journalists at ABC, the Associated Press, and the New York Times. All three outlets issued stories discussing the fraud allegations, but none revealed the existence of the FCA complaint. Respondents themselves met with Mississippi Congressman Gene Taylor, who later spoke out in public against petitioner's purported fraud, although he did not mention the existence of the FCA suit at that time.

After the seal was lifted in part [by U.S. District Court judge], Scruggs disclosed the existence of the suit to various others, including a public relations firm and CBS News.

In March 2008, [attorney] Scruggs withdrew from respondents' case after he was indicted for attempting to bribe a state-court judge. Two months later, the District Court removed the remaining Scruggs-affiliated attorneys from the case, based on their alleged involvement in improper payments made from Scruggs to respondents.

[Insurance company filed motion to have case dismissed, for violation of seal. Court denied the motion.] After a careful analysis, the Court of Appeals for the Fifth Circuit held automatic dismissal is not required by the FCA. 794 F. 3d, at 470–471.

Held:

“Petitioner’s primary contention is that a violation of the seal provision necessarily requires a relator’s complaint to be dismissed. The FCA does not enact so harsh a rule.

The Court’s conclusion is consistent with the general purpose of [False Claims Act] §3730(b)(2). The seal provision was enacted in the 1980’s as part of a set of reforms that were meant to ‘encourage more private enforcement suits.’ S. Rep. No. 99–345, pp. 23–24 (1986). At the time, ‘perhaps the most serious problem plaguing effective enforcement’ of the FCA was ‘a lack of resources on the part of Federal enforcement agencies.’ *Id.*, at 7.

The Senate Committee Report indicates that the seal provision was meant to allay the Government’s concern that a relator filing a civil complaint would alert defendants to a pending federal criminal investigation. *Id.*, at 24. Because the seal requirement was intended in main to protect the Government’s interests, it would make little sense to adopt a rigid interpretation of the seal provision that prejudices the Government by depriving it of needed assistance from private parties.

The Federal Government agrees with this interpretation. It informs the Court that petitioner’s test ‘would undermine the very governmental interests that the seal provision is meant to protect.’ Brief for United States as Amicus Curiae, 10.

Legal Lessons Learned: The Federal government, under the False Claims Act, has recovered \$3.5 billion in 2015, with more than half coming from whistleblower lawsuits.

Note: Fire & EMS departments have been sued by whistleblowers for falsely claiming ALS transports, when only BLS services were provided.

<http://www.jems.com/articles/2011/07/law-firms-court-ems-whistleblowers.html>

File – Chap. 1, American Legal System

NY: EMERGENCY SEARCH USING GPS - POLICE MAY OBTAIN CELL PHONE LOCATION WITHOUT WARRANT – PIMP’S CONV. UPHOLD

On Dec. 1, 2016, in United States v. Jabar Gilliam, the U.S. Court of Appeals for Second Circuit held (3 to 0) that no warrant was required based on the “exigent circumstances” in search for the pimp to avoid his assaulting a prostitute. “We conclude that exigent circumstances justified obtaining and using GPS location information without a warrant and therefore affirm.” This is helpful precedent for fire & EMS when conducting a search.

<http://www.ca2.uscourts.gov/decisions/isysquery/c748ad04-c348-465a-970c-5c6d5d99aa54/1/doc/15->

Facts:

“Gilliam was convicted of sex trafficking offenses after a jury trial and sentenced to imprisonment for 240 months.

The Defendant’s offenses concern sex trafficking of a minor known as Jasmin. She recounted at trial the facts concerning Gilliam’s offenses. Gilliam met Jasmin in Maryland in late October or early November 2011. She was sixteen at the time, but told Gilliam that she was seventeen. Gilliam asked Jasmin to work for him as a prostitute after she told him she was working for another pimp. Gilliam told Jasmin that he was going to take her to New York, where she could work for him.

Jasmin worked for Gilliam as a prostitute in Maryland in November 2011. On two occasions he punched her. On one occasion he had sex with her against her will in a hotel room and on November 30, Gilliam brought Jasmin to New York City after threatening to require her fifteen-year-old sister to work as a prostitute for him if Jasmin refused to go. Gilliam purchased Jasmin’s bus ticket for the trip, and on the ride to New York City, Gilliam told Jasmin to sit near the window and then put his legs up beside her so that Jasmin could not get out of her seat. Gilliam brought Jasmin to his mother’s apartment in the Bronx, where he had sex with her against her will. Jasmin worked as a prostitute for Gilliam in the Bronx, giving him all the money that she earned.”

Locating and arresting pimp

“On November 30 [2011], Jasmin’s foster mother reported to the Sheriff’s Office in Frederick County, Maryland, that Jasmin was missing from home. The foster mother told authorities that Jasmin had mentioned a ‘boyfriend,’ known to her as ‘Jabar,’ who was later identified as Gilliam. On December 2, the case was referred to the Maryland State Police, which assigned Corporal Chris Heid to investigate.

Heid contacted Sprint Corporation (‘Sprint’), a telecommunications company. He told Sprint that he was ‘investigating a missing child who is . . . being prostituted,’ and requested GPS location information for Gilliam’s cell phone. Heid said that he was making the request because of ‘an exigent situation involving . . . immediate danger of death or serious bodily injury to a person.’ Sprint complied with Heid’s request and began providing real-time GPS location information to the Maryland State Police, which passed the information on to the FBI and the New York City Police Department (‘NYPD’).

Also on December 2, Jasmin placed a phone call to her biological mother from the Bronx apartment of Gilliam’s mother. NYPD officers went to that apartment and questioned Gilliam’s mother. Location information provided by Sprint indicated that Gilliam’s cell phone was a few blocks away. Canvassing the neighborhood, two NYPD officers saw

Gilliam and Jasmin on the street and followed them to the third floor of an apartment building. When an officer confronted Gilliam, he attempted to flee. A scuffle ensued, after which Gilliam was arrested.”

Held:

[We agree with the trial judge, who] ruled that the Stored Communications Act, 18 U.S.C. § 2702(c)(4), authorized, and exigent circumstances permitted, Corporal Heid to obtain location information from Sprint without a warrant.

Section 2702(c)(4) provides:

A provider . . . may divulge a record or other information pertaining to a subscriber . . . (not including the contents of communications covered by [other subsections]) – . . .

(4) to a governmental entity, if the provider, in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay of information relating to the emergency.

18 U.S.C. § 2702(c)(4) (emphasis added).

We agree with the District Court that exigent circumstances justified GPS tracking of Gilliam’s cell phone. The evidence available to law enforcement at the time of the search for Gilliam’s location was compelling.

Based on Heid’s discussions with Jasmin’s foster mother, social worker, and biological mother, law enforcement officers had a substantial basis to believe that Gilliam was bringing Jasmin to New York City to require her to work there as a prostitute. That type of sexual exploitation of a minor has often been found to pose a significant risk of serious bodily injury.

Based on Heid’s affirmation, Sprint had a good faith basis for believing that the disclosure of Gilliam’s cell phone location was necessary to protect a missing child from being prostituted and subject to serious physical injury.”

Legal Lessons Learned: Fire & EMS conducting emergency searches may obtain GPS location data, in cooperation with law enforcement, without a search warrant.

File – Chap. 1, AMERICAN LEGAL SYSTEM

OH – MIRANDA WARNING – CONFESSION SUPPRESSED, EVEN IF NO
“EXPRESS QUESTIONING” – DETECTIVE TOLD DEF. SAW BUY DRUGS

On Dec. 2, 2016, in State of Ohio v. Lance Turner, the Court of Appeals for Second Appellate District, Montgomery County, held (3 to 0) that the confession of defendant who had just purchased heroin and cocaine was properly suppressed by the trial judge. “The fact that Turner was not subject to ‘express questioning’ by Det. Braun is immaterial to our analysis.” Arson

investigators should review. <http://www.supremecourt.ohio.gov/rod/docs/pdf/2/2016/2016-Ohio-7983.pdf>

Facts:

“The incident which forms the basis for the instant appeal occurred on September 18, 2015, when Dayton Police Detectives Timothy Braun and Patrick Bell were patrolling the area of James H. McGee Boulevard near North Gettysburg Avenue in Dayton, Ohio.

After following the vehicle for a short time, Det. Braun observed the driver of the vehicle, later identified as Turner, stop the vehicle and park on the side of Prescott Avenue. After a couple of minutes, Det. Braun testified that Turner turned the vehicle around and parked on the other side of the street. A few more minutes passed, and Det. Braun observed a ‘tan-ish’ colored vehicle pull up behind Turner and stop. Thereafter, a male exited the tan vehicle and stopped to talk to the driver of another vehicle that was driving down the road at the same time. After speaking with the other driver for approximately five seconds, the individual began walking toward the driver’s side door of Turner’s vehicle. When he reached the vehicle, the individual leaned over and handed Turner a white envelope and quickly walked away.

Turner immediately drove away after receiving the envelope, and the detectives followed as he turned down several streets.... Det. Braun exited his vehicle and approached Turner who was sitting in the driver’s seat of his vehicle. Det. Braun testified that he grabbed his badge which was displayed around his neck and identified himself to Turner as ‘police.’ Det. Braun testified that he observed that Turner was holding the envelope which contained a plastic baggie. Once Turner became aware of Det. Braun’s presence, he immediately placed the envelope containing the plastic baggie into the glove compartment and closed it. At that point, Det. Braun also observed that Turner had a paper towel in his hand with blood on it, but the origin of the blood was not apparent. Det. Braun testified that he opened the driver’s door and ordered Turner out of the vehicle. Det. Braun testified that he grabbed Turner’s right wrist, and Det. Bell grabbed Turner’s left wrist when he stepped out of the vehicle. Because of the presence of blood on the towel, Det. Braun asked Turner if he had a needle on his person in order to prevent being injured. Because Turner was acting as if he might try to flee on foot, Det. Braun placed him in handcuffs.”

Confession

“Once Turner had been restrained, Det. Braun explained what he and Det. Bell had observed while following him. Turner responded that he would help the detectives by giving them the name of the individual from whom he bought the drugs. Det. Braun testified that he did not ask Turner any questions. However, Det. Braun testified that Turner made several incriminating statements without being asked. At no point during his interaction with Detectives Braun and Bell was Turner provided with his Miranda warnings.

While Det. Braun and Turner were talking, Det. Bell located the envelope containing the plastic baggie in the suspect vehicle's glove compartment. Both cocaine and heroin were found inside the baggie. After finding the drugs, Det. Bell asked Turner for permission to

search his cellular telephone, which he provided. The vehicle was searched, but no other contraband or paraphernalia was found. Rather than having the vehicle towed, the police permitted the female owner of the vehicle to come and pick the car up from the scene. Turner was thereafter transported to jail and charged with possession of heroin and cocaine.”

Holding – Search of glove compartment was lawful, but confession suppressed

“Upon review, however, we agree with the trial court that any incriminating statements made by Turner to Detectives Braun and Bell after being taken into custody at the scene should be suppressed because he was not given his Miranda warnings. Failure to give Miranda warnings when required creates a presumption of compulsion that renders any inculpatory statement a defendant made subject to suppression on a motion filed by the defendant. *State v. Hoskins*, 197 Ohio App.3d 635, 2012-Ohio-25, 968 N.E.2d 544, ¶ 12 (2d Dist.). Additionally, we find that the statements made by Det. Braun to Turner regarding his observations constituted a form of police interrogation that he should have known were reasonably likely to elicit an incriminating response from Turner. *Id.* at ¶ 15. The fact that Turner was not subject to “express questioning” by Det. Braun is immaterial to our analysis. See *Rhode Island v. Innis*, 446 U.S. 291, 298, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). The *Innis* court read the term ‘interrogation’ more broadly, to also include the more subtle ‘techniques of persuasion’ sometimes employed by police officers that do not rise to the level of express questioning, but which also can be extremely coercive in some situations. *Id.*, 446 U.S. at 299–300, 100 S.Ct. at 1689, 64 L.Ed.2d at 306–307. By making statements regarding all the observations he made, Det. Braun gave Turner the impression that he had no alternative but to admit his wrongdoing in an effort to possibly mitigate his punishment. This tactic by Det. Braun was inherently coercive and constituted an interrogation for the purposes of a Miranda analysis.

Accordingly, the inculpatory statements made by Turner as a result of comments made to him by Det. Braun were properly excluded by the trial court.”

Legal Lessons Learned: The defendant will still be facing trial, but his confession will not be admissible. FD arson investigators should review this decision, since some “techniques of persuasion” can be deemed coercive and can require a Miranda warning.

File – Chap. 2, Firefighter Safety

OH: FIREFIGHTER CANCER BILL – HEADED TO GOVERNOR – 38 OTHER STATES – STATUTORY PRESUMPTION

On Dec.7, 2016, Senate Bill 27 passed the Ohio House with a 72-20 vote, and the Senate voted 32 to 1 to accept the House bill, and it now goes to Governor Kasich to be signed into law.

“Firefighters who contract cancer while on the job will be eligible for workers compensation benefits. There are 38 other states with similar legislation. One lawmaker in support of the bill explained one in 14 Columbus firefighters have contracted occupational cancer. That’s in

comparison to one in 192 in the general population.”
<http://myfox28columbus.com/news/local/firefighters-win-battle-for-cancer-protection>

The Act is referred to as the “Michael Louis Palumbo, Jr. Act”

“The bill, entitled the ‘Michael Louis Palumbo Jr. Act,’ is named in honor of a fire captain from Beachwood and Willowick who was diagnosed last year with brain cancer. The Ohio House recognized Palumbo, who was in the gallery Wednesday when the bill was debated.”

http://www.cleveland.com/open/index.ssf/2016/12/ohio_lawmakers_vote_to_recogni.html

Six years active duty:

“Cancer contracted by a firefighter who has been assigned to at least six years of hazardous duty as a firefighter constitutes a presumption that the cancer was contracted in the course of and arising out of the firefighter’s employment if the firefighter was exposed to an agent classified by the international agency for research on cancer or its successor organization as a group 1 or 2A carcinogen.”

Sub. S.B. No. 27, As Passed By House:

<https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA131-SB-27>

Hazardous duty:

“‘Hazardous duty’ has the same meaning as in 5 C.F.R. 550.902, as amended.

5 CFR 550.902: “Hazardous duty means duty performed under circumstances in which an accident could result in serious injury or death, such as duty performed on a high structure where protective facilities are not used or on an open structure where adverse conditions such as darkness, lightning, steady rain, or high wind velocity exist.”

<https://www.law.cornell.edu/cfr/text/5/550.902>

See IARC Monographs: <http://monographs.iarc.fr/ENG/Classification/>

Group 1	<i>Carcinogenic to humans</i>	119 agents
Group 2A	<i>Probably carcinogenic to humans</i>	81

Presumption rebuttable:

“The presumption described in division (X)(1) of this section is rebuttable in any of the following situations:

- (a) There is evidence that the firefighter’s exposure, outside the scope of the firefighter’s official duties, to cigarettes, tobacco products, or other conditions presenting an extremely high risk for the development of the cancer alleged, was probably a significant factor in the cause or progression of the cancer.
- (b) There is evidence that the firefighter was not exposed to an agent classified by the international agency for research on cancer as a group 1 or 2 A carcinogen.

(c) There is evidence that the firefighter incurred the type of cancer alleged before becoming a member of the fire department.

(d) The firefighter is seventy years of age or older.”

Legal Lessons Learned: Congratulations; the bill finally passed on fourth attempt. Ohio is 39th state to enact a statutory presumption law.

<http://www.iaff.org/hs/phi/disease/cancer.asp>

File – Chap. 3, Homeland Security

DC: FBI SEARCH WARRANTS CAN NOW BE ISSUED FOR COMPUTERS IN MULTIPLE LOCATIONS – NEW FED. RULE, EFFECTIVE 12/1/2016

On December 1, 2016, the amended Federal Rules of Criminal Procedure on remote access search warrants became effective. For example, where a crime involves criminals hacking computers located in five or more federal judicial districts, the FBI may apply to one U.S. magistrate to issue a search warrant allowing remote access throughout the nation, instead of having to apply in up to 94 federal districts. The Rule changes were drafted three years ago, and after review by federal judiciary and public comment, approved on April 28, 2016 by the U.S. Supreme Court. See Rule 41, Search And Seizure, (b) Venue For A Warrant Application, Section (6). https://www.law.cornell.edu/rules/frcrmp/rule_41

U.S. Department of Justice, Assistant Attorney General Leslie R. Caldwell, Criminal Division, provided these examples in her June 26, 2016 blog:

“For example, agents may seek a search warrant to assist in the investigation of a ransomware scheme facilitated by a botnet that enable criminal abroad to extort thousands of Americans. Absent the amendments, the requirement to obtain up to 94 simultaneous search warrants may prevent investigators from taking needed action to liberate computers infected with malware.” <https://www.justice.gov/opa/blog/rule-41-changes-ensure-judge-may-consider-warrants-certain-remote-searches>

Another example:

“For example, if agents are investigating criminals who are sexually exploiting children and uploading videos of that exploitation for others to see—but concealing their locations through anonymizing technology—agents will be able to apply for a search warrant to discover where they are located. A recent investigation that utilized this type of search warrant identified dozens of children who suffered sexual abuse at the hands of the offenders. While some federal courts hearing cases arising from this investigation have upheld the warrant as lawful, others have ordered the suppression of evidence based solely on the lack of clear venue in the current version of the rule. <https://www.justice.gov/opa/blog/rule-41-changes-ensure-judge-may-consider-warrants-certain-remote-searches>

On Nov. 17, 2016, several U.S. Senators introduced S.3475 to delay the proposed amendments, so Congress could hold hearing. The Congress has not acted on the bill.

<https://www.congress.gov/bill/114th-congress/senate-bill/3475> Senator Andrew “Chris” Coons (D-Delaware) floor statement included:

“Another change would allow a judge to issue a warrant for information on devices located in five or more judicial districts. While the Department of Justice argues this change will improve the efficiency of investigations by eliminating the need to seek multiple warrants to reach all the devices that are suspected of being the same cyber criminal network, this represents a sweeping change to how search warrants are traditionally reviewed, issued, and executed.

I think all Americans should want criminal investigations to proceed quickly and thoroughly, but I am concerned these changes could remove important judicial safeguards by allowing one judge--one judge--to decide on a search that would give the government the ability to search and possibly alter hundreds or even thousands of computers owned by innocent Americans across the country.”

<https://www.congress.gov/congressional-record/2016/11/17/senate-section/article/S6486-1>

On Nov. 28, 2016, Assistant Attorney General Leslie R. Caldwell wrote a blog, explaining:

“As with all search warrants, warrants issued pursuant to the amended venue provisions will have to be authorized in the first instance by independent federal courts, and will then be subject to challenge after execution as well—if evidence is used in a later prosecution, for example. Nor do we believe that the investigative steps taken by federal law enforcement in our efforts to counteract modern criminals—whether or not they rely on particular venue provisions in the federal rules of procedure—should escape scrutiny.

For example, some have criticized the amendments because they believe the new venue rules would allow investigators to apply for a warrant authorizing the search of multiple computers at the same time. But current law already permits investigators to apply for a warrant to search multiple places, accounts or devices at the same time. So long as the application establishes the legal prerequisites for each search, the law does not govern the number of pieces of paper the agents must bring. And even if the law were different, the proposed venue rules would not change it, because all they do is identify the appropriate court to consider an application, not prejudge whether that application must be granted, modified, or denied.

Others have argued that the amendments are problematic because they permit the search of victim computers—that is, computers infected with malware tied to a botnet. To be clear, the ‘searches’ being contemplated here would, typically, be done only to investigate the extent of the botnet, or to obtain information necessary to liberate victims’ computers from the botnet. For example, law enforcement could obtain identifying information from bot computers in order to contact owners and warn them of the infection. Or, law enforcement might engage in an online operation that is designed to disrupt the botnet and restore full control over computers to their legal owners. Both of these techniques, however, could arguably involve conduct that would constitute a search or seizure under the Fourth Amendment. Whether or not agents can search a computer

infected with malware is a question of substantive law, rather than venue. Existing substantive law expressly contemplates that it may be appropriate to search property belonging to an innocent crime victim. It would be strange if the law forbade searching the scene of a crime. But, again, this law is beside the point because nothing in the venue

amendments would affect that law, because the amendments do nothing more than identify the appropriate court to consider an application.”

<https://www.justice.gov/opa/blog/additional-considerations-regarding-proposed-amendments-federal-rules-criminal-procedure>

Legal Lessons Learned: Criminal misconduct involving modern tools such as computers need modern rules to combat this illicit conduct.

Note: Another example of how the new rule can be very helpful in both national and international cases. On Dec. 5, 2016, the U.S. Department of Justice announced that ‘a multinational operation involving arrests and searches in four countries to dismantle a complex and sophisticated network of computer servers known as “Avalanche.”’

<https://www.justice.gov/opa/pr/avalanche-network-dismantled-international-cyber-operation>

File: Chap. 5, Emergency Vehicle Operations

OH: OHIO SUPREME COURT - DASH-CAM VIDEOS ARE PUBLIC RECORDS - ONLY 90 SECONDS IN THIS CASE NOT PUBLIC

On Dec. 6, 2016 in State ex rel. Cincinnati Enquirer v. Ohio Dept. of Pub. Safety, Slip Opinion No. 2016-Ohio-7987, the Ohio Supreme Court issued an important decision that will impact disclosure of dash-cam videos in future cases. The Court held:

“Based on our review of the recordings, we conclude that about 90 seconds of [Tooper] Harvey’s recording—when Harvey takes Teofilo to her patrol car, reads him his Miranda rights, and questions him—could have been withheld as investigative work product compiled in anticipation of litigation. Harvey conducted her questioning of Teofilo inside the patrol car, away from public view. And by informing Teofilo of his rights as required by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), Harvey intended to secure admissible statements for the prosecution’s later use at trial. This 90-second portion, therefore, could have been withheld. The remaining portions of the recordings, however, are not exempt from public disclosure.”

<http://www.supremecourt.ohio.gov/rod/docs/pdf/0/2016/2016-Ohio-7987.pdf>

Facts:

“The recordings at issue pertain to a January 22, 2015 pursuit on Interstate 71 involving OSHP Troopers Laura Harvey and Cristian Perrin. OSHP is a division of ODPS. R.C. 5503.01. The pursuit began in Warren County, Ohio, shortly after 8:30 a.m. That

morning, Harvey was on duty in her patrol car when she received a dispatcher's radio call relaying a citizen's report of a maroon Ford Fusion traveling south on Interstate 71 without a rear license plate and swerving off the roadway. Harvey waited south of the last known location of the car. She attempted to stop the driver by pulling her patrol car behind the suspect and turning on her emergency lights and siren. The suspect did not

stop or pull over. Perrin and officers from other law-enforcement agencies later joined the pursuit.

The pursuit ended in Hamilton County about 8:50 a.m. after the suspect, Aaron Teofilo, crashed into a guardrail. Teofilo was arrested and charged with multiple felonies.

In its February 11, 2015 letter to the Enquirer, ODPS invoked the exception for confidential law-enforcement investigatory records and argued that disclosure of the recordings would create a high probability of disclosure of specific investigatory work product. See R.C. 149.43(A)(1)(h) and 149.43(A)(2)(c).

Later in March, Teofilo pleaded guilty to one count of fleeing and eluding after receiving a signal from a police officer to stop and one count of carrying a concealed weapon. On May 1, 2015, ODPS provided copies of the recordings to the Enquirer, stating that the conclusion of legal proceedings involving Teofilo allowed for the release of the records."

Held:

"We construe R.C. 149.43 liberally in favor of broad access and resolve any doubt in favor of disclosure. *State ex rel. Toledo Blade v. Seneca Cty. Bd. of Commrs.*, 120 Ohio St.3d 372, 2008-Ohio-6253, 899 N.E.2d 961, ¶ 17.

But a record that merely pertains to a law-enforcement matter does not constitute a confidential law-enforcement investigatory record unless the release of the record would create a high probability of disclosure of specific investigatory work product. Our review of the recordings at issue here leads us to conclude that a 90-second portion of the recordings contains specific investigatory work product, but the remainder does not.

We therefore decline to adopt an interpretation of the investigative-work-product exception that would shield from disclosure all dash-cam recordings in their entirety merely because they contain potential evidence of criminal activity that may aid in a subsequent prosecution. And we also decline to adopt a per se rule subjecting all dash-cam recordings to disclosure notwithstanding the applicability of any exception. Instead, the recordings at issue here illustrate that a dash-cam recording, as a whole, may not easily fall in or outside the exception.

Rather, the three recordings contain images that have concrete investigative value specific to the prosecution of Teofilo that may be withheld, but also contain images that have little or no investigative value that must be disclosed. A case-by-case

review is necessary to determine how much of the recordings should have been disclosed.”

Legal Lessons Learned: Fire & EMS dash-cam video in Ohio will normally be considered public record; consult with your Prosecutor before refusing to provide. See also case pending before PA Supreme Court: <http://www.witf.org/state-house-sound-bites/2016/09/state-supreme-court-case-could-make-pa-police-footage-more-accessible.php>

Note: The Cincinnati Enquirer was denied attorney fees in this case, but in light of this broad public policy decision, in future cases a public agency that refuses to release a dash-cam video could result in court order to pay attorney fees, plus statutory damages under Ohio Public Records Act: “The amount of statutory damages shall be fixed at one hundred dollars for each business day during which the public office or person responsible for the requested public records failed to comply with an obligation in accordance with division (B) of this section.” Ohio Supreme Court Justice William O’Neill, filed a dissenting opinion regarding attorney fees, and would have ordered Ohio Dept. of Public Safety to pay Cincinnati Enquirer’s attorney fees for pursuing this important issue: “The majority’s conclusion that the good faith of law enforcement outweighs the benefit to the public establishes a blueprint for state agencies to stonewall valid requests for public records and then assert a good-faith defense when called into court. This could have a serious chilling effect on the willingness of the press to litigate public-records requests all the way to the Supreme Court of Ohio. Our failure to award attorney fees to the prevailing party essentially rewards bad behavior. ‘Catch me if you can’ should not be the legal standard applied in important policy questions.”

File – Chap. 5, Emergency Vehicle Operations

OH: DASH-CAM VIDEO SHOWS OFFICER MADE RAPID U-TURN - NO QUALIFIED IMMUNITY – WANTON OR RECKLESS - TWO FD CASES

On Dec. 1, 2016, in Mikel Williams v. City of Columbus and Brandon Petry, et al., the Ohio Court of Appeals, Tenth District held (3 to 0), that the trial court properly refused to grant summary judgment for Police Officer Brandon Petry and the City. The Court cited the Ohio Supreme Court’s landmark 2012 decision involving crash of Massillon aerial truck in Anderson v. Massillon, 134 Ohio St.3d 380, 2012-Ohio-5711, and held “Because we find no error in the trial court’s conclusion that reasonable jurors could disagree about whether the officer in question drove his squad car in a ‘wanton’ manner, we affirm.”
<http://www.supremecourt.ohio.gov/rod/docs/pdf/10/2016/2016-Ohio-7969.pdf>

Facts:

“On December 15, 2014, plaintiff-appellant, Mikel Williams, filed a complaint in the Franklin County Court of Common Pleas alleging that Petry had caused a collision between them on November 21, 2013.

Petry explained in his affidavit that on November 21, 2013, shortly before 6 p.m., he was on his way to provide backup to another officer who had initiated a traffic stop on Sullivant Avenue just east of Belvidere Avenue. (Ex. A, Petry Aff. at ¶ 2-4.) He

related that the street was dry, the weather was cloudy, and it was dark out. Id. at ¶ 4. He explained that he was in the process of attempting a U-turn with his flashing lights illuminated when Williams' van collided with his cruiser. Id. at ¶ 5.

The video of the accident shows that it was, indeed, fully dark. (Ex. A-1.) The video shows that Petry drove along Sullivant Avenue which, at the place where the accident occurred, is a four-lane road with no median or turn lane. (Ex. A-1 at 17:41:20.) Petry drove in the left hand lane until he passed another police car engaged in a traffic stop on the opposite side of the road. (Ex. A-1 at 17:41:23.) A short distance past this point, he activated his flashing lights, veered into the right hand lane, and then, from the right hand lane, without first stopping or slowing significantly, attempted a left hand U-turn crossing all four lanes of traffic and the double-yellow line. (Ex. A-1 at 17:41:25-17:41:33.)

Just two seconds elapsed between when Petry turned on his lights and when he began to turn the car and just seven seconds elapsed between when Petry turned on his lights and the collision occurred. (Ex. A-1 at 17:41:26-17:41:33.) Petry slowed from 25 to 20 miles per hour as he swerved into the right lane to begin the attempted U-turn, then slowed further to 15 miles per hour as the car turned left, and finally slowed to 10 miles per hour as he traveled across the center line and oncoming lanes. (Ex. A-1 at 17:41:26-17:41:33.) However, he was unable to complete the U-turn in the space of four lanes and at no time did he stop until his patrol car was positioned broadside across the curb lane of oncoming traffic an instant before impact. Id.

The video also shows that at the time Petry attempted the U-turn, a line of traffic was stopped on the other side of the road in the inside lane waiting to turn left and thus the opposing traffic's curb lane was screened from view at the point where he began the U-turn. (Ex. A-1 at 17:41:30; Nov. 20, 2015 Williams Dep. at 45-46, filed Feb. 22, 2016.)

Williams was driving his minivan in the curb lane, and the video demonstrates that he became visible only approximately two seconds before the collision. (Ex. A-1 at 17:41:30-17:41:33.) Impact occurred, following an audible screech of tires, with the passenger side of the police car. Id.

Williams' deposition testimony is consistent with the depiction of events in the video and generally as related by the officers—that it was dark but dry, that there were a number of cars stopped in the left hand lane waiting to turn left screening the curb lane from view, and that Williams was traveling in the curb lane when Petry pulled out in front of him. (Williams Dep. at 42, 45-46, 48-50.) In addition, Williams testified that Petry told him that Williams was not at fault and that Petry was likely in more trouble than Williams over the accident. Id. at 62. This conversation is also audible (though parts are

unintelligible) on the video. (Ex. A-1 at 17:49:21-17:49:30.) Williams also testified that both his front air bags deployed, that his van was totaled, and that he has experienced continuing pain as a result of the accident. (Williams Dep. at 61, 68-76, 87.)

Held:

“Because Petry was also sued individually, also asserted immunity, and also was denied summary judgment on the issue of immunity, we must consider his individual immunity.... So whether Petry is entitled to immunity is a question of whether he drove in a wanton or reckless manner.

The Supreme Court of Ohio has defined ‘wanton’ in similar cases as:

Wanton misconduct is the failure to exercise any care toward those to whom a duty of care is owed in circumstances in which there is great probability that harm will result.... *Anderson v. Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, ¶ 33.

A reasonable juror could infer that Petry knew he could not see oncoming traffic, including Williams' van, and that a car in Williams' path of travel would not likely see him, yet he made the U-turn anyway. The video shows that Petry slowed relatively little and was still traveling 20 to 25 miles per hour when he began the maneuver and despite the lack of visibility of oncoming traffic had not stopped before he crossed Williams' lane. (Ex. A-1 at 17:41:26-17:41:33.) Moreover, at the speed he was moving, his patrol car was unable to complete much more than half of his intended U-turn within the width of four lanes. *Id.*

This Court recently issued a decision on the question of when an emergency vehicle is driven in a wanton manner. *Glenn [Glenn v. Columbus, 10th Dist. No. 16AP-15, 2016-Ohio-7011, ¶ 8-31* (separately analyzing immunity of a fire truck driver and the immunity of the City:

This matter arises from a collision between an automobile driven by Elvyra Glenn ("Glenn") and a city fire truck ("Engine 32") driven by firefighter Sheridan. At approximately 3:09 p.m., on November 12, 2013, Engine 32 was dispatched to respond to a fire alarm at an elementary school. In addition to Sheridan, firefighters Tyler Heisterkamp and Dave Stone were on Engine 32. Sheridan drove Engine 32 through a curve and approached the Refugee Road and Brice Road intersection intending to go straight through the intersection to reach the elementary school. The fire truck's emergency lights were on, and Sheridan activated the air horn in short bursts. Because vehicles were stopped in the lane where cars were going straight, Sheridan maneuvered Engine 32 into the left turn lane. The light was red for Sheridan but all incoming traffic was either stopped or, at most, one vehicle (driven by Glenn) was travelling at a slow speed. Sheridan did not stop Engine 32 and proceeded into the intersection. On entering the intersection, Engine 32 struck Glenn's small sedan. Glenn died from injuries she sustained in the collision.... Construing the evidence most favorably toward the executor, the jury could find Engine 32's electronic siren was not activated on the emergency run, and not all vehicles were stopped as Sheridan decided to enter the

intersection. A reasonable jury could conclude that Sheridan's conduct of not activating Engine 32's electronic siren during the emergency run, and entering the intersection at 35 m.p.h. against a red light, despite an observable vehicle continuing to move toward the intersection, constituted reckless conduct. Therefore, we agree with the trial court's finding that a genuine dispute exists as

to whether Sheridan operated Engine 32 in a reckless manner.”

<http://www.supremecourt.ohio.gov/rod/docs/pdf/10/2016/2016-Ohio-7011.pdf>]

Considering the video and other evidence in a light most favorable to Williams as we are required to do at this stage of the case, the evidence could support a factual inference by a jury that Petry's conduct was wanton. A reasonable juror could conclude that Petry made the maneuver without knowing whether there was oncoming traffic in the far lane, without knowing whether, if there was a vehicle in that lane, it could see his cruiser or its lights (which he activated a bare few seconds before the maneuver), and without knowing whether such a vehicle could possibly stop in time to avoid the collision. When construing the evidence most strongly in favor of Williams, a reasonable juror could conclude that Petry's driving was wanton.”

Dissent on “wanton” / Concurring on remanding case for trial based on “recklessness” – Judge Schuste

“I believe the majority's analysis is flawed as to whether there is sufficient evidence to send to the jury the issue of wanton misconduct. Wanton misconduct ‘is the failure to exercise any care toward those to whom a duty of care is owed in circumstances in which there is great probability that harm will result.’ Anderson v. Massillon, 134 Ohio St.3d 380, 2012-Ohio-5711, ¶ 33.

Although Officer Petry did not act wantonly, a reasonable jury could find his conduct was reckless. As the majority notes, even though Officer Petry did not, and could not, see traffic movement in the obstructed curb lane when he began the U-turn, he did not take all necessary and precautionary steps to account for the possibility that oncoming motorists in that lane would be approaching too close and too fast to safely stop before striking the officer's vehicle. Evidence concerning this disregard of a known risk presents a genuine issue of fact as to whether Officer Petry's conduct was reckless or merely negligent.”

Legal Lessons Learned: Dash-cams on Fire & EMS vehicles are becoming more common; they are useful tools, and hopefully will influence all emergency vehicle operators to drive with “due regard” to safety of others. <http://codes.ohio.gov/orc/4511.03>

4511.03 Emergency vehicles at red signal or stop sign.

(A) The driver of any emergency vehicle or public safety vehicle, when responding to an emergency call, upon approaching a red or stop signal or any stop sign shall slow down as necessary for safety to traffic, but may proceed cautiously past such red or stop sign or signal with due regard for the safety of all persons using the street or highway.

(B) Except as otherwise provided in this division, whoever violates this section is guilty of a minor misdemeanor. If, within one year of the offense, the offender previously has been

convicted of or pleaded guilty to one predicate motor vehicle or traffic offense, whoever violates this section is guilty of a misdemeanor of the fourth degree. If, within one year of the offense, the offender previously has been convicted of two or more predicate motor vehicle or traffic offenses, whoever violates this section is guilty of a misdemeanor of the third degree.

Effective Date: 01-01-2004

See also:

<https://www.ohioabar.org/ForPublic/Resources/LawYouCanUse/Pages/LawYouCanUse-538.aspx>

File: Chap. 6, Employment Litigation

CA: LA's ARSON "COUNTER TERRORISM" SQUAD – TWO FF FAILED PSYCHOLOGICAL EXAM – NO PROPERTY INTEREST IN ASSIGNMENT

On Oct. 21, 2016, in Patrick Leonard and Steven Barrett v. City of Los Angeles, the U.S. Court of Appeals for Ninth Circuit (3 to 0; unpublished opinion), upheld the grant of summary judgment for the City. "Plaintiffs' property interest claim fails because Plaintiffs do not have a protected property interest in their assignment to Arson."

<http://cases.justia.com/federal/appellate-courts/ca9/14-56796/14-56796-2016-10-25.pdf?ts=1477425723>

Facts:

"Patrick Leonard and Steven Barrett (Plaintiffs) are firefighters who sued their employer, the City of Los Angeles, after they failed a psychological exam and were transferred out of the Arson Counter Terrorism Section of the Los Angeles Fire Department (Arson). Leonard and Barrett brought procedural due process claims against the City under 42 U.S.C. § 1983, alleging violations of property and liberty interests, as well as state claims under the California Peace Officer and Firefighter Procedural Bill of Rights Acts (POBRA and FFBOR).

Here, Plaintiffs did not meet one of the statutory requirements for an assignment as an investigator with peace officer powers— passing a psychological exam — so they had no vested rights in their Arson assignment.

Plaintiffs' POBRA/FFBOR claims also fail because Plaintiffs were not subject to punitive action. See Cal. Gov't Code §§ 3254(b), 3304(b)... Plaintiffs neither completed their probationary period nor met all of the requirements for an Arson assignment. Thus, they were not subject to punitive action when they were transferred out of Arson to other positions within the fire department."

Legal Lessons Learned: Change of assignment in Fire or EMS department for failure to meet clear job requirements is not basis for lawsuit. [Note: Court did not state why they

failed the psychological exam; hopefully the FD has a written report from a psychiatrist confirming they are fit for duty as a firefighter.]

Chap. 6 – Employment Litigation

IL – VOL. FF NOT PROTECTED BY IL STATUTE - LATE TO WORK AND FIRED - STATUE EXCLUDES VOL. GETTING “INCENTIVE PAY”

On Sept. 19, 2016, in William Seeman v. Wes Kochel, Inc., the Appellate Court of Illinois, Third District, upheld (3 to 0) the trial Court’s decision to dismiss this lawsuit under the Volunteer Act. <http://www.illinoiscourts.gov/Opinions/AppellateCourt/2016/3rdDistrict/3150640.pdf>

Facts:

The employer is a towing company. “We are a multi-city towing, recovery, and commercial vehicle repair company serving Will County and beyond for over five decades.” <http://weskochelinc.com/>

“In count I of the complaint, plaintiff alleged that he was hired by defendant in July 2012. Plaintiff was also a volunteer firefighter for the Rockdale Fire Protection District (District). On the morning of January 15, 2014, plaintiff was scheduled to work for defendant. Before plaintiff’s shift, he responded to a fire call, and afterwards he reported for his shift. Wes Kochel, a relative of defendant, informed plaintiff that his employment with defendant had been terminated for being tardy.

In support of its motion, defendant attached, as defendant’s exhibit A, plaintiff’s response to defendant’s ... interrogatories. In the interrogatories, plaintiff said he began volunteering for the District on March 3, 2011. Plaintiff was paid ‘incentive pay’ in the following amounts: \$492.50 in 2011, \$842.50 in 2012, \$1142.50 in 2013, and \$1035 in 2014. Plaintiff said the pay was based on the number of calls he responded to and the training he attended. On January 15, 2014, at 6:45 a.m., plaintiff notified defendant via pager that he was attending a fire call. Plaintiff was scheduled to work for defendant at 8 a.m. Plaintiff returned to work around 12:30 p.m.”

Held:

“Section 5(a) of the Volunteer Act states: ‘[n]o public or private employer may terminate an employee who is a volunteer emergency worker because the employee, when acting as a volunteer emergency worker, is absent from or late to his or her employment in order to respond to an emergency prior to the time the employee is to report to his or her place of employment.’ 50 ILCS 748/5(a) (West 2014).”

The Volunteer Act defines '[v]olunteer emergency worker' as 'a firefighter who does not receive monetary compensation for his or her services to a fire department or fire protection district.' 50 ILCS 748/3 (West 2014). The monetary compensation restriction

does not include 'monetary incentive[s]' that are awarded to a firefighter under section 6 of the Protection Act. Id. ; see also 70 ILCS 705/6 (West 2014).

Plaintiff characterizes the monies he received from the District as permissible 'monetary incentives.' Section 6 of the Protection Act provides:

'[t]o encourage continued service with the district, the board of trustees has the express power to award monetary incentives, not to exceed \$240 per year, to volunteer firefighters of the district based on the length of service. To be eligible for the incentives, the volunteer firefighters must have at least 5 years of service with the district. The amount of the incentives may not be greater than 2% of the annual levy amount when all incentive awards are combined.' 70 ILCS 705/6(f) (West 2014).

The record establishes that the District's annual payments to plaintiff exceeded the stated maximum monetary incentive allowed by section 6(f) of the Protection Act. 70 ILCS 705/6(f) (West 2014). While the District's payments were laudable and serve the spirit of section 6 of the Protection Act, they run afoul of the section's plainly expressed limitations. Specifically, under section 6, plaintiff was entitled to receive a maximum of \$240 in incentive pay after he had served a minimum of five years."

Legal Lessons Learned: This statute needs to be broadened to protect all "volunteer" firefighters; \$240 incentive pay limit is very low. See Ohio Rev. Code 4113.41, <http://codes.ohio.gov/orc/4113.41>

4113.41 Absence by volunteer firefighter or emergency medical services provider.

(A) No employer shall terminate an employee who is a member of a volunteer fire department, or who is employed by a political subdivision of this state as a volunteer firefighter, or who is a volunteer provider of emergency medical services because that employee, when acting as a volunteer firefighter or a volunteer provider of emergency medical services, is absent from or late to the employee's employment in order to respond to an emergency prior to the time the employee is to report to work. An employer may charge any time that an employee who is a volunteer firefighter or a volunteer provider of emergency medical services loses from employment because of the employee's response to an emergency against the employee's regular pay.

(B) An employee who is a volunteer firefighter or volunteer provider of emergency medical services shall do all of the following:

(1) Not later than thirty days after receiving certification as a volunteer firefighter or a volunteer provider of emergency services, submit to the employee's employer a written notification signed by the chief of the volunteer fire department with which the employee serves, or the medical

director or chief administrator of the cooperating physician advisory board of the emergency medical organization with which the employee serves, to notify the employer of the employee's status as a volunteer firefighter or volunteer provider of emergency services;

(2) Make every effort to notify the employee's employer that the employee may report late to or be absent from work due to the employee's dispatch to an emergency.

If notification of dispatch to an emergency cannot be made either due to the extreme circumstances of the emergency or the inability to contact the employer, then the employee shall submit to the employee's employer a written explanation from the chief of the volunteer fire department with which the employee serves, or the medical director or chief administrator of the cooperating physician advisory board of the emergency medical service organization with which the employee serves, as applicable, to explain why prior notice was not given.

(C) At the employer's request, an employee who loses time from the employee's employment to respond to an emergency shall provide the employer with a written statement from the chief of the volunteer fire department or the medical director or chief administrator of the cooperating physician advisory board of the emergency medical service organization, as applicable, stating that the employee responded to an emergency and listing the time of that response.

(D) An employee who is a member of a volunteer fire department, or who is employed by a political subdivision of this state as a volunteer firefighter, or who is a volunteer provider of emergency medical services shall notify that employee's employer when the employee's status as a volunteer firefighter or volunteer provider of emergency medical services changes, including when the employee's status as a volunteer firefighter or volunteer provider of emergency medical services is terminated.

(E) If an employer purposely violates division (A) of this section, the employee may bring a civil action for reinstatement to the employee's former position of employment, payment of back wages, and full reinstatement of fringe benefits and seniority rights. An action to enforce this section shall be commenced within one year after the date of the violation in the court of common pleas of the county where the place of employment is located. ***"

File – Chap. 6, Employment Litigation

NLRB: EMPLOYEE SECRETLY RECORDING – NLRB (2 to 0) CO. POLICY PROHIBITING ALL RECORDINGS TOO BROAD – APPEAL TO 2nd CIRCUIT

On Aug. 26, 2016, the National Labor Relations Board filed their brief in the U.S. Court of Appeals for 2nd Circuit, in response to Whole Foods appeal from Dec. 24, 2015 decision of the Board (vote of 2 to 1), 363 NLRB No. 87 (2015). The Board received a complaint in 2013 by the United Food and Commercial Workers International Union, that the company policy violated Section 7 of the National Labor Relations Act which guarantees right of employees to engage in protected concerted activities. http://pdfserver.amlaw.com/nlj/nlr_b_wholefoods_ca2.pdf

Whole Foods policy forbids employees from taking audio or video recordings of “conversations, images, phone calls or company meetings” without prior management approval, because recordings “inhibit spontaneous and honest dialog.”

http://www.law.com/sites/articles/2016/08/29/nlr_b-defends-sanctions-against-whole-foods-for-anti-recording-policies/

Whole Food won their case before an Administrative Law Judge, who ruled:

The ALJ held, among other things, that “[t]he rule does not prohibit employees from engaging in protected, concerted activities, or speaking about them. It does not expressly mention any Section 7 activity. The only activity the rule forbids is recording conversations or activities with a recording device. Thus, an employee is free to speak to other employees and engage in protected, concerted activities in those conversations.”

<http://www.mondaq.com/unitedstates/x/296046/employee+rights+labour+relations/Employers+NoRecording+Rule+Survives+Initial+Stage+of+NLRB+Attack>

Facts [from NLRB’s brief]:

“The Company is a retailer and distributor of foods. Operationally, it is divided into 12 regions in the United States, Canada, and the United Kingdom. Each region is led by a regional president, regional vice presidents, and regional managers. Within its regions, the Company operates 351 retail grocery stores and employs 76,000 employees. The Company maintains rules in its General Information Guide (‘the Guide’) that apply to all employees. (JA 235, 236; JA43-44, 50-52,96.) Two of these rules prohibit employees from using audio or video devices to make workplace recordings without prior management approval. The first appears under the subheading ‘Team Meetings’ and states:

In order to encourage open communication, free exchange of ideas, spontaneous and honest dialogue and an atmosphere of trust, [the company] has adopted the following policy concerning the audio and/or video of company meetings: It is a violation of [company] policy to record conversations, phone calls, images or company meetings with any recording device (including but not limited to a cellular telephone, PDA, digital recording device, digital camera, etc.) unless prior approval is received from your Store/Facility Team Leader, Regional President, Global Vice President or a member of the Executive Team, or unless all parties to the conversation give their consent. Violation of this policy will result in corrective action, up to and including discharge.

Please note that while many [company] locations may have security or surveillance cameras operating in areas where company meetings or conversations are taking place, their purposes are to protect our customers

and Team Members and to discourage theft and robbery. (JA 235; JA 121.)

The Board (Chairman Pearce and Member Hirozawa; Member Miscimarra dissenting) found that the Company violated Section 8(a)(1) of the Act by maintaining no-recording rules that would reasonably chill employees in the

exercise of their Section 7 rights. To remedy this violation, the Board ordered the Company to cease and desist from the violation found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them under the Act. Affirmatively, the Board's Order requires the Company to revise or rescind its no-recording rules, and to post a remedial notice. (JA 239-240.)

This is a straightforward case that the Board decided squarely within the parameters of applicable law. Based on the proposition, well supported and illustrated by its prior cases, that workplace recording constitutes protected activity if employees are acting in concert for their mutual aid and protection and no overriding employer interest is present, the Board concluded that the Company's total ban on workplace recording chilled the employees' exercise of their Section 7 rights.

However, the Company's broad-brush assertion (Br. 27) that 'making recordings in the workplace is not a protected right' overstates the Board's actual, more specific finding that employees who make workplace recordings are engaged in protected activity in specific circumstances, namely, when they are acting in concert for their mutual aid and protection and no overriding employer interest is present.

We hold only that those rules must be narrowly drawn, so that employees will reasonably understand that Section 7 is not being restricted." (JA 238 n. 9). The Board thereby recognizes that an employer may lawfully prohibit workplace recording so long as it distinguishes between protected and unprotected recording, which the Company did not do here.

While there may be valid reasons for instituting a rule prohibiting some instances of workplace recording, a broad rule like the one here is unlawful because it also 'would be reasonably read to prohibit all recording, including that which we would find to be protected under the Act.' (JA 239 n.14).

Legal Lessons Learned: Second Circuit has not yet decided this important case. Fire & EMS departments in states that make secret recordings a criminal act (“one party” states such as California) should reference that statute in their employee handbook or policy documents. Departments in states that allow secret recordings (“two party” state, such as Ohio) should consider adopting a policy that narrowly prohibits secretly recording of all disciplinary and corrective action discussions.

See California law: “**Penal Code** § 632, enacted under the California Invasion of Privacy Act, makes it illegal for an individual to monitor or record a ‘confidential communication’ whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device. California is known as a ‘two-party’ state, which means that recordings are not allowed unless all parties to the conversation consent to the recording. Under **Penal Code** § 632(c), ‘confidential communication’ includes any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties, but excludes a communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded. A violation of **Penal Code** § 632 can lead to a fine of up to \$2,500 and/or imprisonment for up to a year. In addition, the violator may be subject to civil liability in the amount of \$3,000 or three times the amount of any actual damages sustained as a result. Under the California Public Utilities Commission General Order 107-B(II)(A)(5), a recording is allowed if there is a ‘beep tone’ warning. Under California **Penal Code** § 633, state law enforcement officials may eavesdrop and record telephone conversations.”

<http://www.bc-lp.com/illegally-recording-conversation/>

File – Chap. 7, Sexual Harassment

PA: FD SUED FOR NEG. SUPERVISION - JUNIOR FF (AGE 15) HAD SEX WITH ADULT VOL. & TWO PD (SENT TO PRISON) – NO INSURANCE

On Oct. 3, 2016, in [Nastaha Burdyn v. Old Forge Borough, et al](#), U.S. District Court Judge Robert D. Mariani, Middle District of PA (Scranton), denied the Borough’s motion for summary judgment, holding there is a “serious question of fact as to whether OFHE [Old Forge Hose & Engine Company] fulfilled a responsibility owed to Burdyn to safeguard her against the criminal acts....” Two police officers and vol. FF arrested for Corruption of Minor in May, 2012, sentenced to prison Jan. 2014.* <http://law.justia.com/cases/federal/district-courts/pennsylvania/pamdce/3:2012cv02236/91485/211/>

Note: The Fed. judge describes in detail the sexual relations by these three adults with this minor. Author of this newsletter has decided to not put these in this review; you can read details in this PDF version of case: <http://cases.justia.com/federal/district-courts/pennsylvania/pamdce/3:2012cv02236/91485/211/0.pdf?ts=1475585566>

* See Jan. 27, 2014 article, “Old Forge Scandal – Former Officials Sentenced.” <http://wnep.com/2014/01/27/old-forge-scandal-former-officials-sentenced/>

“In court, the judge said that former Police Chief Larry Semenza [and captain of Vol.FD] helped create a culture of permissiveness and corruption that eventually led to the sexual abuse of a 15-year-old girl. That's why the judge gave Semenza the toughest sentence. ... Semenza was convicted of corruption of minors and failure to report child abuse. But the judge sent Semenza to state prison because he said Semenza created the culture that allowed others to abuse a teenage girl. Semenza was sentenced to 18 months

to four years in state prison. ... In May of 2012, investigators arrested Semenza along with his [police captain] Jamie Krenitsky [9 to 23 months in jail], and a former volunteer firefighter under Semenza's charge, Walter Chiavacci [18 monts in jail].” All three were accused of sexually abusing the same teenage girl. In court, the victim, now a 24-year-old woman said, "when I was 15 these people had a chance to protect me; instead they used my trust and compassion against me."

Facts: [Author's note: I have not quoted the Court's detailed description of the sexual activities with this minor – you can read at: <http://cases.justia.com/federal/district-courts/pennsylvania/pamdce/3:2012cv02236/91485/211/0.pdf?ts=1475585566>]

“Presently before the Court is Defendant Old Forge Hose & Engine Company's ('OFHE') Motion for Summary Judgment (Doc. 165). Defendant Old Forge Borough also filed a motion for summary judgment (Doc. 186) which the Court will address in a separate opinion.

Plaintiff, Jane Doe, filed her complaint (Doc. 1) on November 9, 2012 and subsequently filed an amended complaint on December 3, 2014 (Doc. 125). Plaintiff's amended complaint named as Defendants Old Forge Borough, Old Forge Police Department, Old Forge Fire Department, Old Forge Hose & Engine Company, Lawrence Semenza, Walter Chiavacci, and James Krenitsky

OFHE is one of three volunteer fire companies serving the Borough of Old Forge. (Doc. 166, at ~ 1). OFHE, which shares a building with Lawrence Hose [& Engine Company], another volunteer fire company in the Borough of Old Forge, is attached to the Borough building.

Lawrence Semenza was employed by the Borough of Old Forge as a police officer, starting in a full-time capacity in or around 1989.... From 2004 through 2007, Semenza was also the volunteer Captain of OFHE.... According to Semenza, in his role as Captain, he 'basically ran the fire company from purchasing equipment, scheduling training, making sure the maintenance of the apparatus.'

Volunteer membership at OFHE is open to both males and females over the age of eighteen in three categories: active regular; inactive regular; and social. (Doc. 166, at ~ 9). Additionally, OFHE has a junior member program. During the relevant time period for this case, junior firefighters had to be fourteen years of age, be sponsored by an

active regular member, and submit an application to the OFHE membership before being accepted into the company.”

In or around September of 2004, Plaintiff applied for junior membership with OFHE...”

During the late spring through approximately July of 2004, Burdyn was in a romantic, consensual sexual relationship with OFHE volunteer firefighter, Lieutenant Brian Wruble. She does not claim that this relationship was inappropriate in nature despite the fact that he was several years older than she at the time. 4(Doc. 166, at 1f 12).

Footnote 4: It is unclear how old Brian Wruble was at the time of his sexual relationship with Burdyn. Plaintiff testified at one point in her deposition that she ‘believe[d] he was 17 or 18’ but later stated that he was ‘18 or 19.’ (Dep. of Burdyn, at 82, 426).”

Held - Lawsuit against FD to proceed to trial – Negligence; Negligent Supervision

“The admitted lack of any procedure, rule, or policy by the OFHE related to the junior firefighter program, the presence of minors on OFHE premises, or the interaction between adult members of OFHE and the minors, creates a serious question of fact as to whether OFHE fulfilled a responsibility owed to Burdyn to safeguard her against the criminal acts of Semenza and Krenitsky ... as well as whether the lack of these policies, rules, or procedures was the cause of Plaintiffs injuries. Thus, OFHE's motion for summary judgment on Plaintiffs negligence claim (Count VIII) will be denied.

Therefore, the first element to establish a negligent supervision claim, namely that the intentional harm was committed on the employer's premises by an employee acting outside the scope of his employment, has been met. At issue is only whether Semenza's actions were reasonably foreseeable to the employer. Defendant's motion for summary judgment on this count fails for similar reasons as those previously addressed by this Court.”

No Insurance Coverage

“[U.S. Magistrate Judge’s] Report and Recommendation that both individual defendants were acting outside the scope of their employment for purposes of coverage under the Borough of Old Forge's insurance policy. (See 3:13-cv-127, Docs. 35, 39). In ruling on Aspen Insurance Company's motion for summary judgment, the Magistrate Judge found that ‘nothing in the underlying complaint ... could conceivably be read to suggest that such sexual abuse was undertaken as part of the defendants' law enforcement capacity, and in any event Pennsylvania law has consistently held that such conduct is so outrageous, and is purely motivated by personal reasons without any conceivable motive to further the employer's interests, that it cannot be deemed to have been undertaken as part of an employee's official responsibilities.’”

Legal Lessons Learned: FDs that have minors participating must have clear policies, and strict enforcement of personnel standards. State statutes that indemnify employees typically only apply if the employee was acting in good faith within the scope of their official responsibilities. See, for example, Ohio Rev. Code 2744.07, Defending and indemnifying employees:

“The political subdivision has the duty to defend the employee if the act or omission occurred while the employee was acting both in good faith and not manifestly outside the scope of employment or official responsibilities. Amounts expended by a political subdivision in the defense of its employees shall be from funds appropriated for this purpose or from proceeds of insurance.”

<http://codes.ohio.gov/orc/2744.07>

File – Chap. 7, Sexual Harassment

KY: PREGNANCY – LIGHT DUTY - CITY OF FLORENCE SUED BY U.S. DOJ – SETTLED WITH CONSENT DECREE - EEOC NEW PRIORITY

On Oct. 26, 2016, the Equal Employment Opportunity Commission issued press release, “Justice Department Settles Pregnancy and Disability Discrimination Lawsuit Against City of Florence, Kentucky.” <https://www1.eeoc.gov/eeoc/newsroom/release/10-26-16a.cfm>

Facts:

“According to the department's complaint, Florence discriminated against two pregnant police officers by denying both officers' requests for light duty. The department alleges that Florence previously assigned light duty positions to employees who were temporarily unable to perform their regular job duties, regardless of why the employee needed light duty. In April 2013, within months of a police officer's pregnancy-related light duty request, Florence limited light duty to employees with on-the-job injuries. Florence also required that employees with non-work-related illnesses, injuries or conditions demonstrate that they had "no restrictions" before they could return to work.

In 2014, according to the department's complaint, Police Officers Lyndi Trischler and Samantha Riley requested light duty when they were unable to perform their duties as patrol officers due to their pregnancies. Officer Trischler, who was diagnosed with a high-risk pregnancy and suffered complications, also requested light duty as a reasonable accommodation for her pregnancy-related disability. Florence denied the requests and required each to take leave. After placing Officers Trischler and Riley on leave, Florence continued to grant light duty to other employees who were similar in their ability or inability to work.”

US Supreme Court

“This is the department's first lawsuit challenging a discriminatory light duty policy since the U.S. Supreme Court's ruling regarding light duty policies and pregnant employees in

Young v. United Parcel Service. It is also the department's first lawsuit challenging disability-related 'no restrictions' policies in the workplace.

“No woman should ever have to choose between having a family and earning a salary,” said Principal Deputy Assistant Attorney General Vanita Gupta, head of the Justice Department's Civil Rights Division. “Equally important, individuals with disabilities who need reasonable accommodations deserve an opportunity to

keep their jobs. The Justice Department will continue working tirelessly to protect pregnant women against unlawful discrimination in the workplace.”

Under the consent decree, which still must be approved by the U.S. District Court for the Eastern District of Kentucky, Florence will adopt new policies that allow accommodations, including light duty, for pregnant employees and employees with disabilities; establish an effective process for receiving and responding to employees' accommodation requests and discrimination complaints; and ensure the proper maintenance of employee medical records. In addition, Florence will train all supervisors, administrators, officers and employees who participate in making personnel decisions related to light duty and other accommodation requests made pursuant to Title VII and the ADA. Florence has also agreed to pay \$135,000 in compensatory damages and attorney's fees as well as restore the paid leave that Officers Trischler and Riley were forced to use.”

Legal Lessons Learned: Fire & EMS departments that grant light duty to personnel injured on duty should consult legal counsel before denying light duty to pregnant personnel who present a medical request. Rapidly expanding area; see following two items:

The U.S. Supreme Court in *Young v. United Parcel Service*, March 25, 2015, https://www.supremecourt.gov/opinions/14pdf/12-1226_k5fl.pdf, held (5 to 4) that a pregnant driver may proceed with her lawsuit, after UPS denied her medical request to limit lifting to 20 pounds during her first 20 weeks of pregnancy, and 10 pounds thereafter.

See also EEOC example (EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues; June 25, 2015):

https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm

EXAMPLE 10

Light Duty Policy - Disparate Impact

“Leslie, who works as a police officer, requested light duty when she was six months pregnant and was advised by her physician not to push or lift over 20 pounds. The request was not granted because the police department had a policy limiting light duty to employees injured on the job. Therefore, Leslie was required to use her accumulated leave for the period during which she could not perform her normal patrol duties. In her subsequent lawsuit, Leslie proved that since substantially all employees denied light duty were pregnant women, the police department's light duty policy had an adverse impact on pregnant officers. The police department claimed that state law required it to pay officers injured on the job regardless of whether they worked and that the light duty policy enabled taxpayers to receive some benefit from the salaries paid to those officers.

However, there was evidence that an officer not injured on the job was assigned to light duty. This evidence contradicted the police department's claim that it truly had a business necessity for its policy. ^[108]

This policy may also be challenged on the ground that it impermissibly distinguishes between pregnant and non-pregnant workers who are similar in their ability or inability to work based on the cause of their limitations.

^[108] These facts were adapted from the case of *Lehmuller v. Incorporated Village of Sag Harbor*, 944 F. Supp. 1087 (E.D.N.Y. 1996). The court in that case found material issues of fact precluding summary judgment. These facts could also be analyzed as disparate treatment discrimination.

File – Chap. 7, Sexual Harassment

NY: 2nd CIR – EMPLOYER LIABLE IF FIRED EMPLOYEE BASED ON CO-WORKER STATEMENTS, NOT INVESTIGATED – “CAT’S PAY” LIABILITY

On Aug. 29, 2016, in *Andrea Vasquez v. Empress Ambulance Service, Inc. & Tyrell Gray*, the U.S. Court of Appeals for 2nd Circuit (NY) held (3 to 0) that EMT Vasquez, who complained about sexual harassment, and was subsequently fired based on lies of a co-worker, can sue the ambulance company for failure to adequately investigate the matter. “We conclude, however, that agency principles permit the retaliatory intent of Vasquez’s co-worker to be imputed, as a result of Empress’s alleged negligence, to Empress.”

<http://hr.cch.com/ELD/VasquezEmpress082916.pdf>

Facts:

“In the space of twenty-four hours, Andrea Vasquez faced unwelcome sexual advances in the workplace, complained about that conduct to her employer, and lost her job. After receiving unsolicited sexual photographs from a co-worker one night shift...

Around midnight that night, while out on shift, Vasquez received a picture message from Gray: a photograph of his erect penis, captioned “Wat u think.” App’x 9-10.

Vasquez promptly informed her supervisor and filed a formal complaint of sexual harassment, which her employer promised to investigate that same morning. Within a few hours, however, Vasquez’s co-worker had discovered her complaint and had provided the employer with false documents purporting to show Vasquez’s consent to and solicitation of a sexual relationship.

Gray, meanwhile, had not finished seeking to undermine the accusations he anticipated from Vasquez. Rather, in the intervening hours, Gray ‘manipulated a text message conversation on his iPhone to make it appear as though a person with whom he had legitimately been engaging in consensually sexual text banter was [Vasquez].’ App’x 12. He then ‘took screen shots of portions of the conversation, printed them off,’ and ‘presented it to the management’ of Empress as evidence that he and Vasquez had been in a consensual sexual relationship. App’x 12.

In reliance on those documents, and notwithstanding Vasquez’s offers to produce evidence in refutation, Vasquez’s employer immediately fired her on the ground that she had engaged in sexual harassment.”

Held:

A. “Cat’s Paw” Liability

Vasquez seeks to recover against Empress under what has been termed ‘cat’s paw’ liability. The phrase derives from an Aesop fable, later put into verse by Jean de La Fontaine, in which a wily monkey flatters a naïve cat into pulling roasting chestnuts out of a roaring fire for their mutual satisfaction; the monkey, however, ‘devour[s]. . . them fast,’ leaving the cat ‘with a burnt paw and no chestnuts’ for its trouble. ‘[I]njected into United States employment discrimination law by [Judge Richard] Posner in 1990,’ *Staub v. Proctor Hosp.*, 562 U.S. 411, 415 n.1 (2011), the ‘cat’s paw’ metaphor now ‘refers to a situation in which an employee is fired or subjected to some other adverse employment action by a supervisor who himself has no discriminatory motive, but who has been manipulated by a subordinate who does have such a motive and intended to bring about the adverse employment action,’ *Cook v. IPC Intern. Corp.*, 673 F.3d 625, 628 (7th Cir. 2012) (Posner, J.).

We agree with the First Circuit, and therefore conclude that Vasquez can recover against Empress if Empress was itself negligent in allowing Gray’s false allegations, and the retaliatory intent behind them, to achieve their desired end. Assuming that Empress knew or should have known of Gray’s retaliatory animus, the fact that ‘Gray was nothing more than . . . a low-level employee with no supervisory or management authority,’ Appellee’s Br. 18, cannot shield Empress from answering for Gray’s conduct because Empress’s own negligence provides an independent basis, under Ellerth and agency law, to treat Gray as Empress’s agent and hold Empress accountable for his unlawful intent.”

Legal Lessons Learned: Fire & EMS departments should thoroughly investigate complaints of sexual harassment, and not merely rely on statements from a co-worker.

TX: EMS STUDENT – ANOXIC BRAIN INJURY - REQUESTED SECOND EXAM EACH CLASS – THIS WAS NOT REASONABLE ACCOMMODATION

On Nov. 23, 2016, in Russell Campbell v. Lamar Institute of Technology, the U.S. Court of Appeals for 5th Circuit held (3 to 0) that the District Court judge properly granted summary judgment to the school. “An institution is not duty bound to acquiesce in and implement every accommodation a disabled student demands.” <http://www.ca5.uscourts.gov/opinions/pub/15/15-41294.0.pdf>

Facts:

“Russell Campbell is a former student at Lamar Institute of Technology (LIT) where he earned an Associate’s Degree in Emergency Medical Services (EMS) and subsequently enrolled in LIT’s Respiratory Care Program. Due to an anoxic brain injury, Campbell struggles to retain and process information. While he was enrolled in the EMS program, LIT accommodated his learning disability by extending time for all of his exams and providing a laptop and a recorder to help with note-taking during class.

In addition, on her own initiative, one of Campbell’s professors, Stephanie Lanoue, created a unique accommodation by permitting Campbell to take two exams: one at the same time as the rest of the class and a second exam—which was different, but covered the same material—two weeks later.

In response to his declining performance, Campbell met with Rebecca Cole, the Coordinator of Special Populations Programs, to request another accommodation. In addition to the accommodations he was already receiving, Campbell requested that, similar to his arrangement with Professor Lanoue, he be permitted to take two exams in each class: one at the same time as the other students and another two weeks later. Alternatively, he requested two extra weeks of study time after the other students had taken the exam (which would also require creation of a second exam to prevent cheating). In support of his request, he offered a doctor’s note, which stated that ‘he needs a week to two weeks to retain new information prior to testing over that material.’ Cole consulted with Dr. Jefferson, the Vice President of Student Services, and with other vice presidents of other Texas State University schools. Cole and Jefferson determined that Campbell’s requested additional accommodation would be unreasonable because it would give Campbell an unfair advantage over his classmates and would burden professors by requiring them to modify their teaching or testing schedules.

A few days later, Campbell met with these instructors to consider an individualized plan for success. While instructors were standing, they informed him that they would only provide him with the originally approved accommodations and would not alter the testing schedule.”

Held:

“A student may only recover compensatory damages upon a showing of intentional discrimination. *Delano-Pyle*, 302 F.3d at 574. When the record is ‘devoid of evidence of malice, ill-will, or efforts . . . to impede’ a disabled student’s progress, summary

judgment must be granted in favor of the university. Id. In such a case, this court must defer to the university's academic decision not to alter its program.

Footnote 2: The Appendix to the ADA regulation provides: 'The accommodation, however, does not have to be the 'best' accommodation possible, so long as it is sufficient to meet the job-related needs of the individual being accommodated [T]he employer providing the accommodation has the ultimate discretion to choose between

effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide.' 29 C.F.R. pt. 1630, App., § 1630.9."

Legal Lessons Learned: The Institute wisely made a detailed record of dialog with the student and reasonable attempts to accommodate.

File – Chap. 11, Fair Labor Standards Act

TX: INJUNCTION ISSUED DELAYING DOL ALARY TEST FOR "EXEMPT" EMPLOYEES - \$47,476 - GOV'T EXPEDITED APPEAL TO 5th CIR

On Dec. 1, 2016, the U.S. Department of Justice filed a Notice of Appeal to the U.S. Court of Appeals for Fifth Circuit, seeking to set aside the Preliminary Injunction issued Nov. 22, 2016 by District Court Judge Amos Mazzant, on motion of 21 states.
<https://www.dol.gov/whd/overtime/final2016/litigation.htm>.

On Dec. 8, 2016, the U.S. Court of Appeals has granted the U.S. Department of Labor's motion for expedited briefing, and oral argument will be set after Jan. 31, 2017.
<https://onlabor.files.wordpress.com/2016/12/pacerdocnevada.pdf>

Facts:

Judge Mazzant wrote as follows about lawsuit filed by 21 states:

The FLSA's Application to the States The State Plaintiffs argue the FLSA's overtime requirements violate the Constitution by regulating the States and coercing them to adopt wage policy choices that adversely affect States' priorities, budgets, and services.

After reading the plain meanings together with the statute, it is clear Congress intended the EAP [Executive, Administrative, Professional] exemption to apply to employees doing actual executive, administrative, and professional duties. In other words, Congress defined the EAP exemption with regard to duties, which does not include a minimum salary level."

Kansas example

“In particular, the Kansas Department for Children and Families and the Kansas Department of Corrections have over fifty percent of employees affected by the Final Rule (Dkt. #10, Exhibit #3 at ¶ 11). The Kansas Department for Children and Families and the Kansas Department of Corrections are unable to increase salaries to comply with the Final Rule, as ‘limited resources of both agencies are already being prioritized toward . . . critical, public safety-related functions.’ (Dkt. #10, Exhibit #3 at ¶ 12–13). As a result, agencies with budget constraints, such as the two in Kansas, have relatively few options to comply with the Final Rule—all of which have a detrimental effect on government services that benefit the public.

The State Plaintiffs’ proposed preliminary injunction seeks to enjoin the Department from implementing its Final Rule on December 1, 2016. The State Plaintiffs allege that, in the absence of a preliminary injunction, the significant cost of complying with the Final Rule will cause irreparable injury. The State Plaintiffs offer many examples of such costs. They submit declarations from seven state officials who estimate it will cost their respective states millions of dollars in the first year to comply with the Final Rule. The Department agrees the Final Rule will cause increased costs.

Accordingly, State Plaintiffs have shown they will suffer irreparable harm if the preliminary injunction is not granted.”

Legal Lessons Learned: The U.S. Department of Labor’s “Final Rule” may not be final after-all. With the incoming Trump Administration, the “Final Rule” may soon be “history.”

File: Chap. 13, EMS and Chap. 18, Legislation

OH: NEW STATUTE – EMERGENCY TREATMENT OF DOGS & CATS – QUALIFIED IMMUNITY FOR FIRE & EMS

On Aug. 31, 2016, House Bill 187 became effective, authorizing EMS to provide emergency care for an injured dog or cat before the animal is treated by a veterinarian, and extending “qualified immunity” to EMS so long as conduct does not constitute willful or wanton misconduct. <https://legiscan.com/OH/text/HB187/2015>

Ohio Governor Kasich signed the bill into law on May 31, 2016.

<http://www.governor.ohio.gov/MediaRoom/PressReleases/TabId/200/ArticleId/429/language/en-US/kasich-signs-12-bills-5-31-16.aspx>

“The legislation was sponsored by Rep. [Tim] Ginter, [R-Salem] who was approached with the idea by a constituent who was concerned that a Columbiana County police canine may be lost due to a drug overdose while on the job. Emergency personnel standing by would not have authority to save the canine officer’s life, meaning that not only would an innocent life be lost, but the taxpayer dollars used to train and care for the dog would also lost.”

“Sec. 4765.52.

(A) As used in this section, "veterinarian" means an individual licensed under Chapter 4741. of the Revised Code to practice veterinary medicine.

(B) In the course of an emergency medical response, fire response, or response to aid law

enforcement, a first responder, emergency medical technician-basic, emergency medical technician-intermediate, or emergency medical technician-paramedic may provide any of the following emergency medical services to a dog or cat prior to the dog or cat being transferred to a veterinarian for further treatment, but only to the extent that the first responder, EMT-basic, EMT-I, or paramedic is authorized by this chapter or rules adopted pursuant to this chapter to perform the corresponding form of each of the services when providing emergency medical services to a human patient:

- (1) Opening and manually maintaining an airway;
- (2) Giving mouth to snout or mouth to barrier ventilation;
- (3) Administering oxygen;
- (4) Managing ventilation by mask;
- (5) Controlling hemorrhage with direct pressure;
- (6) Immobilizing fractures;
- (7) Bandaging;
- (8) Administering naloxone hydrochloride, if administering the drug has been authorized by the medical director or cooperating physician advisory board of an emergency medical service organization and the drug is administered either in accordance with a written protocol established and provided by a veterinarian or pursuant to a consultation with a veterinarian.

(C) In addition to the immunity from civil liability granted under division (A) of section 4765.49 of the Revised Code, a first responder, EMT-basic, EMT-I, paramedic, or medical director or member of a cooperating physician advisory board of an emergency medical service organization is not subject to prosecution in a criminal proceeding or professional disciplinary action allegedly arising from an act or omission associated with the provision of emergency medical services to a dog or cat under this section, unless the act or omission constitutes willful or wanton misconduct.

(D)(1) An emergency medical service organization is not liable for or subject to any of the following that allegedly arises from an act or omission associated with the provision of emergency medical services to a dog or cat under this section, unless the act or omission constitutes willful or wanton misconduct: damages in a civil action for injury, death, or loss to person or property; prosecution in a criminal proceeding; or professional disciplinary action.”

Legal Lessons Learned: Fire & EMS departments should arrange for training and equipment, and include these skills in the EMS protocol for your department.

On Nov. 15, 2016, in Lee Roy Bember v. American Medical Response of Connecticut, Inc., a New Haven Superior Judge, Hon. Robin R. Wilson, after a three-day bench trial (no jury), April 13-15, 2016, found AMR liable for negligence of its personnel who had responded on a call for a diabetic emergency (two paramedics not sued). AMR has filed an appeal to Appellate Court. <http://civilinquiry.jud.ct.gov/CaseDetail/PublicCaseDetail.aspx?DocketNo=NNHCV146049824>
S

Facts:

“Ashley Gill, the plaintiff’s girlfriend who resided with the plaintiff and their two children at the time, called 911 for medical assistance [on June 23, 2012 at 3:17 am] because the plaintiff who is a diabetic was having a diabetic crisis. According to the defendant’s Patient Care Report (PCR), when [paramedics] David & Thornhill arrived, they took the plaintiff’s vital signs and noted that his Glasgow Coma Scale was 6, and blood glucose was 49 mg/dl. Thereafter, an IV was started while the plaintiff was lying on his back on his bed.

[After failing to start IV in left arm, paramedic] David reached across plaintiff’s body to attempt vascular access in the plaintiff’s right forearm, which was successful. David began administering the 50% dextrose which is used in emergency care to treat hypoglycemia.

While the medication was first being administered, Gill observed that the IV needle did not appear to be fully inserted. As the dextrose medication entered the plaintiff’s forearm, Gill observed the plaintiff yell out in pain, and she observed that his arm was swollen. It is undisputed that dextrose medication can cause tissue necrosis and or death if it enters the “third space” of the forearm instead of the vein.

David acknowledged that he was aware of dextrose causing tissue necrosis if entered into the third space of the forearm instead of the vein. David also acknowledged that the dextrose solution entered the plaintiff’s forearm instead of his vein. David further acknowledged that the dextrose solution entered the plaintiff’s forearm, while he was pushing the plunger on the medication tube when the IV was not properly inserted. David also acknowledged that it was his responsibility to take all steps necessary to ensure this does not occur. David noticed swelling in the plaintiff’s right arm and discontinued the IV, however at that point, 12.5 grams of dextrose had already entered the plaintiff’s right forearm. It is undisputed that the dextrose medication infiltrated the plaintiff’s arm, and when he arrived at the hospital, he was diagnosed with compartment syndrome as a result of the infiltration, which required emergency fasciotomy.

On June 25, 2012, the plaintiff underwent a second surgery to his right forearm....

On July 17, 2012, the plaintiff was again hospitalized and underwent a skin graft of his right forearm which was performed by Dr. Alfred Sofer. The skin graft was harvested from the plaintiff's right thigh. The plaintiff remained hospitalized from July 17, 2012 until he was discharged on July 24, 2012.

The court also notes the plaintiff continues to have pain in his right upper extremity with normal activities, and is able to perform self-care activities with modification but unassisted.

Held:

“[T]he court finds that the plaintiff has proven by a fair preponderance of the evidence, that the defendant breached the standard of care in that its employees failed to adequately secure the IV catheter after insertion so as to prevent dislodgement from the plaintiff's vein; in that they failed to properly monitor the IV catheter after insertion into the plaintiff's right forearm; in that they failed to pay proper attention while injecting the dextrose medication into the plaintiff's right arm; in that they failed to properly restrain the plaintiff so as to prevent the IV catheter from becoming dislodged.

[T]his court concludes that the [Good Samaritan statute] Sec. 52-557b, by its plain language and by examination of its history and public policy, does not afford immunity to the defendant.

[E]ven if this court were to find that the defendant's employees were immune from liability, this immunity would be personal to the individual employees and would not extend to the defendant, [for-profit] employer.”

Legal Lessons Learned: Practice IV skills and be very observant of patients. Cases such as this can lead to adverse publicity. See Nov. 18, 2016 article, “Ambulance Company to Pay \$722,290 for “Gross, Willful or Wanton Negligence.”

<http://www.ctlawtribune.com/id=1202772843124/Ambulance-Company-to-Pay-722290-for-Gross-Willful-or-Wanton-Negligence?slreturn=20161109165206>

Note: Good Samaritan statutes in many states provide immunity to individuals only when care provided does not constitute willful or wanton misconduct. See Ohio Rev. Code, <http://codes.ohio.gov/orc/2305.23>

2305.23 Liability for emergency care.

“No person shall be liable in civil damages for administering emergency care or treatment at the scene of an emergency outside of a hospital, doctor's office, or other

place having proper medical equipment, for acts performed at the scene of such emergency, unless such acts constitute willful or wanton misconduct.

Nothing in this section applies to the administering of such care or treatment where the same is rendered for remuneration, or with the expectation of remuneration, from the recipient of such care or treatment or someone on his behalf. The administering of such care or treatment by one as a part of his duties as a paid member of any organization of law enforcement officers or fire fighters does not cause such to be a rendering for remuneration or expectation of remuneration.”

File – Chap. 13, EMS

IL: HIPAA VIOL - STOLEN LAPTOP COMPUTERS WITH PATIENT HEALTH INFO - MEDICAL PROVIDER PAYS \$5.5 MILLION

See Dec. 2, 2016 article, “HHS Cracks Down on Health Care Privacy Violations Under HIPAA.” <http://www.nationallawjournal.com/id=1202773736001/HHS-Cracks-Down-on-Health-Care-Privacy-Violations-Under-HIPAA->

“The HHS Office for Civil Rights extracted a total of \$25.6 million in settlement payments between Oct. 1, 2015, and Sept. 30, 2016, more than triple the previous annual record of \$7.9 million set in fiscal year 2014, according to the law firm.

In 2016, the OCR also reached 13 settlements, called ‘resolution agreements,’ in HIPAA enforcement actions, a new high for an agency that has never before resolved more than seven HIPAA cases in a fiscal year.”

For example, on Aug. 4, 2016, Advocate Health Care Network, a Chicago and Bloomington-area fully-integrated health care system in Illinois, with more than 250 treatment centers, including 10 acute-care hospitals and 2 children’s hospitals, settled with U.S. Dept. of Health & Human Services for \$5.5 million. This is largest HIPAA settlement since the inception of the Security Rule. Advocate advised HHS in 2013 of breaches of electronic protected healthcare information on approximately 4 million patients. See press release: “Advocate Health Care Settles Potential HIPAA Penalties for \$5.55 Million.” <http://www.hhs.gov/about/news/2016/08/04/advocate-health-care-settles-potential-hipaa-penalties-555-million.html>

The Chicago Tribune reported:

“In July 2013, four unencrypted laptops with personal health information were stolen from an administrative office in Park Ridge. Also that summer, an unauthorized third party accessed the network of an Advocate business associate, potentially compromising the information of more than 2,000 patients. Then in November, Advocate told the U.S. Department of Health and Human Services' Office for Civil Rights that an unencrypted laptop with personal information of more than 2,200 individuals was stolen from the vehicle of an Advocate Medical Group employee.” <http://www.chicagotribune.com/business/ct-advocate-settlement-privacy-0805-biz-20160804-story.html>

Class action lawsuits have also been filed, but as of July, 2014, those cases were dismissed for failure to prove the plaintiff's suffered any actual identity thefts or damages.

<http://www.chicagotribune.com/business/ct-advocate-settlement-privacy-0805-biz-20160804-story.html>

Legal Lessons Learned: Fire & EMS departments should conduct annual review of HIPAA policy with personnel. In the Advocate Health Care settlement, they were required to “implement policies and procedures and facility access controls to limit physical access to electronic information systems” for employees and their business associates.

File – Chap. 13, EMS

DC: EMS BILLING – SOFT BILL / INSURANCE ONLY BILLING - HHS
FINAL RULE ON “SAFE HARBORS” FOR PUBLIC EMS AGENCIES

On Dec. 7, 2016, the Office of Inspector General issued a Final Rule to provide helpful guidance: “In this final rule, we amend 42 CFR 1001.952 by modifying certain existing safe harbors to the anti-kickback statute and by adding safe harbors that provide new protections or codify certain existing statutory protections. These changes include:

- waivers of cost-sharing for emergency ambulance services furnished by State- or municipality-owned ambulance services....

We believe the safe harbors in this rule further the goals of access, quality, patient choice, appropriate utilization, and competition, while protecting against increased costs, inappropriate steering of patients, and harms associated with inappropriate incentives tied to referrals.”

<https://www.gpo.gov/fdsys/pkg/FR-2016-12-07/pdf/2016-28297.pdf>

Prior Advisory Opinions have also provided “safe harbors”- for example. See Nov. 21, 2013, HHS opinion on a County-wide FD that does “insurance-only” billing of residents, and sought advisory opinion to extend this to non-residents. “The County accepts payment from Residents’ insurers, including Federal health care programs, as payment in full for the emergency ambulance services (i.e., ‘insurance only billing’) and treats revenues received from taxes as payment for cost-sharing amounts.”

<https://oig.hhs.gov/fraud/docs/advisoryopinions/2013/AdvOpn13-17.pdf>

Safe Harbors – Only for emergency transports

In draft the Final Rule, HHS sought public comment.

“Comment: One commenter requested that we protect psychiatric emergency transportation. Another commenter requested protection for cost-sharing waivers for ambulance transports that do not qualify as ‘emergency’ transports, but that are initiated based on a provider’s judgement that the patient requires specialized transportation.

Response: We decline to expand the safe harbor to protect cost-sharing waivers for either of these suggested forms of transportation, to the extent that the transports do not meet the definition of ‘emergency response’ set forth in the regulation. As a threshold matter, we did not propose either of the suggested policies. The safe harbor is limited to waivers for emergency transports, and we believe waivers in connection with nonemergency transports are too high risk to be protected by a safe harbor at this time. We note, however, that the regulation does not necessarily exclude transportation of psychiatric patients. For example, if a psychiatric patient is a threat to himself, herself, or others, and an emergency transport is necessary (to a hospital emergency department or psychiatric hospital), cost-sharing waivers for the transportation could be protected.”

Legal Lessons Learned: This is a complex area, and FDs should consult with legal counsel with expertise in EMS billing. For example, see this helpful guidance:

“While the OIG has permitted some municipally-owned ambulance providers to treat tax revenues as payment of cost-sharing amounts through past Advisory Opinions, this new rule establishes a nationwide safe harbor regulation for government owned/operated ambulance services to waive copayments and deductibles for emergency ambulance services *if they meet the OIG’s specific conditions.*” Page, Wolfberg & Wirth, 12/6/2016. <https://www.pwwemslaw.com/news/oig-issues-safe-harbor-government-ambulance-agencies>

File: Chap. 16, Discipline

TX: FIREFIGHTER THREATENS TO KILL FD OFFICER, OTHER FFs - CONVICTED BY JURY OF TERRORIST THREATS OF PUBLIC SERVANTS

On Dec. 6, 2016 in Scott Niles v. The State of Texas, a former Houston firefighter appealed his two convictions by a jury of “terrorist threats against a public servant” and sentenced to 1-year in county jail, suspended and two years of probation. The FD learned his driver’s license had been suspended, and his Captain then ordered him to no longer drive the ambulance until license was reinstated. This put him in a lower pay grade, and Scott Niles threatened to get a firearm and kill his Captain and other firefighters at Station 64. He was fired, and then prosecuted for the threats. The Court of Appeals upheld the conviction, holding that any error by prosecution in closing argument (that defense counsel had presented “a paid version” of defendant’s actions) was corrected when judge instructed jury to disregard improper comments. The Court of Appeals did order him resentenced for a “Misdemeanor B” threats (max of 180 days in jail), instead of the more serious “Misdemeanor A” – threats against public official

<http://law.justia.com/cases/texas/fourteenth-court-of-appeals/2016/14-15-00498-cr.html>

Facts:

“Appellant was charged by information with two offenses of terroristic threat against a public servant. Trial to a jury commenced on May 12, 2015.

During its case-in-chief, the State called ten witnesses to the stand. Junior Captain Bradley Maddin testified that in April 2014, appellant had been employed as a firefighter with the Houston Fire Department's Station 64 for approximately four months. On April 29, 2014, Maddin became aware that appellant did not have a valid driver's license. Maddin brought concerns over appellant's lack of a license to his senior captain, Andrew Haygood. Subsequently, Maddin and Haygood summoned appellant into Maddin's office and asked if appellant had a driver's license. Appellant responded in the negative; however, appellant revealed a license for a concealed handgun.

Because appellant did not have his license, he was removed from the rotation list for driving the ambulance, and Haygood assigned him to performing patient care in the back of the ambulance. According to Maddin, appellant was 'visibly upset' by his assignment and questioned his superiors as to why he was being punished. Because the role of driver

is a higher pay classification, appellant was paid less when he was removed from driving duty.

Robert Gordon was working as an engine operator at Station 64 when appellant joined the station. Gordon testified that he was on duty on April 29, 2014. Gordon spoke with appellant following his meeting with Maddin and Haygood, at which time appellant stated that he was upset over no longer receiving his higher classification pay. Approximately an hour later, Gordon, along with fellow firefighter, Mark Keelen, approached appellant who was sitting on a couch on the apparatus floor and mumbling inaudibly. When Keelen asked appellant what was wrong, appellant responded, 'I'm going to start shooting people, I just need to figure out who I'm going to take out first.'

Robert Sadler worked as an EMT with Station 64. Sadler testified that appellant would often bring guns to the station in the back of his car. According to Sadler, appellant was trying to sell the guns. On April 29, 2014, Sadler was assigned to drive the ambulance after appellant was removed from that duty for not having a driver's license. Sadler testified that when appellant got into the ambulance for their first call, he appeared upset. When Sadler asked him if everything was okay, appellant responded, 'that if [sic] he was going to kill everybody in the fire station.' Then he told Sadler the order in which he was going to do it. According to Sadler, appellant said he was going to kill Captain Haygood, Robert Gordon, and Sadler first because they were gun owners.'

Held:

"The jury heard testimony from multiple witnesses, including both complainants, who stated that appellant had threatened to shoot them. These witnesses also testified that appellant generally did not fit in well at the fire station and that he was an avid gun collector.

The defense called several witnesses to testify as to appellant's non-violent character generally. However, the psychologist, Dr. Buser, also testified that at the time he assessed appellant and determined he was not a threat to others, appellant had neglected to

mention the threats he had made to his co-workers. Buser stated his opinion might have been different had he been aware of the threats.

The record reflects that appellant informed multiple individuals in the fire station that he was going to shoot and/or kill everyone. EMT Sadler testified that appellant stated he was going to kill Sadler and [Captain] Haygood first. Sadler further testified that he believed appellant was trying to put him and Haygood in fear at the time appellant made his threats. Although appellant never directly threatened Haygood, there was evidence that the firefighters strictly adhered to protocol requiring them to report any threats up the chain of command and, therefore, the jury could infer that appellant knew Haygood would almost certainly learn of appellant's threats. There was also evidence that Haygood in fact learned of the threats the same day.

Haygood testified that upon learning of appellant's threats, he was in fear of imminent serious bodily injury. Haygood testified that he was concerned for his safety based upon his knowledge of appellant's firearms collection and appellant's previous military experience as well as his belief that appellant was irritated with him. Haygood further testified that although he did not hear the threats directly, he was concerned appellant would shoot him because he understood appellant's intention was to kill Haygood first.

During closing argument the prosecutor improperly argued that the State sought the truth be found, but that defense counsel had no similar goal. "Here, the prosecutor's comment that appellant's defense attorneys presented a paid version of the case arguably impugns defense counsel's character by suggesting they were paid to present only a particular (perhaps untrue) version of the case.

Considering the strength of the State's case, we conclude that appellant's convictions were more certain than not, and that appellant would have been convicted in the absence of the prosecutor's statement. Thus the third factor also weighs in favor of the State.

On balance, we conclude the strength of the evidence supporting the convictions and the trial court's instruction to disregard outweigh the prosecutor's misconduct. We therefore hold the trial court did not abuse its discretion by denying appellant's motion for mistrial."

Legal Lessons Learned: Threats by a firefighter to kill must be taken very seriously; notify police immediately.

On Nov. 10, 2016, in Timothy Larios v. Scott Lunardi, et al., U.S. District Court Judge Morrison S. England, Eastern District of California (Sacramento), held that the lawsuit by terminated CHP officer Timothy Larios may proceed against the CHP investigators who ordered him to turn over his personal cell phone. For fire & EMS department investigators, when faced with similar situation, consider getting a search warrant for the personal cell phone that narrowly defines items to be seized.

The Judge wrote:

“In this case, Plaintiff has alleged that Defendants searched everything contained on his phone. They purportedly confiscated his device, extracted all data, and made phone calls

from the device. According to Plaintiff, Defendants were not looking for a particular type of data or limiting their search to a particular time frame. If those allegations prove correct, Defendants clearly overstepped the bounds of the Fourth Amendment.”

<https://docs.justia.com/cases/federal/district-courts/california/caedce/2:2015cv02451/288321/22>

Facts:

“Plaintiff was an officer with the California Highway Patrol (‘CHP’) and was assigned to the Shata Interagency Narcotics Task Force. He was issued a cell phone by the CHP, and he also had a personal cell phone. In September 2014, plaintiff was removed from his position and was told that he was the subject of an internal investigation. The investigation was led by Defendants Lunardi and Hutsell. During the course of those proceedings, Plaintiff was ordered to relinquish his state issued phone. As part of the investigation, that phone and Plaintiff’s thumb drives, locker, work truck, and desk were all searched.

On November 6, 2014, Plaintiff met with Lieutenant Foster, Officer Lunardi and one other unidentified officer in Lieutenant Foster’s office. Prior to that meeting, Lieutenant Foster advised Plaintiff that he would not need a union representative to be present. Despite that advice, Plaintiff contacted his union representative, who accompanied him. The purpose of the meeting was to confiscate Plaintiff’s personal cell phone. Plaintiff refused to give up his phone on grounds that it contained purely personal information. In response, Lunardi provided Plaintiff with a memorandum from [Supervisor R. J.] Jones, in which Jones directed that Plaintiff’s phone had to be turned over so that the CHP could ‘conduct a data extraction to retrieve all work product.’ ECF No. 13 at 6. The memo warned that Plaintiff would be subject to ‘charges/disciplinary action’ if he failed to cooperate. Id.

Plaintiff objected to the order and offered to voluntarily show Officer Lunardi any and all work product stored on Plaintiff’s personal phone. Officer Lunardi, in turn, rejected Plaintiff’s offer and assured Plaintiff that his personal phone would only be

confiscated for three to four hours. According to Plaintiff, he was concerned he might be subject to criminal prosecution if he failed to obey his superior's directives, and therefore eventually relinquished his personal phone to Officer Lunardi. Plaintiff's phone was returned to him approximately eight hours later. Upon its return, Plaintiff noticed that phone calls had been made from his device after he had turned it over and that all of the information stored on the phone had been searched and downloaded.

Plaintiff was subsequently informed that he was suspected of violating a number of sections of the California Penal Code. Eventually, on two separate occasions, Plaintiff

was issued Miranda warnings and was interrogated by Defendants. Officers Lunardi and Hutsell questioned Plaintiff about personal information discovered on his phone, and Officer Hutsell admitted that the reason Plaintiff's phone had been searched was to gather that personal information. As a result of the investigation, Plaintiff was terminated."

Held:

"According to Defendants, Plaintiff had a diminished expectation of privacy in his personal cell phone because he was on notice that he would have to relinquish any work on personal devices upon demand. Indeed, General Order 100.95 of the CHP's Policy and Guidelines ('Order') states that '[w]ork stored on any type of electronic device is the property of the state and must be relinquished upon demand.' Plaintiff correctly counters, however, that 'this policy is silent as to whether its officers must submit their cellular telephones [for] inspection.' ECF No. 13 at 3.

Contrary to Defendants' arguments, Plaintiff maintains a reasonable expectation of privacy in his password protected personal cell phone, despite having used it at times for work with the permission of his government employer, and even in the face of notice that any work product would have to be turned over to the state. Knowing that work product would remain open to inspection in no way puts an employee on notice that the government will also have carte blanche to review everything an employee keeps on his or her phone. To be sure, if the government's argument is taken to its logical conclusion, permissively keeping work files at home would permit the government to search an employee's house.

Certainly employees have a legitimate expectation of privacy in their homes, and their interest in the contents of their cell phones is not materially different. In fact, 'a cell phone search would typically expose to the government far more than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form....' *Riley v. California*, ___ U.S. ___, 134 S. Ct. 2473, 2491 (2015)."

No Qualified Immunity

“In order to be entitled to qualified immunity, a defendant must have violated a constitutional right that was not clearly established at the time of the violation. *Saucier v. Katz*, 533 U.S. 194, 202 (2001); *Pearson v. Callahan*, 555 U.S. 223, 235 (2009). The unlawfulness alleged must be apparent in light of the preexisting law. Defendants argue that the constitutional violation was not clearly established here because government employers were permitted to search employees according to the agency’s policy and to investigate work-related misconduct. More specifically, they contend that ‘Defendants could have reasonably believed that the inspection of Plaintiff’s phone was lawful as long as (1) they had a reasonable belief that he used the phone to conduct work-related misconduct; and (2) the search was tailored to find only evidence of the work-related misconduct.’ ECF No. 15-1 at 17. Even assuming Defendants are correct, they are not entitled to qualified immunity at this juncture because that is not what Plaintiff alleges they did. Plaintiff alleges they went well beyond investigating work-related misconduct via an appropriately tailored search and instead used such an investigation as a pretense to target all of Plaintiff’s personal information in

the hopes of locating evidence of conduct that could be charged criminally.”

Legal Lessons Learned: To avoid similar litigation, Fire & EMS investigators should get a search warrant for personal cell phones, personal computers, or other electronic storage devices that are not government owned.

Chap. 18 – Legislation

OH: CONCEALED CARRY BILL PASSED - UNIVERSITIES, OTHER PUBLIC LOCATIONS CAN DECIDE TO ALLOW - IF GOVERNOR SIGNS

On Dec. 9, 2016, the Ohio General Assembly passed a bill that will allow concealed carry in government buildings, public areas of airports, universities and colleges, unless the facility posts signs prohibiting. On Dec. 18, 2017, the Governor signed the bill into law:

http://www.cleveland.com/politics/index.ssf/2016/12/gov_john_kasich_signs_bill_to.html

Active duty military will not need a concealed carry license if they have proof of training in firearms.

http://www.cleveland.com/politics/index.ssf/2016/12/ohio_lawmakers_scale_back_conc.html

Am Sub. S.B. 199: <https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA131-SB-199>

Government building (including Fire Houses) – may authorize concealed carry:

“[A] building that is a governmental facility ... unless the governing body with authority over the building has enacted a statute, ordinance, or policy that permits a licensee to carry a concealed handgun into the building.”

Universities may also authorize concealed carry:

“An institution of higher education shall be immune from liability in a civil action for any injury, death, or loss to person or property that was allegedly caused by or related to a licensee bringing a handgun onto the premises of the university, including motor vehicles owned by the university, unless the institution acted with malicious purpose.

Legal Lessons Learned: Ohio Fire & EMS Departments should post signs on their buildings that no firearms are permitted (except those who are sworn law enforcement personnel).

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