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JAN. 2022 – FIRE & EMS LAW Newsletter

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE.]

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PROF. BENNETT'S UPDATED WORK IN SCHOLAR@UC:

- **2022: FIRE & EMS LAW – RECENT CASE SUMMARIES / LEGAL LESSONS LEARNED [updated monthly]:** Case summaries since 2018 from monthly newsletters: https://doi.org/10.7945/j6c2-q930
- **2022: FIRE & EMS LAW – CURRENT EVENTS [updated bi-weekly]**: https://doi.org/10.7945/0dwx-fc52
- **2022: FIRE & EMS OFFICER DEVELOPMENT / LEGAL LESSONS LEARNED / AMERICAN HISTORY [updated each Officer I, II, III class]:** https://doi.org/10.7945/av8d-c920

26 RECENT CASES

Chap. 1 – American Legal System, incl. Fire Codes, Investigations, Arson

File: Chap. 1

OH: WARRANTLESS ENTRY - CAUSE & ORIGIN OF HOUSE FIRE - DRUGS PLAIN VIEW – ADMISSIBLE IN EVIDENCE

On Dec. 27, 2021, in State of Ohio v. Nicole L. Holmes, the Court of Appeals for the Eleventh District (Ashtabula) held (3 to 0) that trial judge improperly granted the defendant's motion to suppress evidence. Fire Captain lawfully entered house during overhaul and observed drugs in plain view; warrantless entry during "exigent circumstances" as authorized by U.S. Supreme Court in Michigan v. Tyler, 436 U.S. 499, 506, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978). Case remanded for defendant's criminal trial - aggravated trafficking in drugs, aggravated possession of drugs, possessing criminal tools, illegal use or possession of drug paraphernalia, and endangering children.

> "Here, applying these Fourth Amendment standards and exceptions, we conclude that Captain Chase was permitted to enter the residence without a warrant under the doctrine of exigent circumstances. During the initial entry, while investigating and before he had determined the cause and origin of the fire, Captain Chase discovered contraband in plain view. Due to limitations on his training with evidence collection, he acted appropriately in requesting assistance from the police department. Patrolman Perry was permitted to enter the residence and seize the contraband without a warrant *only* because he "stepped into the shoes" of Captain Chase, who was still on the scene conducting his initial investigation. Patrolman Perry entered solely for the purpose of assisting Captain Chase; he collected only the items to which he was directed by Captain Chase; he did not search any other area of the residence; and he did not further intrude on Hommes' privacy interests. Accordingly, the warrantless seizure did not violate Hommes' Fourth Amendment rights. *** The trial court erred in granting Hommes' motion to suppress, and the state's sole assignment of error has merit. The judgment of the Ashtabula County Court of Common Pleas is reversed, and this matter is remanded for further proceedings consistent with this opinion."

Facts:

> "In February 2019, the Ashtabula Fire Department responded to a fire at Hommes' residence. Multiple children safely exited the home. Captain Stephen Chase, a certified fire investigator, searched the house to determine the origin and cause of the fire. Hommes was not present when the fire ignited and did not return until after the fire had been suppressed and the captain was conducting his investigation.
>
> ***
>
> When extinguishing the fire, the suppression crew had breached a locked interior door to a room described as an office. In that room, Captain Chase observed two computers connected to webcams pointed at the back door of the home, ammunition, airsoft pistols, and an open safe on the floor that appeared to contain illegal drugs and paraphernalia. It was reported that a handgun had also been seized from that room by the fire suppression

crew and turned over to a police officer. Captain Chase seized the two computers, which were then locked in evidence at the fire department. Captain Chase testified that he has 'had a number of trainings dealing with evidence collection,' but that it is 'outside the scope of my training as a fire investigator to collect [drugs] as evidence'; 'nor am I trained to collect weapons.' He contacted the Ashtabula Police Department and requested an officer to respond. At this time, the captain testified, he had not yet searched the entire house nor determined the cause and origin of the fire. Captain Chase testified that Officer Thomas Perry, a patrolman at the time, 'was there quickly,' within 'five minutes, ten minutes.'

***

Patrolman Perry secured the items and placed them in evidence. He suspected the substance was methamphetamine, which was later confirmed by a presumptive test at the police station. The officer also collected two boxes of 9mm ammunition from the office. A warrant was not obtained for the seizure of evidence.

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Fourth Amendment protections and the exceptions thereto extend to fire officials responding to an ongoing fire. Michigan v. Tyler, 436 U.S. 499, 506, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978) ("there is no diminution in a person's reasonable expectation of privacy nor in the protection of the Fourth Amendment simply because the official conducting the search wears the uniform of a firefighter rather than a policeman"). Applying the doctrines of exigent circumstances and plain view, the United States Supreme Court held that '[a] burning building clearly presents an exigency of sufficient proportions to render a warrantless entry 'reasonable[,]' * * * [a]nd once in a building for this purpose, firefighters may seize evidence of arson that is in plain view.' Id. at 509, citing Coolidge at 465-466. Further, 'officials need no warrant to remain in a building for a reasonable time to investigate the cause of a blaze after it has been extinguished.' Tyler at 510."

Legal Lesson Learned: Wonderful decision; excellent appeal by the Ohio Attorney General's office.

File: Chap. 1

PA: FD ENTRY BASEMENT WITHOUT WARRANT - ELECTRIC STOVE, CIRCUIT BRAKERS BASEMENT – BLDG CONDEMNED

On Dec. 13, 2021, in George Cannarozzo v. Borough of West Hazleton and Diane Panzarella, U.S. District Court Judge Robert D. Mariani granted summary judgment to the Borough and their code enforcement officer, Diane Panzarella. The fire department had been dispatched twice to the building; first for light smoke on first floor (cleared scene in 10 minutes) and twelve minutes later called back for electrical stove sparking. They removed the stove, but circuit brakers were in locked basement; when in basement they observed "dangling" and "hanging" wires, some without coatings and corroded.

"This evidence shows that the fire crew's entry into the basement was related to the second incident in which the stove was removed from the apartment unit, whether it was to check for extension of the fire or to turn off the circuit breaker "to secure the electrical oven" as Segaria said would be a concern ([Deputy Fire Chief Robert] Segaria Dep. 36:24-37:1 (Doc. 73-2 at 18)). As such, the fire crew's entry into the basement can be considered an extension of their firefighting duties, i.e., remediation of a potential hazard related to the incident or checking for an extension of the fire into the basement. Activities to prevent a fire's recurrence are properly characterized as reasons for firefighters to remain in a building with no warrant and present no Fourth Amendment violation. *See [U.S. Supreme Court decision in Michigan v.] Tyler,* 436 U.S. at 510."

Facts:

"These claims arise from events which occurred on February 6, 2016, at a five-unit apartment building owned by Plaintiff in the Borough of West Hazleton ("Borough")….. On that date, the West Hazleton Fire Department responded to a report of a fire at the property…. The Fire Department cleared the scene within ten minutes but received a second call to the property approximate twelve minutes later…. Subsequently the Borough's code enforcement officer, Diane Panzarella, was called to the scene…. Eventually, Fire Department crew members and Defendant Panzarella accessed the basement of the apartment unit, and, thereafter, Defendant Panzarella called Carl Faust, an independent building inspector who does work for the Borough, to the scene…. Plaintiff did not consent to a code inspection of the basement and no warrant was obtained….The property was condemned by the Borough as a result of the search….

***

[On second fire run the] West Hazleton Fire Department arrived on the scene at approximately 11:27 am…. Upon arrival, the Fire Department crew found the first-floor apartment on the 12 East Oak Street side filled with heavy smoke…. Outside the back door of the building, the engine crew discovered burnt papers with heavy black charring…. Sparks were noted coming from the stove in the first-floor apartment, and, at some point after the fire crew's arrival, the stove was unplugged and removed to the outside.

***

Defendant Panzarella was called to the scene after the crew's arrival at the Property for the second time, and she arrived within fifteen minutes of being called….The West Hazleton Fire Department was at the scene and in control of the Property when Defendant Panzarella arrived.

***

The Fire Department accessed the basement, and Deputy Chief Segaria and the ladder crew entered the basement…. Defendant Panzarella testified that when Deputy Chief Segaria came up from the basement 'he basically said, you've got to get down there….' The fire department was in control of the Property and was conducting an investigation in the basement when Defendant Panzarella was instructed to enter the basement…. Defendant Panzarella entered the basement at the instruction of Deputy Chief Segaria

with the ladder crew, which was within 30-40 minutes of her arrival at the property, and at the same time the fire crew was in the basement…. Multiple fire hazards were clearly evident in the basement upon visual inspection.

Subsequently, Mr. Faust was contacted by Defendant Panzarella, and he arrived at the Property within forty-five minutes…. When she contacted Faust, Defendant Panzarella had determined that there was an imminent danger to life or property….. The fire department had control of the property when Mr. Faust arrived."

Legal Lesson Learned: The warrantless entry was lawful, and the Code Enforcement Officer enjoys qualified immunity. The facts in this case are so clear, it makes you wonderful why the lawsuit was ever filed.

Chap. 2 – Line Of Duty Death / Safety

File: Chap. 2

NY: POST 9/11 – SINUS/ BREATH - FDNY MEDIC TRAPPED NORTH TOWER - FINALLY GETS 100% DISABILITY

On Dec. 13, 2021, In the Matter of the Application of Gary Smiley v. Melanie Winnery, as the Executive Director of the New York City Employee's Retirement System, Justice Loren Bailey-Schiffman, Supreme Court (Kings County) held (unpublished decision) held that the firefighter is entitled to full "Performance of Duty" (POD) disability benefits since he is no longer able to perform duties of a paramedic. The Workers' Compensation Board in 2013 had only awarded him a 45% partial disability for reactive airway disease, eye irritation, shortness of breath, sinusitis & PTSD.

> "The Board repeatedly found that Petitioner has no functional impairment despite confirmed reports that he cannot be exposed to smoke or other irritants, often has to lie down for hours at a time due to headaches and dizziness and is required to administer no less than three to four sinus rinses per day as well as two or three inhalers and possibly the nebulizer. Clearly, the standard as set forth above has not been met…. The reports upon which Respondents' denials are based fail to set forth any facts supporting the conclusion that Petitioner does not have a functional impairment. No less than four doctors confirmed Petitioner's debilitating severe and debilitating sinusitis accompanied by headaches and dizziness. Moreover, Dr. Shohet, Dr. Lin, Dr. Crane and all treating doctors have opined that Mr. Smiley cannot perform the duties of a paramedic. No reason is given why these opinions are ignored."

Facts:

> "Petitioner was employed as a paramedic for the City of New York on September 11, 2001. Mr, Smiley arrived at the World trade Center (WTC) site before either tower collapsed and began participating in the rescue efforts. However, Petitioner became

trapped underneath the rubble when the North Tower fell and was not rescued until several hours later. After Petitioner was found he was taken by ambulance to Long Island College Hospital where he was admitted overnight. Petitioner returned to light duty on or about September 17th and to full duty at the WTC site on October 20, 2001. He was assigned to the recovery operation and as a stand-by paramedic until November 30, 2001. Petitioner's symptoms began while he was working at Ground Zero and during that time he sought treatment for sinus and ear infections.

***

The record indicates that Smiley presented to the WTC Health Program at Mount Sinai Hospital in October of 2002 and complained of facial pain, sinus congestion, ear pain, throat irritation, cough and chest tightness. The symptoms persisted, increased in severity and by 2007 were accompanied by headaches, facial pressure and dizziness. These newer symptoms also affected his balance, caused motion sickness and required Petitioner to lie down. The record confirms 'frequent incidents of random loss of balance and disequilibrium especially with head/eye and body movements...'

***

This is the third time Mr. Smiley has brought a Petition to annul Respondents' denial of his application for disability retirement benefits for injuries received: as a result of his work at the WTC site. The conditions reported on the first application included: WTC exposure, extrinsic asthma, chronic sinusitis, chronic rhinitis, prolonged PTSD, GERD, chronic dizziness, chronic headaches, kidney cysts, chronic ear infections, chronic nasal congestion, chronic respiratory infections, pain, weakness, depression, facial and eye pain, While that application was pending the Workers' Compensation Board awarded Petitioner a 45% permanent partial disability on December 26, 2013. The conditions set forth in the award were reactive airway disease, eye irritation, shortness of breath, sinusitis & PTSD.

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The record reveals that Petitioner suffered from no less than eight and sometimes even more, severe sinus infections throughout the year. The following diagnostic tests were performed with positive findings for chronic sinus disease: two CT scans/multiple nasal endoscopies, a table test for postural disequilibrium, VNG and FEV studies; In fact, Petitioner's rhino sinusitis symptoms became so severe that Functional Endoscopic Sinus Surgery (FESS) was performed on June 26, 2008. Infected sinus tissue was removed and the opening of his sinuses and the inside of his nose was enlarged in an attempt to facilitate better breathing and drainage of the mucous that was constantly getting backed up.

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On October 29, 2019, Dr. Shohet examined Petitioner and reported that Mr. Smiley's symptoms of chronic rhinosinusitis with recurring acute exacerbations and vertigo had been progressing. Dr Shohet also detected residual friability (tissue that tears, sloughs and bleeds more easily when touched) at the caudal septum. Also reported was that thick mucus was draining from Mr. Smile/s left nostril. Dr. Shohet recommended the cessation

of any activity that could result in exposure to smoke and other irritants which includes working as a paramedic.

***

The law is well settled that the Medical Board cannot cherry pick the evidence it chooses to rely on. Daly v Nigro, 65 Misc.3d 1206(A) (Sup Ct, Kings County, 2019). However, in the case at bar they have utilized only pieces of Petitioner's medical documentation and ignored the rest. The reports fail to address the objective positive findings contained in the diagnostic studies. They did not address any of the opinions that certified Petitioner as 100% disabled. These reports clearly do not meet the requirement; s set forth by the Court of Appeals that the Medical Board must explain why the evidence it discounts is not valid and why the evidence it relies upon is more persuasive."

Legal Lesson Learned: Helpful opinion; the Medical Board cannot "cherry pick" the evidence on disability.

Chap. 3 – Homeland Security, incl. Active Shooter, Cybersecurity, Immigration

File: Chap. 3

MI: TERRORIST CONFESSION TO FBI - MIRANDA WARNINGS GIVEN BY FBI DURING C-17 FLIGHT TO U.S. - ADMISSIBLE

On Dec. 13, 2021, in United States of America v. Ibraheem Izzy Musaibi, U.S. District Court Judge David Lawson, U.S. District Court for Eastern District of Michigan (Southern Division) denied the defense motion to suppress his statements; the FBI gave him clear *Miranda* warnings.

> "The evidence adduced at the evidentiary hearing establishes that the statements the defendant made while in the custody of the agents on the flight from the Middle East to the United States were voluntary and preceded by the appropriate advice of constitutional rights and warnings, and the defendant's waiver of those rights was knowing and voluntary. The statements the defendant made in text messages with FBI agent Kerner were voluntary and not the product of coercion by the government agent. There is no valid reason to suppress the statements or the text messages."

Facts:

> "Musaibli is an American citizen born in Dearborn, Michigan. In April 2015, he supposedly was radicalized after reading and viewing 'jihadi materials,' including lectures by Anwar al-Awlaki. That month, he traveled to Yemen. Six months later, he left Yemen and traveled to Syria by way of Saudi Arabia and Turkey. Upon arrival in Syria, he joined ISIS.

***

Musaibli was extracted from the Middle East on July 24, 2018. He says that when he was turned over to U.S. authorities, he had not eaten since the prior afternoon, and he had slept less than two hours within the prior 24 hours, although there is no record evidence backing up those assertions.

***

One hour after the plane took off for its 16-hour flight to the United States, agents Nutter and Kerner approached Musaibli and asked if he wanted to speak with them. When the agents spoke to the defendant his goggles were removed, and the noise cancelling earmuffs were replaced with a headset (the agents also wore headsets and ear protection) so the defendant and agents could communicate over the din of the aircraft noise. The agents offered the defendant food and water, which he declined. Instead, he 'immediately started telling 'Wendy' about what happened in the days after their last chat in June.' He asked if the agents had retrieved any of his personal property from the SDF, told the agents that he had slept the day before, and said that he 'wanted to 'cooperate 100%' with the FBI.'

Agent Kerner then provided a written advice of rights form and orally advised Musaibli of his *Miranda* rights. In addition to the standard advice of rights, the form also stated that the agents were unaware of any statements previously made by the defendant, any such statements could not be used against the defendant in U.S. courts, and he was not obligated to make any further statements because he previously had spoken to other U.S. authorities. Musaibli said he understood his rights and elected to waive them, and he signed the advice of rights form at 11:13 p.m. Eastern Time.

***

The interview recommenced at 9:15 a.m. Eastern Time after the defendant awoke, washed up, and was offered water and a bathroom break. He also ate some cereal. During the interview the defendant was again offered water around 11:00 a.m., and the interview ended at 11:35 a.m. The defendant then ate a hot meal and drank water. The agents conducted a final brief in-flight interview at 2:08 p.m. Eastern Time before the plane landed in Gary, Indiana. None of the interviews on the airplane were recorded.

***

When the plane landed in Indiana, the defendant was transferred to a minivan, and the goggles and handcuffs were removed. He was handcuffed again once he was seated in the transport van. Musaibli was transported a short distance to a nearby hangar for customs processing and to await transportation to Detroit. While in the hangar, he was interrogated again by agents Nutter and Kerner, and an audio recording was made of that interview. The interview began at 2:45 p.m., about 45 minutes after the plane landed, and it continued for only about 15 minutes. Kerner reminded Musaibli of his *Miranda* rights at the outset of the interview, and the defendant again acknowledged his rights and said he wanted to speak to the agents. The agents then asked several "clarifying questions" related to his prior statements, which the defendant answered. At the end of the interview,

the agents again offered the defendant water and a bathroom break, and then they drove him to Detroit.

***

It is undisputed that he was twice advised of his *Miranda* rights and affirmatively waived them orally and in writing. The first written notice of rights particularly advised him that [FBI] agents Kerner and Nutter did not know anything about statements he might have made during a prior interview with unidentified U.S. intelligence agents, which occurred while the defendant was held in an SDF prison. There is no evidence that the interrogating agents used any intimidating, deceptive, or physically abusive tactics during the questioning. The defendant does not dispute the government's representation that the two interrogators were unarmed and dressed in civilian clothes during the interrogations. The interrogation spanned one session of approximately five hours during a long-haul flight from Kuwait to the United States, with a follow-up session of around two hours and 20 minutes, brief follow-ups of a few minutes before the plane landed, and a final 15-minute session after arrival."

Legal Lesson Learned: The post-Miranda warning 5-hour interrogation during C-17 flight, and 2-hours upon arrival in U.S. were lawful.

Chap. 4 – Incident Command, incl. Training, Drones, Communications

File: Chap. 4

MI: INCIDENT COMMANDER IMMUNITY – HOUSE FIRE – BODY CHILD NOT FOUND 5 DAYS - NO GROSS NEGLIGENCE

On Dec. 21, 2021, in Kelly Dougherty, individually and personal representative of the estate of Kevin McGriff, Jr. v. City of Detroit, Detroit Fire Department and Sergeant Roger Harper, the Court of Appeals of Michigan held (3 to 0) that trial court should have granted Sergeant Harper's motion to dismiss under the Michigan Governmental Tort Liability Act (GTLA), since his conduct did not "amount to gross negligence that is the proximate cause of the injury or damage." The City and the FD were previously granted summary judgment under the GTLA.

"[W]we think it is too heavy a burden to impose an affirmative duty on firefighters to ensure the survival of individuals that are unobservable at the scene of a fire…. As defendant pointed out, imposing such a broad duty that places personal liability on firefighters not only contradicts established law, but could also have a chilling effect on recruitment of firefighters. Similarly, this enhanced burden would alter how long a firefighter must remain in a fire-compromised building, thereby jeopardizing his or her own safety and the safety of his or her crew…. We see no reason to impose an affirmative duty on firefighters requiring them to ensure the survival of individuals, who

firefighters are unaware that exist, and cannot be located despite numerous searches of an area."

Facts:

"This case arises out of a fire that occurred on March 5, 2018, at McGriff's house, where McGriff's deceased body was found in the kitchen five days later. At approximately 5:00 a.m. on the day of the fire, McGriff's father left the house while McGriff was sleeping in bed. At approximately 8:25 a.m., DFD dispatched firefighters to extinguish a fire at the house. Defendant was one of the first firefighters to arrive at the house, arriving approximately five minutes after the dispatch call. Defendant ordered firefighters to begin extinguishing the fire and search the house. After firefighters reported to defendant that there were no bodies or fire in the basement, defendant entered the house and began searching it himself. Once he concluded his search of the second floor and found no bodies there, defendant and another firefighter began inspecting the dining room and kitchen on the first floor. Although defendant could not confirm whether anyone else searched the kitchen before him, multiple firefighters reported that they were in the kitchen extinguishing a fire before defendant entered. Defendant asserted that the kitchen was well lit and clear of smoke when defendant searched it. Defendant reported that he was able to clearly see the areas in front of the lower kitchen cupboards and saw no bodies in the room. Other firefighters also searched the kitchen after defendant and also did not find McGriff's body. After defendant completed his search of the house and was satisfied that all other searches were completed, he informed DFD dispatch that the house was cleared of any individuals.

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Later that day, DFD informed McGriff's father that firefighters did not locate anyone inside the house. McGriff's father then searched the city for his missing son for five days until McGriff's body was discovered in the kitchen huddled by the stove. The medical examiner determined that McGriff died as a result of smoke and soot inhalation and thermal burns. Although defendant maintained he did not see the body in the kitchen during his search and did not know how the body ended up there, DFD disciplined defendant for failing to supervise a proper search of the house.

***

The circumstances surrounding McGriff's death are peculiar, especially considering that his 6-foot-2-inch body was subsequently found in a "cubby" between the cabinets and the stove in the kitchen.

***

Based on the evidence presented, reasonable minds might differ as to whether defendant was ordinarily negligent in the way he searched the house, but reasonable minds could not differ as to whether his conduct was grossly negligent. Nothing in the evidence suggests that defendant acted recklessly or willfully disregarded the safety of anyone he knew or suspected was in the house. Therefore, defendant was entitled to governmental immunity.

***

Reversed and remanded for entry of an order granting summary disposition in favor of defendant. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219. We do not retain jurisdiction. "

Legal Lesson Learned: Michigan governmental tort liability act protects Incident Commanders from personal liability unless proof of gross negligence.

Note: Ohio Revised Code, Section 2744.03, Defenses – Immunities, https://codes.ohio.gov/ohio-revised-code/section-2744.03
"(6) In addition to any immunity or defense referred to in division (A)(7) of this section and in circumstances not covered by that division or sections 3314.07 and 3746.24 of the Revised Code, the employee is immune from liability unless one of the following applies:
(a) The employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities;
(b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner…."

File: Chap. 4

WA: FED. GOV'T IMMUNITY - FIRE BREAK, 15 ACRES BURNED OK PROPERTY OWNER / IC DIDN'T PROMISE FOAM

On Dec. 17, 2021, in Alfred Cruz Esquivel and Donald David Willard v. United State of America, the U.S. Court of Appeals for the 9th Circuit (San Francisco) upheld the trial court's dismissal of the case based on holding that the FTCA [Federal Tort Claims Act] claims fell within the discretionary function exception to the FTCA's waiver of sovereign immunity, and the FTCA's misrepresentation exception. The Bureau of Land Management had rejected the property owners' claim of $5 million for burn of his 15 acres.

"Willard later swore that [IC Thomas] McKibbin 'convinced' him that the team 'would protect [the] property and make sure that [the] property would not be excessively burned.' Willard also declared that when he was old about the foam he thought 'it would be safe for [him] to leave.' McKibbin swears he does not recall any discussion of foam in his conversation with Willard. He also states in his declaration before the district court that it would be highly unusual for foam to be used during a burnout because foam is typically used only to contain the advance of a wildfire, while burnouts are performed under controlled conditions and normally do not need to be contained. McKibbin also swears that if 'Willard had wanted to forego a burnout, [McKibbin] would not have done one.' 'That would have put the entire property at extreme risk, but it was [Willard's] prerogative to take the risk if [Willard] wanted to.' *** Accepting as true the factual allegations contained in Appellants' complaint, we conclude as a matter of law that McKibbin's communication with Willard was 'based upon the exercise or performance' of choosing how to organize and conduct fire suppression operations, which undisputedly requires the exercise of judgment grounded in social, economic, or political policy. We therefore hold that the government has met its burden of establishing that Appellants' claims fall within the scope of the discretionary function exception."

Facts:

> “On August 12, 2015, the human-caused North Star Fire began to burn on the Colville indian Reservation in northeastern Washington. The fire eventually combined with several other naturally caused fires-including the large and complex Tunk Block Fire-to form the Okanogan Fire Complex. The Okanogan Fire Complex was then the largest wildfire in Washington State's history and burned more than 300, 000 acres throughout the Colville indian Reservation, the Colville National Forest, and Okanogan and Ferry counties.
> ***
> Before McKibbin and his team implemented the defensive measures, McKibbin spoke with Donald Willard who was then living in a motor home on the property. According to McKibbin, Willard expressed distrust of the federal government and worried that firefighters intended to excessively burn his land to save adjacent federal lands. McKibbin responded by assuring Willard that this was not the case, and that his crew was there to protect Willard's property. According to Willard, McKibbin also responded that Willard ‘didn't have to worry about excessive burning because he and his crew were going to spray foam around the area so that the fire could not spread very far.’
>
> ***
> After Willard consented to the burnout, McKibbin and his team began to implement the defensive measures. McKibbin stated that the fire crew ‘introduced a low-intensity fire along [the] fire line, which was in a remote corner of the property, and then allowed it to burn out under close observation.’ The crew then ‘secured the fire line, ceased operations, and monitored the area until [they] were confident the line would keep the wildfire from advancing through the night.’ The team remained on the property until ‘well after dark,’ by which point the ‘vegetation along the fire line had been fully consumed.’ After the crew ensured that any residual fire was not a threat, they left to eat, debrief with their commanders, and sleep.
>
> ***
> Here, Appellants do not dispute that McKibbin's communications with Willard were discretionary, nor do they direct us to any statute, regulation, or policy that dictates the precise manner in which fire crews are to communicate with landowners when conducting burnouts on their property.”

Legal Lesson Learned: The Federal Tort Claims Act includes exemptions from liability for discretionary decisions and also for alleged misrepresentations.

Chap. 5 – Emergency Vehicle Operations

File: Chap. 5

TX: RED LIGHT - AMBULANCE DRIVER LIGHTS & SIREN DIDN'T SLOW DOWN - OBSTRUCTED VIEW – NO IMMUNITY

On Dec. 30, 2021, in Seronda Gillespie and Torondia Talber v. Galveston County Health District, the Court of Appeals of Texas, Fourteenth District, held (3 to 0) that trial court is reversed and lawsuit reinstated. By entering into the obstructed intersection without slowing down as she had for prior red lights, there is sufficient evidence of "reckless disregard for the safety of others." The posted speed was 35 mph; paramedic was going about 40 mph.

> "The [County Health] District presented no evidence that a reasonably prudent official could have believed that Sanders-Fletcher was justified in entering the intersection without first slowing down under these circumstances. The District does not contend otherwise; it merely asserts on appeal that Sanders-Fletcher is entitled to official immunity because there is no fact issue as to whether her conduct was reckless and that the video shows her cautious speed and approach through the intersection. Because there is a genuine issue of material fact as to whether Sanders-Fletcher's conduct was reckless, the District's official-immunity argument cannot be sustained on this basis."

Facts:

> "Paramedic Brittany Sanders-Fletcher was on duty as a paramedic and ambulance driver for the Galveston County Health District when she was dispatched to pick up a patient for emergency transportation to the hospital. Paramedic Spencer Dauphine was in the front passenger seat, and a paramedic student rode in the back of the ambulance. Sanders-Fletcher's route lay along Broadway Avenue J in Galveston. On this street, a broad median separates the three east-bound lanes from the three west-bound lanes, and the speed limit in this area is 35 miles per hour. Sanders-Fletcher drove the ambulance east on Broadway Avenue J with the ambulance's emergency lights and siren activated. A police patrol car happened to be following a short way behind the ambulance, and its dashboard camera recorded the events that followed.
>
> When Sanders-Fletcher approached a red light at the intersection of Broadway Avenue J and 23rd Street, she slowed the ambulance nearly to a stop before proceeding through the intersection and continuing east toward 21st Street. The video taken from the patrol car shows that the median of Broadway Avenue J leading up to 21st Street is planted with trees and shrubs that largely obstruct the view between drivers traveling east on Broadway Avenue J and drivers traveling south on 21st Street.
>
> At the intersection of Broadway Avenue J and 21st Street, Sanders-Fletcher again faced a red light, but this time she did not slow down. The patrol car's video captured the scene immediately before the ambulance entered the intersection, and in the video, a white car, already in the intersection, is visible through a gap between a hedge and a tree on the median. When the ambulance was nearly across the intersection, the left front of the white car struck the left rear of the ambulance. The collision turned the white car more than 90 degrees, and the car rolled to a stop on the median west of the intersection. The

ambulance spun around, overturned onto its roof, and slid to a stop further west on the median.

***

The trial court points out that the car struck the ambulance, but it is also true that running the red light without slowing placed the ambulance in the car's path, and they collided less than one second after Sanders-Fletcher entered the intersection. Although the trial court found that Sanders-Fletcher 'was proceeding with appropriate caution,' a reasonable factfinder viewing the video properly could conclude otherwise."

Legal Lesson Learned: Operators of emergency vehicles should slow down when approaching a red light or stop sign, particularly if on a road with obstructed views.

Note: Ohio Revised Code Section 4511.03 | Emergency vehicles at red signal or stop sign. https://codes.ohio.gov/ohio-revised-code/section-4511.03

> "(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."

Chap. 6 – Employment Litigation, incl. Work Comp., Disability, Vet Rights

File: Chap. 6

IL: PENSION - INJURED MOVING WATERBOTTLES AT STATION – FF GETS PENSION FOR "ACT OF DUTY" INJURIES

On Dec. 28, 2021, in The Village of Roselle v. The Board of Trustees of the Roselle Firefighters' Pension Fund, and Ryan Case, the Court of Appeals of Illinois, Second District, held (3 to 0) that the Circuit Court judge had improperly reversed the Board of Trustees decision, and firefighter Ryan Case is entitled to a disability pension. His failure to inform the Village of prior back problems when working at four prior fire department is not a defense; it was the back injury on Sept. 18, 2016 when moving the bottles which led to the disability

> "As for the Village's assertion that the Board applied too broad a definition of 'act of duty,' that complaint is more properly directed at the General Assembly, which chose to define the term broadly. The Board's duty was not to craft its own, narrower definition but to apply the definition provided in the Code. The Board did just that, and we find no error in its decision."

Facts:

> "Case began working as a firefighter in December 2002. Over the next 13 years, he was employed at various times by the fire departments of Belvidere, Wauconda, Woodstock, and Cary. In June 2015, he was hired by the Village's fire department.
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> ***
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> Case's documented back problems also began in 2002 and thus go back at least as far as his work as a firefighter. Medical records from 2006, 2008, 2009, and 2012 show doctor visits for low back pain. None of his complaints of pain was associated with any injury and all were treated solely with muscle relaxants. The 2009 visit included an X-ray; the doctor Case saw reported that Case's X-ray and physical examination showed a normal back, with "excellent strength" in his arms and legs. The 2012 visit (to Dr. Haider, Case's primary care provider) included a complaint of pain with neck movement, but again there was no associated injury and the only treatment was muscle relaxants.
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> On September 18, 2016, Case was on duty. The fire department was preparing for their annual open house, during which the fire station would be open to the public. The shift commander ordered Case and another firefighter to perform various tasks in preparation, including moving cases of bottled water from one side of the station to the other and then filling a cooler with the bottles. While filling the cooler, Case felt a pop and pain, and began having a hard time moving his legs. Paramedics were called and Case was transported to a hospital emergency room. The MRI taken that day showed an acute right-side L5-S1 disk herniation compressing the S1 nerve root. Thereafter, Case began a course of treatment that included pain medications, physical therapy, cortisone shots, and eventual surgery to fuse his lumbar spine. He was permanently restricted to lifting less than 50 pounds and was unable to return to full duty as a firefighter/paramedic for the Village. He applied for a duty disability pension under section 4-110 of the Illinois Pension Code (Code) (40 ILCS 5/4-110 (West 2016)).
>
> Case was examined by three independent medical examiners (IMEs), who were provided with all of his medical records. The IMEs unanimously concluded that Case was disabled as a result of his September 2016 injury."

Legal Lesson Learned: To avoid "surprises" concerning medical conditions of new hires, Fire Departments can (1) require release of prior medical records, and (2) condition hiring on passing medical examination.

File: Chap. 6

IL: INJURED CHICAGO FFs PENSION - FREE AGE 65 – THEN MUST USE MEDICARE – PAY FOR ANY SUPPLEMENTAL

On Dec. 23, 2021, in Thomas Barry, et al. v. City of Chicago, the Court of Appeals of Illinois, First District (Fourth Division) held (3 to 0) that the City's obligation to provide premium-free participation in its group plan for active-duty firefighters ended when the plaintiffs became

eligible for Medicare. Unfortunately, the City had also allowed plaintiffs to participate in its Medicare supplement retiree health care plan until that plan was discontinued in December 2016.

> "We reject plaintiffs' argument that the Act guarantees lifetime premium-free health insurance under the City's group plan because the Act neither references Medicare nor states that benefits cease at a certain age. This argument seeks to add words to the Act that the legislature did not use and fails to construe the entire statute coherently. Although the Act does guarantee that injured firefighters will always have some type of health insurance coverage, whether from their former employer or another source like Medicare, the Act never states that premium-free coverage under the employer's group plan must last a lifetime. Instead, section 10(a)(1) of the Act explicitly limits the employer's obligation to pay premiums for its group health insurance plan when benefits are payable from any other source. The public employer's obligation to pay the premiums is not reduced based on the beneficiaries' age per se but rather based on the existence of benefits payable "from any other source." 820 ILCS 320/10(a)(1) (West 2018)."

Facts:

> "Nineteen plaintiffs filed a complaint in April 2019. They alleged that the Act required the City to provide them with premium-free coverage through its group plan for active-duty employees for the duration of their lifetimes regardless of their Medicare eligibility. Some plaintiffs also alleged that the City improperly terminated premium-free coverage for their spouses and children under age 26. Plaintiffs requested an injunction requiring the City to reinstate them in its group insurance plan for active-duty employees and sought damages in the amount of the premiums they paid for plans that supplemented their Medicare coverage.
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> ***
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> Under the Act's plain language, the City's obligation to provide the benefit the Act requires-the payment of premiums for the City's group health insurance plan-is reduced when Medicare benefits are available…. Accordingly, this court construes the plain language of the Act to conclude that it relieves the City of the requirement of paying health insurance premiums for Medicare-eligible individuals.
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> ***
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> The City argued section 10(a)(1) of the Act expressly limits employers' obligation to pay premiums for health coverage when other benefits are available, stating that "[h]ealth insurance benefits payable from any other source shall reduce benefits payable under this Section." 820 ILCS 320/10(a)(1) (West 2018). The Act also states that "[t]he term 'health insurance plan' does not include supplemental benefits that are not part of the basic group health insurance plan." Id. § 10(a). The City contended that because plaintiffs had Medicare, they wanted to use the City's plan for active-duty employees to supplement that coverage, but the Act does not require the City to pay premiums for supplemental coverage.
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> ***
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> According to the plain language of section 10(a), the Act provides that the '[h]ealth insurance benefits' that section 10(a) guarantees are the payment of premiums for 'the

employer's health insurance plan' (820 ILCS 320/10(a) (West 2018)); '[h]owever,' section 10(a)(1) reduces those benefits to the extent health insurance benefits are 'payable from any other source'*(id.* § 10(a)(1)). And subsections (a)(2) and (a)(3) limit the obligation to pay the premiums when a beneficiary is convicted of fraud. *Id.* § 10(a)(2), (a)(3)."

Legal Lesson Learned: The medically retired firefighters must pay for Medicare supplemental retiree health care insurance.

File: Chap. 6

PA: ASTHMA / LUNG ISSUES - 11 YEARS FIRE SCENES PHOTOS - WORKERS COMP IF CAN PROVE JOB CAUSED

On Dec. 23, 2021, in Peter DiLaqua v. City of Philadelphia Fire Department, the Commonwealth Court of Pennsylvania held (3 to 0) that the firefighters' claim is remanded for further evidence to be presented to the Workers Comp Judge; the court reversed the Workers' Compensation Review Board that had overturned the WCJ's finding that the firefighter's asthma and RADS (Reactive Airways Dysfunction Syndrome) were job related.

"At the WCJ hearings, Claimant testified that, although Employer provided respiratory protection equipment when he fought fires for the first two years of his employment, Employer did not provide such equipment when he photographed fire scenes for the VCU [Visual Communication Unit]…. Claimant estimated that he photographed 8 to 10 multiple-alarm fires per year and, over time, he photographed 50 to 70 rooms where deaths occurred…. Claimant explained that, for multiple alarm fires, he would be at a scene for 8 to 10 hours and, relative to death investigations, he would be at a fire scene for at least 6 hours…. Here, key to the Board's and this Court's review is whether Claimant proved his entitlement to WC benefits. Specifically, whether he proved the injury he alleged in the Claim Petition, and whether it was causally related to his employment (or he was entitled to the Presumption). Because those issues cannot be resolved by this Court, this matter must be remanded to the Board and the WCJ for application of the correct legal principles."

Facts:

"The City of Philadelphia Fire Department (Employer) hired Claimant as a firefighter in 2003. After 2 years of fighting fires, Claimant spent 11 years working for Employer's Visual Communication Unit (VCU). Although Claimant's VCU duties consisted mostly of office work, he was also required to go to and photograph multiple-alarm fires, fire fatalities, and other accident scenes where he spent numerous hours directly exposed to soot and fire debris…. '[Claimant's] eyes would tear and become red at the scenes. At the end of the day, his nasal mucous would be black and he coughed-up soot….' Over time, Claimant experienced asthma symptoms and he developed bronchitis approximately five times per year.

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In August 2016, after undergoing testing, Claimant's doctor informed him that he 'was suffering from RADS (Reactive Airways Dysfunction Syndrome)[,] which is a form of occupational asthma….' By August 22, 2016 letter, Claimant notified Employer of his RADS diagnosis and requested Employer to recognize his condition as a compensable work injury…. On September 26, 2016, Employer rejected Claimant's request and issued a Notice of Denial…. Claimant continued to work for Employer until June 2018, when he left work due to an unrelated elbow injury.

***

Based on the foregoing, this Court reverses the Board's order and remands the matter to the Board to remand to the WCJ for further proceedings consistent with this Opinion."

Legal Lesson Learned: PA has a helpful statutory presumption for diseases of lungs for firefighter with four or more years of service.

Note: See Ohio Revised Code 742.38, statutory presumption:

(3)(a) A member of the fund [Ohio police and fire pension fund] who is permanently disabled as a result of heart disease or any cardiovascular or respiratory disease of a chronic nature, which disease or any evidence of which disease was not revealed by the physical examination passed by the member on entry into the department or another examination specified in rules the board adopts under section 742.10 of the Revised Code, is presumed to have incurred the disease while performing the member's official duties, unless the contrary is shown by competent evidence. The board may waive the requirement that the absence of disease be evidenced by a physical examination if competent medical evidence of a type specified in rules adopted under section 742.10 of the Revised Code is submitted documenting that the disease was not evident prior to or at the time of entry into the department.

File: Chap. 6

PA: FF DIED LUNG CANCER – HEAVY SMOKER - 40% INCREASE - WIFE NO WORKERS COMP DEATH BENEFITS

On Dec. 13, 2021, in Vincent Regan v. City of Philadelphia (Workers' Compensation Appeal Board), the Commonwealth Court of Pennsylvania held (3 to 0) that the widow of Vincent Regan is not entitled to workers compensation, since the Administrative Law Judge found the city's expert witness very credible. He stated that "medical records revealed that Decedent began smoking at age 16, and quit at age 68 in 2008, with a 40- to 50-pack per year history of tobacco use. He said that the effect of a 40-pack per year history will increase the risk of lung cancer by 40 times." The PA statutory presumption law for firefighters was "fully rebutted" by the City's expert.

"Because the WCJ's credibility determinations were not made arbitrarily and capriciously and her findings are supported by substantial evidence, the WCJ's decision cannot be disturbed on appeal. *Id.* Further, we conclude that the WCJ's decision sets forth an adequate explanation of her reasons for accepting and rejecting evidence, and therefore satisfies the reasoned decision requirements of Section 422(a) of the Act. *See id.* at 1089

(noting that Section 422(a) does not require 'adequate reasons,' but an adequate explanation for those reasons, in order for appellate review to be meaningful). "

Facts:

"Decedent died on September 29, 2012. On November 26, 2012, Claimant, Decedent's widow, filed a Fatal Claim Petition alleging that Decedent died from metastatic lung cancer. Employer filed Answers to the Claim and Fatal Claim Petitions denying all of the material allegations raised therein.

***

Claimant testified that Decedent became a firefighter in 1974, following a three-year stint in the Army in Korea from 1969 to 1971, and that he worked continuously until he retired in 2008. She stated that she observed soot on his firefighting gear and smelled smoke on his gear. She said that Decedent started smoking when he returned from Korea and estimated that he smoked about half a pack a day until 2008. Claimant stated that Decedent's father was also a smoker and died from lung cancer as well as prostate cancer. She said that Decedent's sister had colon cancer and that Decedent had a number of aunts and uncles who had died of lung cancer as well. She testified that Decedent also had skin cancer and emphysema.

***

Claimant also submitted deposition testimony from two of Decedent's fellow firefighters, Joseph Hitchens and Gene Lancaster. Hitchens testified that he and Decedent fought 15 to 20 'good' fires together annually while working in the same platoon for Employer, and that he witnessed Decedent participate in various stages of firefighting.

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[Plaintiff's expert, Dr. Barry Singer, MD] testified that there is no question that Decedent was a heavy smoker but given the number of fire runs that he made while firefighting, there was significant exposure to fire and its carcinogenic contents, and that the combination would be synergistic in his development of lung cancer. Ultimately, he opined that Decedent's service and exposure to carcinogens as a firefighter was a substantial contributing factor in his death from lung cancer.

***

Employer presented the deposition testimony of Tee Guidotti, M.D., who is board certified in internal, pulmonary, and occupational medicine, and trained in the fields of epidemiology and toxicology. He stated that he has designed, performed, and analyzed hundreds of epidemiologic studies, including drafting three studies involving cancer risk in firefighters. He testified that on reviewing Dr. Singer's report, he was unable to state with any certainty that Dr. Singer used any method at all in arriving at his opinions because the report did not include any mention of what methodology was used. He pointed out several shortcomings in Dr. Singer's work, which spoke to the lack of methodology and lack of understanding of general scientific principles.

***

Employer also offered the deposition testimony of Andre Haas, M.D., Ph.D., a specialist in interventional pulmonary and thoracic oncology. He testified that his practice primarily focuses on treating patients by performing diagnostic procedures to establish a diagnosis, usually cancer, and he is primarily involved with the differentiation and diagnosis of lung cancers. He stated that medical records revealed that Decedent began smoking at age 16, and quit at age 68 in 2008, with a 40- to 50-pack per year history of tobacco use. He said that the effect of a 40-pack per year history will increase the risk of lung cancer by 40 times. He opined that Decedent's tobacco exposure is the primary etiologic agent of his lung cancer and outweighed his occupational exposure to carcinogens. He noted Decedent's family history of cancer revealed a genetic component placing Decedent at an increased risk to lung carcinogens and that 85% of lung cancer is due to genetic alterations caused by exposure to inhaled carcinogens. He testified that there is no strong data suggesting that firefighting plays a causal role in the development of lung cancer and opined that firefighting is not a substantial contributing factor in the development of lung cancer. He stated that the *Baris* study of Philadelphia shows that firefighters do not have a statistically significant higher incidence of lung cancer, and that although arsenic is a lung carcinogen, a firefighter's level of exposure to arsenic does not cause lung cancer because firefighters are not developing lung cancer at a higher rate than people who are not exposed to arsenic.

***

As outlined above, in this case, the WCJ specifically found that 'Dr. Guidotti's testimony that Dr. Singer did not employ a generally accepted methodology is unrebutted'; that '[t]herefore, Dr. Singer's testimony and opinions are incompetent as a matter of law and are rejected in whole'; that Dr. Guidotti's 'unrebutted testimony that general causation must be proven prior to rendering a specific causation opinion is hereby acknowledged as fact'; and that 'Dr. Guidotti's testimony that there is no causal link between lung cancer and the job of firefighting is accepted as fact.' WCJ 10/30/19 Decision at 10. Because the WCJ accepted Dr. Guidotti's testimony regarding general causation over that of Dr. Singer, Claimant did not carry his initial burden as to general causation under Section 108(r) of the Act to invoke the presumption in Section 301(f), and the burden of proof never shifted to Employer to prove specific causation as to Decedent's fatal lung cancer. Accordingly, contrary to Claimant's assertions, the Board did not err in affirming the WCJ's decision denying the Claim and Fatal Claim petitions."

Legal Lesson Learned: The statutory presumption for firefighters can be overcome by expert testimony, including evidence the firefighter was a heavy smoker.

Note: Ohio statutory presumption includes provision on firefighter use of tobacco products. Ohio Rev. Code 4123.68, includes following. https://codes.ohio.gov/ohio-revised-code/section-4123.68 i

> "(X)(1) Cancer contracted by a firefighter: 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.
(2) 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."

File: Chap. 6

WA: HEART - RETIRED FF - FAILED TO HAVE CARDIOLOGIST TESTIFY HEART CONDITION CAUSE EARLY SYMPTOMS

On Dec. 7, 2021, in Larry Spohn v. Department of Labor And Industries, the Court of Appeals of Washington, Division 2, held (3 to 0) that trial court is reversed and should not have granted the firefighter's claim for workers comp. The firefighter (firefighter from 1990 to 2013) submitted his application for benefits in 2017, his "application for benefits failed to include a physician's report or medical proof. The Department notified Spohn that it had not received the provider's section of the application four separate times."

> "Spohn contends that he is entitled to the presumption in RCW 51.32.185(1)(a)(ii) because he provided evidence that he suffered shortness of breath, fatigue, and other symptoms with 72 hours of exposure to smoke, fumes, or toxic substances and within 24 hours of strenuous physical exertion due to firefighting activities. But experiencing symptoms that could reflect a heart condition is not sufficient to trigger the presumption in RCW 51.32.185(1)(a)(ii) without a doctor providing a medical opinion that those symptoms were caused by a heart condition. As our Supreme Court has recognized, testimony about symptoms is not a substitute for a doctor's testimony that the symptoms were evidence of a specific health condition. Gorre, 184 Wn.2d at 38. Medical testimony is required to connect the symptoms that Spohn experienced to a heart problem. Spohn has not provided any admissible medical evidence that the symptoms he experienced were related to a heart problem."

Facts:
"Spohn was employed as a firefighter from 1990 to 2013. Spohn claimed an occupational disease; however, Spohn failed to provide any admissible medical evidence establishing a qualifying medical condition to support his claim for benefits.

> ***
> In 2017, Spohn filed a report of accident with the Department. The report identified the body part that was injured or exposed as the 'heart'" Administrative Record (AR) at 355. Spohn provided the following description of the injury or exposure, 'climbing hillside when experiencing shortness of breath along [with] many years exposure to toxic fumes and smoke. AR at 355.

The Department denied Spohn's claim for benefits because the application did not include a licensed physician's report or medical proof, the presumption of an occupational disease in firefighters did not apply, and Spohn's condition was not an occupational disease. After reconsideration, the Department affirmed the order denying Spohn's claim for benefits.

***

Spohn testified that he saw several cardiologists in 2008. He stated that in the summer of 2009, he had three stents placed in his heart. Spohn also testified that the placement of the stents helped his shortness of breath, fatigue, and chest pain.

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The IAJ concluded that Spohn's 2008 medical records were inadmissible as substantive evidence of Spohn's diagnosis and considered them only for the limited purpose of notice. The IAJ also concluded that Spohn 'was not competent to identify and diagnose heart problems for the purpose of the application of the presumption, within the meaning of RCW 51.32.185.' AR at 41. The IAJ ruled that Spohn's alleged heart problem was not an occupational disease and affirmed the Department's order rejecting the claim.

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The Department argues that the superior court erred by relying on medical records as substantive evidence because the medical records were inadmissible hearsay. To the extent the superior court relied on the medical records as substantive evidence, we agree.

***

Spohn also contends that the stents he received in 2009 are evidence that he was suffering from a heart problem. However, evidence of stents being placed in 2009 is not evidence that Spohn had a heart condition between 2006 and 2008, when Spohn testified that the symptoms occurred.

***

Because Spohn has not shown that he has a qualifying medical condition that qualifies for the presumption in RCW 51.32.185(1)(a)(ii), the superior court erred by granting Spohn's motion for summary judgment. Therefore, we reverse the superior court's summary judgment order. Further, because none of the facts of this case are in dispute and the Department properly rejected Spohn's claim, we remand for the superior court to enter summary judgment in favor if the Department."

Legal Lesson Learned: The former firefighter never provided medical testimony to support his claim.

Chap. 7 – Sexual Harassment, incl. Pregnancy Discrimination, Gay Rights

File: Chap. 7

OH: PUBLIC RECORDS - PERSONNEL FILE FEMALE OFFICER - SEXUALY ABUSED AS CHILD – HR RELEASED / PD SHARED

On Dec. 27, 2021, in Jane Doe, et al. v. City of Mansfield, et al., United States Magistrate Judge David A. Ruiz, U.S. District Court for Northern District of Ohio (Eastern Division), orders the lawsuit by the Police Sergeant to proceed against the city's Human Resources Manager in his personal capacity, and to proceed against the police officer for intentional infliction of emotion distress for disclosing records about her childhood abuse from age 7 to 18 to others. The records came from Polygraph examination when the Sgt. had applied to Ohio State Patrol.

> "Here, Mr. Remy [HR & attorney] reviewed the personnel file, determined that redactions were not necessary under State law, and disclosed the file in full to Officer Nixon. The record shows that Mr. Remy did not even consider Sgt. Doe's informational privacy interest protected under the Fourteenth Amendment or whether any means short of full disclosure of the information at issue, such as redaction or inspection without copying, would permit a narrow tailoring of any required disclosure…. On the record presented, however, Mr. Remy, a trained lawyer and human resources professional, failed to consider Sgt. Doe's longstanding informational privacy interests. Disclosure of her personnel file without any redaction of the sexual, personal, and humiliating information at issue was not narrowly tailored to serve a compelling governmental interest."

Facts:

> "The parties largely agree on the following events. Defendant Freeman Nixon has been employed by the Mansfield Police Department for about five and a half years as a patrol officer…. Officer Nixon has known Plaintiff Jane Doe since he started working there….. At some point, Ms. Doe became a sergeant and was Officer Nixon's supervisor. (*Id.*) The two had a difficult relationship.
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> ***
>
> A couple months later, in June 2018, Officer Nixon and Sgt. Doe had another incident at work in which she wrote up Officer Nixon for insubordination after he used department resources to wash his car, allegedly in violation of a direct order from Sgt. Doe…. The charged offense was cause for termination, so Officer Nixon figured reporting the earlier incident regarding the altered photograph 'wasn't going to stop what she was already doing to me.'
>
> ***
>
> After reporting the earlier incident involving the photograph, Officer Nixon was not informed how it was resolved or whether Sgt. Doe had been disciplined in connection with it, so he made a public records request for his personnel file and Sgt. Doe's.
>
> ***

Mr. Remy fulfilled Officer Nixon's request by December 17, 2018, a week after Officer Nixon made the request…. Officer Nixon retrieved both files and reviewed their contents…. Sgt. Doe's personnel file contained the following statement regarding her sexual history when she was a minor:

> Between the ages of 7 and 18 XXXXX…. According to Sgt. Doe, this behavior resulted from sexual abuse, though she concedes that a reader of that information from the polygraph might not have known as much and that she never told anyone about prior sexual abuse.

Before releasing Sgt. Doe's personnel file without redactions, Mr. Remy gave no consideration to federal law beyond the requirements of the Health Insurance Portability and Accountability Act of 1996…. Nor did he advise Officer Nixon not to share the contents of the personnel files with anyone else.

***

Officer Nixon showed the document to one sergeant and two officers in the department.

***

After Sgt. Doe filed suit, Officer Nixon told his friend about the lawsuit…. He also told 'some close family members' an 'all inclusive story from the beginning to the end of what happened.'

***

Sgt. Doe testified that when she learned about Officer Nixon's disclosure to her colleagues, she 'literally lost my mind.' When she contacted her supervisor after learning about the disclosure, he told her to leave work and go home, which she did. She called her husband from the car and 'got through a conversation with him' 'because of course he didn't know' about the information disclosed. (*Id.*) She hyperventilated on the way home and testified that 'the next six weeks of my life is a complete blur.'

She visited the emergency room in February 2019 with stomach and back problems, testifying that she 'couldn't eat,'but she was not admitted to the hospital. She did not work for six weeks and started seeing a counselor within the first week of the disclosure. Sgt. Doe testified that she retained a lawyer shortly before she started seeing a psychologist after the disclosure. Previously, she had never had psychological treatment (*id.*), but she suffered from depression for the first six months to a year afterward. She now sees two mental health professionals. One prescribes medications, and the other offers counseling services. (*Id.*)

After six weeks, Sgt. Doe returned to work. To avoid running into Officer Nixon, she does not accept overtime hours. (*Id.*) She testified that she is now irritable and has trouble focusing on work. (*Id.*) During the course of this lawsuit, she filed for disability to leave the police department due to post-traumatic stress related to this injury and for an unrelated physical injury.

Officer Nixon was terminated for disclosing the information in Sgt. Doe's personnel file. He went to work as a deputy in the Ashland County Sherriff's Department from about

August 2019 to February 2020, when he returned to his position in Mansfield after prevailing in the grievance from his termination.

***

Officer Nixon testified that he disclosed the information in Sgt. Doe's personnel file out of genuine concern that she was not fit as a police officer. In that event, Officer Nixon argues that a higher standard requiring malice applies. A jury may well accept such a rationale for Officer Nixon's disclosure, but that explanation for the disclosure presents a dispute of fact. The record also shows that Sgt. Doe and Officer Nixon had a troubled relationship at work and engaged in an escalating tit-for-tat pattern that could lead a jury to view the disclosure as intentionally embarrassing or harassing and unrelated to good-faith concerns about Sgt. Doe's fitness for duty. Further, the face of the disclosure reveals a co-worker's sexual conduct while a minor, which is highly personal and sensitive. On these facts, reasonable finders of fact could differ as to whether Officer Nixon knew or should have known his disclosure of the information would cause Plaintiff emotional distress and whether he acted with the requisite intent."

Legal Lesson Learned: Public records requests involving employee personnel files must be very carefully reviewed; consider inviting the employee to participate in the review prior to release.

File: Chap. 7

DE: FEMALE FF LAWSUIT TO PROCEED – "ME TOO" EVIDENCE BY OTHER FF OF HOSTILE WORKPLACE

On Dec. 3, 2021, in April D. Molchan v. Delmar Fire Department, Inc., U.S. District Court Judge Maryellen Noreika, U.S. District Court for District of Delaware, denied in part the FD's motion for summary judgment. The Judge ruled there is sufficient evidence misconduct by former Fire Chief "because several declarants appear to have experienced or witnessed" conduct." The Judge dismissed the plaintiff's retaliation claim; she was removed from paid position, along with two other paid firefighters, based on bylaw changing requiring all personnel to either be paid or volunteer members.

"According to the Supreme Court, 'me too' evidence is neither '*per se* admissible or *per se* inadmissible.' *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 388 (2008). The determination of the relevance of this evidence 'is fact based and depends on several factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case.' *Mandel*, 706 F.3d at 167. Here, the Court is persuaded that at least some of the offered 'me too' evidence is relevant, at least because several declarants appear to have experienced or witnessed Rementer's harassment and suggest that Delmar FD was aware of repeated instances of it. Some of the evidence also suggests that [former Fire Chief Andrew] Rementer's conduct was well-known within the fire department and thus may bear on whether Plaintiff subjectively perceived the environment to be abusive. And finding that, the Court is persuaded that genuine issues of material fact exist that preclude summary judgment of Plaintiff's hostile work environment claim."

Facts:

"Plaintiff was a volunteer member with Delmar FD starting in 2009, and she was a paid employee of Delmar FD from 2009 to December 27, 2018…. At the core of this matter is the behavior of Andrew Rementer ("Rementer"), a former defendant to this lawsuit…. Plaintiff claims that Rementer had a history of making 'suggestive comments and employ[ing] sexual innuendo in conversation' with her and other female Delmar FD members and employees….. On September 8, 2015, Rementer - who was then Fire Chief - and Plaintiff, along with two other Delmar FD officers, were returning from a meeting in Dover when they stopped for lunch in Greenwood…. At that lunch, Rementer purportedly placed his hand on the inside of Plaintiff's thigh and Plaintiff 'immediately and forcefully told him to remove his hand….' Rementer complied…. Nearly two years later, on July 30, 2017, while Plaintiff was on duty as a paid Delmar FD employee, Rementer - who was then President and Second Assistant Chief of the Delmar FD - placed his hand on Plaintiff's buttocks while walking behind her…. Plaintiff reacted and Rementer replied, 'I'm sorry, I can't do that. You're paid today not volunteer….' Surveillance video captured the incident.

***

On August 20, 2017, Plaintiff sent a complaint letter regarding Rementer to the Delmar FD Employment Committee Chair and the Fire Chief…. That same day, prior to a Delmar FD membership meeting, the membership allegedly asked Rementer to resign as President…. At the meeting, the membership announced that an employee had filed a complaint against Rementer…. Subsequently, the membership announced that Rementer was suspended for thirty days or until an investigation into a complaint of "improper conduct" against him concluded…. Further, the membership mandated that he attend sexual harassment training.

***

On September 18, 2017, the House Committee questioned Rementer about previous complaints of inappropriate touching by other female Delmar FD members; at least one instance was confirmed by the Fire Chief…. The House Committee's recommendation to expel Rementer from the Delmar FD received a simple majority of votes…. The House Committee did not expel Rementer because the bylaws required a 'third offense' and a two-thirds majority vote…. Rementer resigned as President and Second Assistant Chief but, about a month later, was appointed as Engineer, a leadership position within the organization.

***

In December of 2017, the House Committee amended several of its bylaws, one of which mandated that individuals choose between volunteer or employee status…. The bylaws allowed for amendments at only two points in the year: June and December…. The relevant amendment stated: 'Any member, Life, Active, Honorary, or Fire/EMS Associate may not work and collect money from the Delmar Fire Department. Members who want to apply for employment must first resign before submitting the application….' The amendment's purpose was 'the avoidance of wage and hour issues by preventing a situation in which a volunteer member claims he or she was actually working and is due

wages or precluding a volunteer member from getting a cash award from the state for volunteering, while also being paid by the volunteer fire company to work…." This change was an ongoing discussion amongst the membership; Keith Abbott ('Abbott'), the Employee Chair, stated: "I knew there had been some talk before about the legality of volunteering, getting a LOSAP [length of service award program] check from the state and getting a paycheck from the department. I wasn't surprised it was coming.'

***

The amendment, at that time, applied to three individuals: Plaintiff, Abbott himself, and Roland Morris, and it also 'impacted all members of DFD, current and new….' The parties dispute whether the House Committee notified Plaintiff of this change and her need to act…. Defendant provided Exhibit 15, a series of text messages, that appear to have informally notified Plaintiff…. According to Defendant, Plaintiff did not choose one role or the other.

***

On December 27, 2017, Plaintiff was removed from the work schedule, her previously scheduled shifts were cancelled, and she was apparently removed from the payroll as well…. Plaintiff asserts that the bylaw amendment was therefore 'simply a pretext to terminate [her] and which, on knowledge and belief, has not been applied to any other member…' She further claims that one of the other individuals, whom she does not name, was permitted to keep both his membership and his employment.

***

An email from Abbott to another employee, dated January 17, 2018, stated the following: 'Remove Roland Morris from the payroll. Remove April Molchan from the payroll. Remove Keith Abbott from the payroll.'

***

Plaintiff argues that the bylaw amendment operated as a form of retaliation against her for filing a complaint against Rementer…. Here, assuming that Plaintiff is able to make out a prima facie case of retaliation, there is no real dispute that Defendant has offered a legitimate, non-retaliatory reason to adopt the bylaw amendment. The bylaw amendment was one of thirteen introduced as a group four months after her complaint. The purpose of the bylaw amendment was to avoid wage and hour liability involved in having workers logging time as both volunteers and paid employees. And the bylaw amendment impacted all members of Delmar FD, current and new, and required at least two other members to elect between paid employment and volunteer work."

Legal Lesson Learned: "Me too" evidence can be very damaging when presented by numerous witnesses to the jury.

File: Chap. 7

PA: FEMALE EMT - ONLY ONE MINOR INCIDENT OF OFFENSIVE CONDCT – NO HOSTILE WORKPLACE PROVEN

On Dec. 1, 2021, in Tracy Szyper v. American Medical Response Mid-Atlantic, Inc. et al., U.S. District Court Judge Chad F. Kenny granted defendants' motion for summary judgment. Plaintiff was hired on May 17, 2018, and on June 27, 2018 she went outside to smoke a cigarette and heard Manager (after he told her to cup her ears), talking to two other male employees about a webinar on EVOC "that made my dick hard." She heard the comment and was offended. She alleges the Manager then "proceeded to grab me by my wrist and say something along the lines of 'Help me fix my problem' which she took as a sexual proposition. The Judge noted a different meaning to the comment: "One witness to the event, Mr. Papakonstantinou, stated that Mr. Brock only gently took Plaintiff's wrist to lead Plaintiff away from them to 'fix the problem' of her eavesdropping on their conversation. The next day she was interviewed by AMR management and refused to return to work unless AMR fired Mr. Brock; and she was terminated.

> "The Court finds that Mr. Brock's isolated statements and actions do not rise to the level of 'severe or pervasive' conduct required to maintain a Title VII/PHRA claim. Plaintiff only identifies one incident of offensive conduct. See Breeden, 532 U.S. at 270-271 (a single incident of lewd, allegedly joking, comments made by a supervisor were 'at worst an isolated inciden[t] that cannot remotely be considered extreme and serious' enough to violate Title VII) (internal citations omitted). Plaintiff concedes that prior to the relevant incident Mr. Brock 'had never said anything to Plaintiff that she regarded as inappropriate…. After the incident, Mr. Brock did not interact with Plaintiff for the remainder of her time at AMR…. Thus, there is no allegation of ongoing harassment. *** Looking at the totality of the circumstances in this case, the single incident alleged was not severe enough to be sexual harassment. Unlike Bacone, where the plaintiff was alone when his harasser grabbed plaintiff's groin, here the incident occurred in an area that was open to public view and Plaintiff was easily able to leave the situation…. In fact, this incident was observed by two other co-workers…. Additionally, the comments made by Mr. Brock to his co-workers and the Plaintiff did not surpass the level of a mere offhand remark or joke."

Facts:

> "Plaintiff began working for Defendants American Medical Response Mid-Atlantic, Inc. and American Medical Response, Inc. (collectively 'AMR' or the 'AMR Defendants')[on May 7, 2018 as an Emergency Medical Technician ('EMT')…. Plaintiff worked at AMR's Philadelphia office which is located on Essington Avenue…. Defendant Mr. Leslie Brock interviewed Plaintiff for her position at AMR.… Mr. Brock also conducted Plaintiff's Emergency Vehicle Operator Course ('EVOC') training, during which he was alone with Plaintiff for around one hour…. Plaintiff stipulates that Mr. Brock never said anything to her during the interview or training that Plaintiff felt was inappropriate…. On June 27, 2018, Plaintiff went outside behind AMR's main building to smoke a cigarette while waiting for a new ambulance…. Plaintiff saw Mr. Brock speaking to two other male AMR employees, Nicholas Kirschner and Christos Papakonstantinou…. Plaintiff was not part of the conversation between the three men; she was standing off to one side…. Mr. Brock and the two other AMR employees were discussing, in part, a webinar for a national EVOC training course…. On her employee incident report, Plaintiff recounted what happened next, saying, in part:

> Brock had told me to cover my ears. I looked at him & said jokingly 'I'm not listening to you anyway.' He asked me again to cover my ears. I cupped my hands over my ears but could still hear what was said. Brock said to Papa and Nick, 'that made my dick hard.' I uncupped my hands and told him I heard what he said. Brock then proceeded to grab me by my wrist and say something along the lines of 'Help me fix my problem.'

> Plaintiff then told Mr. Brock to get off her, put her cigarette out, and went back inside…. The incident made Plaintiff "feel extremely uncomfortable…." Plaintiff understood Mr. Brock's comment stating that Plaintiff could 'solve his problem' to be a reference to wanting to have sex with her and viewed his conduct as an 'unwelcome sexual advance.' Plaintiff further stated in her report that 'until said issues [are] resolved, I refuse to work my scheduled shifts.'

> ***

> On June 28, 2018, AMR interviewed Plaintiff about the incident…. The interview was conducted by Mr. Brown, the person in charge of the Philadelphia office, and Ms. Byers, who worked in AMR's Human Resources Department…. In the interview, Plaintiff was asked if she felt threatened by Mr. Brock…. Plaintiff responded, 'I would go with uncomfortable….' Plaintiff testified that she likely had joked around with Mr. Brock prior to this incident…. Additionally, prior to this incident Mr. Brock had not touched Plaintiff inappropriately and he never touched her breast, groin, or face.

> At the AMR interview, Plaintiff stated that she would not return to work until the situation was resolved…. Plaintiff did not see or communicate with Mr. Brock again during the remainder of her employment at AMR…. Plaintiff was asked to return to work but refused because AMR had not terminated Mr. Brock.

> ***

> The Court finds that Mr. Brock's isolated statements and actions do not rise to the level of "severe or pervasive" conduct required to maintain a Title VII/PHRA claim. Plaintiff only identifies one incident of offensive conduct.

Legal Lesson Learned: Excellent decision.

Chap. 8 – Race / National Origin Discrimination

File: Chap. 8

KY: REVERSE DISCRIM. NOT PROVED - WHITE POLICE MAJOR DEMOTED LT. – USED "N" WORD IN RECRUIT CLASS

On Dec. 29, 2021, in Aubrey E. Gregory, Jr. v. Louisville / Jefferson County Metro Government, U.S. District Court Judge Claria Horn Boom granted the City's motion to dismiss; Major

Gregory (Caucasia) was Director of the Training Academy for the Louisville Metro Police Department, and during a classroom discussion on cultural diversity with Recruit Class 48 on May 20, 2021, he and African-American retired firefighter, and black man from Africa, discussed use of the "N" word. The next day, Police Chief Erika Shields, called him and suspended him. On June 4, after interview with County HR and another with Police Chief, he was demoted to Lieutenant (and retired Aug. 1, 2021). The Judge held that plaintiff "utterly fails to allege any facts that even hint at Defendants being 'that unusual employer who discriminates against the majority.'"

> "The only two individuals mentioned in the Complaint are the two African American men also involved in the May 19, 2021, incident. While Gregory alleges he and the two African American individuals engaged in the same conduct (i.e., used the same racial epithet in a LMPD classroom setting), he wholly fails to allege how these individuals are similarly situated in any other relevant respect. The Complaint contains no factual allegations that both Gregory and the African American individuals dealt with the same supervisor, were subject to the same standards, or had similar job responsibilities."

Facts:

> "On May 19, 2021, Gregory entered the classroom of Metro Academy Class 48 to instruct recruits, who were all present, on "isms, " including racism, sexism, implicit bias, cultural diversity, and other related topics….Upon entry into the classroom, Gregory found two African American men discussing the use of a racial epithet…. One of the men was from Africa and the other was a retired firefighter.
>
> ***
>
> During their discussion, both men were using the racial epithet…. The individual from Africa stated that at the time of his immigration to the United States, he was not warned that the use of the racial epithet was offensive in America…. He explained that in his home country, the racial epithet was not offensive, but simply meant black…. He then went on to say that he was a [the racial epithet] because he is black…. The retired firefighter responded by stating that the racial epithet had multiple meanings in America--sometimes it means family or kinship, and sometimes it is offensive…. He then turned to the class of recruits and told them that that they had better be prepared because they were going to hear the racial epithet in certain communities in the Metro…. In support of his statement, the individual told the recruits that because Gregory (i.e., the Major), had worked in such communities for years, he could confirm the use of the racial epithet within the communities…. At this point, Gregory addressed the recruits, stating, '[Y]es, you are going to hear [the racial epithet] out there. Sometimes it does mean family or like a kinship of shared struggle, and sometimes it is the most derogatory, disgusting word you will hear; but you are going to hear it.'
>
> ***
>
> The next day, on May 20, 2021, Gregory was contacted via telephone by Chief Erika Shields, who stated that she had heard that Gregory used a racial epithet during training class…. Gregory acknowledged his use of the racial epithet and explained the context in which it was used…. Chief Shields then instructed Gregory to not report to work until she decided what was going to be done about the situation…. Gregory talked with

> various members of the LMPD about the matter, including Deputy Chief Gwinn-Villarreal, who advised Gregory to retire even though no one believed he used the racial epithet in a derogatory manner…. On May 24, 2021, Gregory was interviewed by Louisville Metro Government Human Resource representative Adrian Henderson…. Gregory informed Henderson of the facts of the incident in question and Henderson stated that Gregory's account matched what other interviewees had reported…. On June 1, 2021, Gregory met with Chief Shields alone…. Three days later, on June 4, 2021, Gregory was presented with a letter of demotion, which demoted him from Major to Lieutenant…. Gregory retired from the LMPD on August 1, 2021.
>
> ***
>
> Gregory has not adequately pleaded a claim under 42 U.S.C. § 1985. In his Complaint, Gregory fails to allege any facts plausibly supporting the existence of a conspiracy between the Defendants to deprive him of his rights."

Legal Lesson Learned: Even when conducting cultural sensitivity training, avoid the use of the "N word" and other highly sensitive terms.

Chap. 9 – Americans With Disabilities Act

File: Chap. 9

MD: DEAF APPLICANT TO VOLUNTEER FD – REJECTED - WAS VOLUNTEER IN PA – LAWSUIT PROCEED DISCOVERY

On Dec. 9, 2021, in Charles Hine v. Prince George's County, Maryland and Morningside Volunteer Fire Department, Inc., U.S. District Court Judge Theodore D. Chuang, U.S. District Court for District of Maryland, denied the County's motion to dismiss. Pre-trial discovery will gather facts on (1) does the County have sufficient control over the volunteer FD to be considered a joint-employer, and (2) does the volunteer FD provide sufficient compensation or other benefits to be considered an employer under federal ADA and Title VII employment discrimination laws.

> "Determining whether an entity exercises sufficient control to qualify as an employer is 'a highly fact-specific' endeavor. Id. at 410, In his Rule 56(d) affidavit, Hine notes that the denial letter he received 'was sent by the Prince George's County Office of Law on behalf of the Prince George's County Fire & EMS Department,' not by the MVFD…. This assertion supports Hine's contention that there is a factual dispute over whether the County was an employer for purposes of the denial of Hine's application that should not be resolved without discovery. *** Hine has pleaded in the Amended Complaint that he would have been an employee based on the 'significant benefits' he would have received as a volunteer firefighter, including disability and survivor benefits, insurance benefits, tuition reimbursement, tax exemptions, and other benefits."

Facts:

"In February 2017, Hine applied to work as a volunteer firefighter and emergency medical technician ('EMT") for the MVFD, a non-profit corporation located in Suitland. Maryland which Hine alleges to be an instrumentality of the County. Hine is deaf and is thus substantially limited in the major life activities of hearing and speaking. Nevertheless, Hine previously served as a volunteer firefighter in Pennsylvania with no restrictions on his duties.

***

As part of the application process with the MVFD, Hine was referred for a physical examination. On March 8, 2018, Defendants informed Hine that he did not meet the standards set by the Prince George's County Fire Department to become a firefighter because of his '[f]ailed medical examination (Hearing Loss).' Am. Compl. 117, ECF No. 26. Although Hine submitted additional records relating to past hearing test results, and requested an opportunity to receive another hearing test, on February 23, 2019, the County sent him a denial letter informing him that he did not meet the standards to safely perform the essential functions of the position. Hine alleges that the County and MVFD are joint employers because they were both involved in the hiring process, and that he would have been hired as a volunteer firefighter if not for Defendants' discriminatory policies, practices, and procedures.

***

On June 12, 2019, Hine timely filed a charge of discrimination ('the Charge') with the United States Equal Employment Opportunity Commission ('EEOC') and the Maryland Commission on Civil Rights ('MCCR'). The EEOC issued a Notice of Right to Sue on July 28, 2020, and Hine filed his Complaint in the present case on October 9, 2020, within the requisite 90 days of the issuance of the Notice.

***

The County also argues that Hine's employment discrimination claims should be dismissed because the County is not an employer within the meaning of the applicable federal and state statutes. Title I of the ADA provides that '[n]o covered entity,' which includes an 'employer,' 'shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.' 42 U.S.C. §§ 12111(2), 12112(a). Specifically, the County asserts that it is not an employer because it does not have sufficient control over MVFD volunteer firefighters and because the position sought by Hine was a volunteer position for which there was not sufficient compensation for such a firefighter to constitute an employee under those statutes.

***

Where the question of whether the County qualifies as an employer for purposes of the employment discrimination claims involves two fact-based inquiries for which the County asks the Court to rely on its submitted evidence, the Court agrees with Hine that

discovery is necessary before it may resolve this question. The Court will deny the Motion as to this issue."

Legal Lesson Learned: The lawsuit will now proceed to pre-trial discovery; the Court did not indicate the hearing loss of the plaintiff.

Note: See article: "Can You Be A Firefighter With Hearing Loss/Hearing Aids?"
If you suffer from a Category A condition, then you are likely to be immediately be prevented from taking up a firefighter's job. This is because these conditions have been demonstrated to put the safety of both the individual and their firefighting peers at risk. *** If you have a Category B condition, then you will need an examination from a health professional that is trusted by your potential employer to determine whether or not you are suited to firefighting.

See NFPA 1582 Standards - 9.3.4.2 (2022) – Minimum Hearing Standard:

"Hearing aids or other hearing assistive devices shall be required for members who have an average hearing loss in the unaided better ear greater than 40 decibels (dB) at 500 Hz, 1000 Hz, 2000 Hz, and 3000 Hz when tested on an audiometric device calibrated per ANSI / ASA S.36, *Specification for audiometers*."

See 2016 NFPA 1582 Standards version:

6.5.1: Category A medical conditions [would preclude person performing in emergency operational environment] shall include the following:
(2) On audiometric testing, without the aid of a hearing assistance device, average hearing loss in the unaided better ear greater worse than 40 decibels (dB) at 500 Hz, 1000 Hz, 2000 Hz, and 3000 Hz when the audiometric device is calibrated to ANSI Z24.5, Audiometric Device Testing
6.5.2
Category B medical conditions [could preclude person performing in emergency operational environment] shall include the following:
(2) Average uncorrected hearing deficit at the test frequencies 500 Hz, 1000 Hz, 2000 Hz, and 3000 Hz worse than 40 dB in either ear.

See "EEOC Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the Ada." (July 27, 2000.)

"The ADA's provisions concerning disability-related inquiries and medical examinations reflect Congress's intent to protect the rights of applicants and employees to be assessed on merit alone, while protecting the rights of employers to ensure that individuals in the workplace can efficiently perform the essential functions of their jobs.

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

Chap. 11 – Fair Labor Standards Act

Chap. 12 – Drug-Free Workplace, inc. Recovery

File: Chap. 12

LA: DRUG TEST - EMT FAILED / FIRED - INJURED BACK WITH PATIENT – TOOK WIFE'S BARBITURATE PILLS BEFORE TEST

On Dec. 22, 2021, in Antoine Dufrene v. Northshore EMS, LLC, Court of Appeals of Louisiana, Fire Circuit, held (3 to 0) that trial judge properly granted summary judgment to the employer which terminated the EMT for breach of Drug-Free Workplace policy; plaintiff failed to that he was fired in retaliation for filing workers comp claim.

> "[W]e find that the plaintiff failed to produce sufficient factual support demonstrating the existence of a genuine issue of material fact on the question of whether he was terminated from his employment due to him filing a workers' compensation claim. The evidence offered by the plaintiff in opposition to the motion for summary judgment did not establish that he could demonstrate a causal connection between his termination of employment and his workers' compensation claim with any reasonable probability. In fact, the plaintiff offered no evidence to rebut the defendant's claim that his employment was terminated due to the plaintiff's violation of the defendant's Drug-Free Workplace policy. Therefore, the trial court correctly granted summary judgment in favor of the defendant."

Facts:

> "The defendant hired the plaintiff as an emergency medical technician (EMT) on August 21, 2013 as an at-will employee. On July 30, 2017, the plaintiff allegedly sustained injuries in an altercation involving a patient while on duty as an EMT. Due to the altercation, the plaintiff reported the incident to the defendant on August 2, 2017 and told the defendant's Operations Manager, Eric Reed, that he wanted to submit a claim for works' compensation under La. R.S. 23:1201, et seq. Mr. Reed informed the plaintiff that he needed to prepare an incident report and get a drug screen that same day, August 2, 2017.
>
> On August 3, 2017, the plaintiff submitted the incident report to the defendant, which stated that his back pain was so severe from the incident on July 30, 2017, that he sought treatment in the emergency room at Lakeview Regional Medical Center on August 1, 2017.
>
> ***
>
> On approximately August 22, 2017, the defendant learned that the plaintiff tested positive for barbiturates and butalbital from the drug screen administered on August 2, 2017 at the St. Tammany Parish Hospital emergency room. That same day, the defendant contacted the plaintiff and gave him an opportunity to provide a written response as to why he tested positive for the drugs. In his written response, the plaintiff stated that his back pain was so severe from the incident on July 30, 2017 that he sought treatment at Lakeview Regional Medical Center on August 1, 2017.

Prior to going to Lakeview Regional Medical Center, the plaintiff had an appointment with Dr. Harry Jasmin, his treating physician for his opioid addiction, wherein he was randomly drug tested. The plaintiff stated that the back pain worsened, so he took one of his wife's prescribed fioricet tablets the night before he provided a drug screen sample to the St. Tammany Parish Hospital emergency room on August 2, 2017.

***

On August 31, 2017, the defendant sent the plaintiff a letter of termination due to his violation of the defendant's Drug-Free Workplace Policy. The termination letter further stated that the defendant did not find the plaintiffs explanation to be sufficient grounds to waiver from the Drug-Free Workplace Policy. The defendant later learned that on August 1, 2017, the plaintiff tested positive for buprenorphine during the drug screen with Dr. Jasmin.

***

Footnote 4: Dr. Jasmin stated in his deposition that the plaintiff did not tell him that he had injured himself and was suffering with back pain during his August 1, 2017 appointment. Dr. Jasmin further stated that the plaintiff was undergoing opioid treatment with suboxone, which is buprenorphine. The plaintiff had been treated for his opioid addiction with suboxone for over five years.

***

Although the plaintiff may have been upset and insulted after reading his termination letter, the receipt of this correspondence regarding his employment does not rise to a cause of action for intentional infliction of emotional distress, as he was clearly aware that violating the defendant's Drug-Free Workplace Policy could result in his termination of employment."

Legal Lesson Learned: Drug-Free Workplace policies, including post injury drug testing, are lawful for EMS and other emergency responders.

Note: Drug-Free Workplace policies should require all personnel to report in writing if they are on prescribed medication.
For example, see Court's comment in this case.

> "Dr. Jasmin further stated that the plaintiff was undergoing opioid treatment with suboxone, which is buprenorphine. The plaintiff had been treated for his opioid addiction with suboxone for over five years."

See also this info on suboxone:

> "Suboxone does sometimes create mild side effects such as dizziness that could affect your ability to do certain types of work. You will begin using suboxone while you are in the treatment center and under the care of your medical team. This allows you to learn how your body responds to the suboxone before you ever return home and go back to work. In most cases, you will find that any side effects that you experience are mild enough that they do not affect your ability to perform your job duties. In fact, you will be better able to maintain a career when

you are not stuck in the throes of dealing with addiction. Keep in mind that adjustments to your dosage could alter your reaction so always follow the medication instructions and be cautious about activities such as driving until you know how you react."

File: Chap. 12

LA: URINE TEST – "SHY BLADDER" - 1st SAMPLE TOO COLD - 3 HRS NO SAMPLES – REHIRED – BREACH FED. PROTOCOL

On Dec. 1, 2021, in Roy Neely v. Department of Fire [New Orleans], the Court of Appeals of Louisiana, Fourth Circuit, held (3 to 0) that the City Civil Service Commission properly ordered the 11-year firefighter (no prior discipline) reinstated. "Had the SAMHSA [federal Substance Abuse and Mental Health Services Administration] guidelines been followed, an alternate specimen would have been quickly collected or a medical evaluation would have occurred within five days, thereby facilitating the agency's efficient operation." The Court noted that the FD could have provided in its protocol for hair or blood testing for "shy bladder" cases.

> "Analyzing these guidelines together, it is evident that the appellee's conduct did not characterize a refusal to test. He appeared for the test, underwent and passed the first portion of it, stayed on the premises for the duration of the test, drank more than the minimum amount of fluid to facilitate urination, made three observed attempts to provide a sample, and expressed a willingness to undergo additional testing when he was unable to provide a second specimen. The appellee believed that he would have an opportunity to provide an alternate specimen, and when one was not requested, he paid for an additional test himself. The appellant failed to follow the mandatory testing protocol set forth in SAMHSA by not requesting an alternate sample or ordering a medical evaluation, and incorrectly concluded that the appellee's behavior constituted a refusal to test. *** The comments reveal that in drafting updates to the guidelines, a commenter requested that immediate alternate collections be made mandatory, to avoid additional costs associated with medical evaluations of "shy bladder" that would otherwise be necessary. Instead, the Department gave agencies the authority to decide whether to implement a standard protocol requiring an immediate alternate specimen, or to decide on a case-by-case basis whether to request an alternate specimen. This commentary illustrates a collective understanding that a 'shy bladder' is a condition requiring further evaluation."

Facts:

> "On September 1, 2020, at approximately 10:46PM, Mr. Neely was driving a rescue unit vehicle out of Fire Station 7. As the vehicle exited the station, it struck the overhead door, causing damage to the door. Mr. Neely's District Chief ordered a post-accident substance abuse test, as required by Civil Service Rule V, Section 9.13. The test was administered by Jeffrey Mendler, the owner of Toxicology and Drug Analysis Laboratory ('TDAL'). TDAL contracts with the City of New Orleans to provide substance abuse collection and testing. The contract is managed by the Civil Service Department.

Mr. Mendler first administered an alcohol breath test to Mr. Neely at 11:45PM, with a negative result from Mr. Neely. Next, Mr. Mendler requested an unobserved urine sample of Mr. Neely, which Mr. Neely provided at 11:55PM. Mr. Mendler inspected the urine sample and detected it to be out of the acceptable temperature range. Mr. Mendler proceeded to discard the first unobserved sample and requested an observed sample, as required by the testing protocol. Mr. Mendler advised Mr. Neely that, per the protocol, he would be given up to three hours to provide a second sample and would be offered up to forty ounces of fluids to facilitate a second sample. Mr. Neely drank over fifty ounces of fluid in that time and made three observed attempts to provide urine, but did not produce urine before the three hour time limit expired. Mr. Mendler filled out an 'Unusual Collection Form' and recorded the outcome of Mr. Neely's attempts to provide urine as a 'shy bladder.'

***

Beginning the next afternoon, Mr. Neely contacted the Deputy Chief of Safety and Investigations, Terry Hardy, multiple times to attempt to discuss the incident. Mr. Neely declares that he did so with the intention of arranging for another substance abuse test. There is no record of Deputy Chief Hardy responding to him on that subject. On September 7, 2020, NOFD Superintendent Timothy McConnell issued a Notification of A Suspension and Pre-Termination Hearing to Mr. Neely, informing him that he was immediately suspended due to a refusal to participate in a substance abuse test, in violation of Civil Service Rule V, Section 9, and that a hearing would take place on September 9, 2020.

On September 8, the Civil Service Department issued a letter to Mr. Neely and NOFD enclosing 'a copy of the positive test results' of the comprehensive substance abuse screening.

***

On that same day, Mr. Neely undertook an unobserved drug test, at his own expense, at an Ochsner Urgent Care facility and received a negative result. Mr. Neely presented the test results during the pre-termination hearing.

***

On September 25, 2020, Superintendent McConnell issued a letter to Mr. Neely informing him that he was terminated from employment with NOFD for his refusal to participate in a substance abuse screening procedure, in violation of Civil Service Rule V, Section 9, Substance Abuse Testing. The letter stated that Mr. Neely did not provide any credible explanation for his refusal to participate.

***

The contract specifications state that '[i]f a medical condition makes it impossible to produce a urine specimen, Contractor upon request will collect a hair or blood sample for testing.' The appellant [FD] argues that the appellee [firefighter] presented no evidence of a medical condition that would have warranted a request from the Civil Service Department for a hair or blood sample test. The appellant also asserts that Mr. Mendler's

> description of appellee's 'shy bladder' is not a diagnosis of a medical condition because Mr. Mendler is not a medical practitioner. The appellant further contends that no medical condition was alleged by the appellee. However, it is unclear how the appellant concluded that a medical condition did not exist, if no medical practitioner reviewed the appellant's test result.
>
> ***
> Under both the SAMHSA guidelines, which explicitly govern the substance abuse screening procedure, and the DOT Regulations, which the contractor relied upon for best practices, the appellee's conduct cannot be construed as a refusal to test, and cannot be considered as presumptive evidence of a positive test result. Therefore, the Commission did not abuse its discretion in concluding that the appellant failed to demonstrate that the misconduct for which Mr. Neely was terminated was, in fact, misconduct and occurred."

Legal Lesson Learned: To avoid similar litigation, FDs should adopt a policy that gives firefighters with a "shy bladder" the option taking a hair or blood test, or a medical exam at the firefighter's expense.

Chap. 13 – EMS, incl. Community Paramedicine, Corona Virus

File: Chap. 13

LA: CHILD STRUCK BY CAR – NO PULSE, PASSED LOCAL HOSPITAL TO TRAUMA CENTER – MUST SHOW PROTOCOLS

On Dec. 30, 2021, in Gauis Horton, individually and on behalf of Mary Horton v. St. Tammany Fire Protection District # 4, the Court of Appeals of Louisiana, First Circuit, held (3 to 0) that trial court should not have dismissed this lawsuit alleging gross negligence for failing to timely depart the scene of the accident (20 minutes on scene) and failing to take patient to the nearest hospital (directed to Level II Trauma Center). Court of Appeals remands case since the Fire District in its motion for summary judgment on basis of governmental immunity failed to attach current certificates of the paramedics and failed to attach the protocols for transporting patients to a trauma center.

> "Because we have found that the [Fire Protection] District failed to establish that Lunn and Becerril were duly licensed or certified or that they acted in accordance with protocols adopted and promulgated by LERN [Louisiana Emergency Response Network] for the transport of trauma and time-sensitive ill patients, we likewise find that the District has failed to meet its burden in establishing that it is entitled to immunity pursuant to La. R.S. 9:2798.5."

Facts:

> "On April 20, 2016, Mary Horton was struck by a vehicle while riding her bicycle. EMS employed by the District received a call regarding the accident at 7:08 a.m. and dispatched EMT/paramedics Christopher Lunn and David Becerril to the scene at 7:09 a.m. Lunn and Becerril arrived on scene at 7:14 a.m. and found Horton laying in the roadway with tire marks noted on her abdomen and left groin; however, there was no obvious bleeding. Horton was responsive upon initial assessment.
>
> Once in the EMS unit, Horton became extremely agitated and reported more difficulty breathing; however, she would not tolerate attempts to oxygenate with a non-rebreather. Lunn and Becerril established two large IVs and reported to the Louisiana Emergency Response Network (LERN), who directed them to North Oaks Medical Center. Horton was still conscious and agitated and would not tolerate attempts to oxygenate when transport began. Once the EMS unit left the scene at 7:29 a.m., Horton became bradycardic, unresponsive, and had no pulse. Lunn and Becerril contacted LERN and advised of Horton's condition, and LERN re-routed them to Lakeview Regional Medical Center (LRMC), where they arrived at 7:34 a.m. Horton passed away shortly after arriving at LRMC.
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> ***
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> The petition alleged that the defendants were jointly and severally liable for negligence in failing to timely depart the scene of the accident and failing to take Horton to the nearest hospital.
>
> ***
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> As previously noted, the District submitted the affidavit of Mr. Salzer in support of its motion for summary judgment. However, Mr. Salzer makes no reference to Lunn or Becerril being 'licensed' paramedics nor do any attachments to his affidavit show any valid licenses. Furthermore, while Mr. Salzer's affidavit references that the District had in use a set of protocols for District EMS personnel, including but not limited to paramedics, that were developed and approved by the District's medical director, a licensed physician, there is no testimony or evidence as to what the protocols were in the instant case. Additionally, although Mr. Salzer states that Lunn and Becerril were following these protocols, as well as the protocols established by LERN, in their treatment of, care for, and transport of Horton, this conclusory allegation, without any factual support or evidence as to what these protocols entail and how they were followed, is insufficient to carry its burden of establishing that it is entitled to immunity pursuant to La. R.S. 40:1133.13."

Legal Lesson Learned: Follow your trauma protocols and submit copies of the protocols and EMS current licenses when filing motion for summary judgment.

File: Chap. 13

IL: COVID - FF INJUNCTION DENIED – VACCINATION OR WEEKLY NEG TEST - "NATURAL IMMUNITY" NOT ENOUGH

On Dec. 19, 2021, in John Halgren, et al. v. City of Naperville, et al., U.S. District Court Judge John Robert Blakey denied the six Naperville Fire Department firefighters' motion for preliminary injunction to bar enforcement of the State and City mandate, including those firefighters claiming "natural immunity" from a prior infection and recovery.

> "Given the preliminary factual record, however, Plaintiffs have failed to show that the statements made by the Governor constitute sufficient evidence of animus and thus, absent more facts, traditional rational basis review governs their equal protection challenge. Cf. Dr.A v. Hochul, No. 21A145, --- S.Ct. ----, 2021 WL 5873126, at *3 (U.S. Dec. 13, 2021) (Gorsuch, J. and Alito, J., dissenting) (discussing overt proof of a vaccine mandate's 'animus' as to those seeking religious exemptions under the first amendment)…. Under the rational basis test and factual record presented, Plaintiffs have also failed to show that the mandate's differential treatment of the vaccinated and unvaccinated violates equal protection. As explained during this Court's substantive due process analysis, a 'conceivable' rational basis supports the mandate's vaccine and testing provisions, as to persons with or without natural immunity."

Facts:

> "Plaintiffs are employees of the Naperville Fire Department, which provides fire suppression and emergency medical services to residents of Naperville and remain subject to Naperville's Directive. Each of the six named Plaintiffs has worked for the Naperville Fire Department for many years: Gil Cortez has been with the department for over 26 years; Joel M. Fox for 21 years; John K. Stiegler for over 20 years; John Halgren for 20 years; Robert McCormick for 13 years; and Chris Garon for 9 yearsIn the last eighteen months, all of the named Plaintiffs have assumed EMS duties, primarily to provide emergency care to the citizens of Naperville who exhibit symptoms of COVID-19. Id. at 1. Some of the employees of the Department are vaccinated against COVID-19; others are not…. Some have contracted and recovered from COVID-19; others have not.
>
> ***
>
> Over the course of the last year, Governor Pritzker has invoked emergency powers under the Illinois Emergency Management Agency Act ('EMAA'), 20 ILCS 3305/1 et seq., to issue a series of proclamations and executive orders that, among other things, mandate COVID-19 vaccination (or testing) for certain categories of the Illinois citizenry…. As part of these measures, the Governor issued the order at issue in this case, Executive Order 2021-22 ("EO 2021-22" or "Order" or "mandate") on September 3, 2021.
>
> ***
>
> On September 9, 2021, following the Governor's lead, the City of Naperville- nestled in the northeast corner of Illinois-issued a vaccination mandate requiring its emergency medical technicians and firefighters to produce a weekly negative COVID-19 test or demonstrate proof of vaccination…. Naperville interpreted the Governor's mandate as 'giv[ing] an employer an option to offer a hard mandate (mandatory vaccinations) or a soft mandate (vaccination or at least weekly testing)….' Naperville opted for the 'soft

mandate,' which allows employees to refuse vaccination, contingent upon weekly testing…. Naperville's mandate is effectively coterminous with EO 2021-22.

***

On September 23, 2021, Plaintiffs brought this suit against Governor Pritzker and the City of Naperville challenging the Governor's Order and Naperville's Directive.

***

In seeking a preliminary injunction, Plaintiffs' primary legal challenge sounds in due process (both substantive and procedural) and equal protection. With respect to substantive due process, Plaintiffs maintain that the Order impinges upon two, long-recognized fundamental rights: (1) the right to bodily autonomy, free from intrusions by the state; and (2) the related right of privacy.

***

Having extensively reviewed the issues and the parties' submissions and argument, the Court stated from the bench that it would deny the motion subject to a subsequent written order."

Legal Lesson Learned: Several Federal courts have denied injunction against vaccination requirement for Fire & EMS and other health care workers.

Note: On Jan. 7, 2021, the U.S. Supreme Court will hear oral arguments on the vaccination and mask requirements for both large employers, and for health care workers.

On Dec 30, 2021, U.S. District Court Judge in Indianapolis denied a preliminary injunction for a physician at Children's Hospital.

> "Under the totality of the circumstances, Dr. Halczenko has failed to make a 'substantial showing' of irreparable injury and insufficiency of remedies that would justify the extraordinary relief he seeks pending the outcome of this litigation-that is, reversing Ascension's decision to deny his exemption request and reinstating him to his position in the Pediatric Intensive Care Unit."

On Dec. 17, 2021, the U.S. Court of Appeals for the 6th Circuit (Cincinnati) upheld (3 to 0) the OSHA mandate for private employers with 100 or more employees.

> "Employers have the option to require unvaccinated workers to wear a mask on the job and test for COVID-19 weekly. *** Consistent with other OSHA standard penalties, employers who fail to follow the standard may be fined penalties up to $13,653 for each violation and up to $136,532 for each willful violation."

On Dec. 13, 2021, the U.S. Supreme Court majority denied an injunction for New York health care workers. Justice Gorsuch and Justice Alito dissented about lack of an exemption based on sincere religious beliefs.

> "New York recently issued a regulation requiring healthcare workers to receive a COVID–19 vaccine. Those who cite medical reasons are exempt. But no comparable exemption exists for individuals whose sincere religious beliefs

prevent them from taking one of the currently available vaccines. It seems New York is one of just three States to have a scheme like this."

Chap. 13

NM: BLOOD DRAW – EMTs MAY DRAW IF EMPLOYED AT HOSPITAL & TRAINED – NO REQ. BE "LAB TECHNICIAN"

On Dec. 16, 2021, in State of New Mexico v. Brian Adams, the Supreme Court of New Mexico held (4 to 0) that EMTs may conduct blood draws, resolving 6 pending case appeals, but clarifying that the EMT "must be employed by a hospital or physician to perform blood draws, trained to perform legal blood draws, and have on-the-job experience in doing so."

> "This case is one of six cases arising under very similar fact patterns. In each case, an 'emergency department technician,' also licensed as an emergency medical technician (EMT), performed a blood draw test at San Juan Regional Medical Center in Farmington for the purpose of a DWI investigation. The defendants in these cases argue that 'emergency department technicians' are not qualified to draw blood under the Implied Consent Act, NMSA 1978, §§ 66-8-105 to -112 (1978, as amended through 2019). Thus, this case presents an issue of statutory construction. Specifically, whether an emergency department technician, licensed as an EMT, with training and experience in drawing blood is authorized to perform legal blood draw tests as a 'laboratory technician' under NMSA 1978, Section 66-8-103 (1978), which states, '[o]nly a physician, licensed professional or practical nurse or laboratory technician or technologist employed by a hospital or physician shall withdraw blood from any person in the performance of a blood-alcohol test.' As explained herein, we conclude that such medical professionals are qualified to draw blood under the statute so long as they were employed to do so by a hospital or physician and have adequate training and experience."

Facts:

> "After receiving a report of a drunk driver, a Farmington police officer was dispatched to a local gas station. Upon arriving at the gas station, the police officer found Defendant inflating his car tires. The officer noticed that Defendant's legs were shaking, his eyes were bloodshot, and his speech was slurred. The officer conducted a number of field sobriety tests with Defendant. In performing the tests, Defendant failed to follow directions, swayed back and forth, and struggled to maintain balance. Defendant told the officer that he drank whiskey and took Xanax and Suboxone pills earlier that day.
>
> The officer arrested Defendant for DWI. Pursuant to the Implied Consent Act, the officer then drove Defendant to the San Juan Regional Medical Center in Farmington for a blood test to determine the drug and alcohol content of Defendant's blood. When they arrived, the officer unsealed a Scientific Laboratory Division (SLD) blood draw kit in the presence of emergency department technician and licensed EMT Danica Atwood. He then requested that Atwood draw Defendant's blood using the SLD blood draw kit.
>
> ***

The State charged Defendant with one count of DWI contrary to NMSA 1978, Section 66-8-102 (2016). In magistrate court, Defendant moved to suppress the blood test results on the basis that Atwood was not qualified to draw blood under Section 66-8-103. The magistrate judge denied Defendant's motion to suppress. Defendant pleaded no contest, reserving his right to appeal the magistrate court's decision.

***

Defendant then appealed to the district court, which held an evidentiary hearing to determine the issue. After the hearing, the district court granted Defendant's motion to suppress the blood test results because it concluded that Atwood was not qualified to draw blood under the statute. The district court explained that it was bound by the New Mexico Court of Appeals holding in *Garcia*, 2016-NMCA-044, ¶ 20, 'that a person's 'license as an EMT does not qualify her to draw blood to determine its alcohol or drug content under the Implied Consent Act.'

***

[T]he State argues that rather than focusing on the lack of an exact match between Atwood's job title and the categories listed in the statute, we should interpret the statute in a way that better 'accomplish[es] the legislative purpose of deterring drunk drivers and aid[s] in discovering and removing the intoxicated driver from the highways.'
We agree with the State that a strict plain language interpretation is not appropriate in this case. We must analyze the statute through the lens of the Legislature's intended purpose, which we conclude encompasses two goals: (1) to protect patients subject to a blood draw and (2) to ensure the collection of a reliable blood sample for use in DWI prosecutions.

***

Based on the foregoing statutory construction analysis, we conclude that the Court of Appeals and the State are correct in their interpretation of the law. It follows then that the district court did indeed abuse its discretion by misinterpreting the law when it suppressed Defendant's blood test results from evidence. Therefore, the Court of Appeals, *Adams*, 2019-NMCA-043, ¶ 34, correctly remanded the case to the district court with instructions for it to render a decision consistent with an accurate interpretation of the law as set forth in its opinion."

Legal Lesson Learned: EMTs not employed at a hospital or medical office cannot draw blood for police.

Note: See New Mexico The Implied Consent Act:

> "Any person who operates a motor vehicle within this state shall be deemed to have given consent, subject to the provisions of the Implied Consent Act . . . to chemical tests of his breath or blood or both . . . as determined by a law enforcement officer, or for the purpose of determining the drug or alcohol content of his blood if arrested for any offense arising out of the acts alleged to have been committed while the person was driving a motor vehicle while under the influence of an intoxicating liquor or drug."

See Ohio statute, Section 4511.191:

> "(2) Any person who operates a vehicle, streetcar, or trackless trolley upon a highway or any public or private property used by the public for vehicular travel or parking within this state or who is in physical control of a vehicle, streetcar, or trackless trolley shall be deemed to have given consent to a chemical test or tests of the person's whole blood, blood serum or plasma, breath, or urine to determine the alcohol, drug of abuse, controlled substance, metabolite of a controlled substance, or combination content of the person's whole blood, blood serum or plasma, breath, or urine if arrested for a violation of division (A) or (B) of section 4511.19 of the Revised Code, section 4511.194 of the Revised Code or a substantially equivalent municipal ordinance, or a municipal OVI ordinance."

Chap. 14 – Physical Fitness, incl. Heart Health

Chap. 15 – CISM, incl. Peer Support, Employee Assistance

File: Chap. 15

NY: PTSD - BASED ON SEVERAL INCIDENTS 26 YRS ON FD – WORKER'S COMP – DON'T NEED "EXTRAORDINARY" EVENT

On Dec. 23, 2021, In the Matter of the Claim of Brian C. Reith v. City of Albany, and Workers. Compensation Board, the Supreme Court of New York (Third Department, held (4 to 0) that the Workers Compensation Board is reversed and the firefighter is entitled to workers comp since he did "sustain a causally-related psychological injury" based on several incidents. New York in 2017 amended statute so no longer must prove stressful incident was "greater than that which other similarly situated workers experienced in the normal work environment."

> "During the hearing, claimant explained that he had witnessed several traumatic incidents during his nearly 26-year career as a firefighter, including a suicide, a triple homicide of children, car accidents with fatalities and individuals who had been "dead for days stuck to the floor." He also recounted spraining his ankle after he slipped on brain matter while rendering aid to a victim, experiencing CPR regurgitation while attempting to resuscitate a fellow firefighter and dragging a woman out of a fire, which resulted in 'deglov[ing] her.' *** We reverse. Prior to the enactment of Workers' Compensation Law § 10 (3) (b) in April 2017 (see L 2017, ch 59, part NNN, subpart I, § 1), a claimant seeking to recover for a psychological injury was required to 'demonstrate that the stress that caused the claimed mental injury was greater than that which other similarly situated workers experienced in the normal work environment' … The statutory amendment, however, effectively removed that hurdle for certain first responders by providing, as relevant here, that where a firefighter 'files a claim for mental injury premised upon extraordinary

work-related stress incurred in a work-related emergency, the [B]oard may not disallow the claim, upon a factual finding that the stress was not greater than that which usually occurs in the normal work environment' (Workers' Compensation Law § 10 [3] [b]; see Matter of McMillan v Town of New Castle, 162 A.D.3d 1425, 1426 [2018])."

Facts:

"In 2018, claimant filed a claim for workers' compensation benefits alleging that he suffered from posttraumatic stress disorder (hereinafter PTSD) brought on by 'countless horrific, work-related emergency situations' that he had encountered during his decades-long career as a firefighter. Following a hearing, a Workers' Compensation Law Judge established the claim for work-related PTSD and authorized medical treatment. Upon administrative review, the Workers' Compensation Board disallowed the claim, finding that the 2017 amendment to Workers' Compensation Law § 10 (3) did not apply and, further, that claimant's medical proof was insufficient to establish that he sustained a causally-related psychological injury. Claimant appealed to this Court and additionally sought reconsideration and/or full Board review.

In response, the Board issued an amended decision finding, among other things, that claimant could in fact avail himself of the statutory amendment. The Board nonetheless disallowed the claim, finding that claimant's evidence was insufficient to establish the required causal relationship between his employment as a firefighter and his PTSD. Claimant appealed from the Board's amended decision, and this Court granted claimant's subsequent motion to withdraw his prior appeal.

***

Claimant began experiencing PTSD symptoms in January 2018, prompting him to seek professional treatment. His symptoms included 'uncontrollable crying,' weight loss, chest pain and outbursts of anger, with claimant testifying that he 'sometimes [went] three days without eating[,]... was sleeping... [around] three hours a night' and had to be put on a heart monitor at work. Claimant's treatment records also document a host of symptoms that were indicative of 'serious emotional and psychological difficulties and... serious impairment in relational, work and/or school functioning.' Claimant's psychotherapy intake note, dated January 22, 2018, states that he was experiencing 'anxiety of a clinically significant magnitude.' The foregoing evidence readily establishes that claimant's claim is 'premised upon extraordinary work-related stress' within the meaning of Workers' Compensation Law § 10 (3) (b).

Legal Lesson Learned: Great decision, and helpful statute, recognizing that PTSD can arise from multiple incidents.

Note: The Workers Comp. Board wisely recognized the 2017 statutory amendment applied to multiple incidents, not just a singular event.

Footnote 1: "The Board initially ruled - citing the singular form of the phrase 'in a work-related emergency' - that the statutory amendment did not apply where the injury sustained was the product of stress-inducing events incurred over a period of time. Upon reconsideration, the Board effectively reversed course, ruling that

> the amendment could apply where, as here, a claimant 'alleges multiple incidents of exposure rather than one singular event' (citing Employer: Town of New Castle, 2018 WL 6132752, *4, 2018 NY Wrk Comp LEXIS 11628, *10 [WCB No. G140 4105, Nov. 16, 2018])."

In Ohio, Governor DeWine on Jan. 9, 2021 signed into law House Bill 308, which created a fund for first responders who become disabled from PTSD, without any need to also have physical injury. See statutory language:

> Sec. 126.65. (A) The state post-traumatic stress fund is created in the state treasury. The director of budget and management shall be the trustee of the fund. (B) The state post-traumatic stress fund shall be used for the following purposes: (1) Payment of compensation for lost wages that result from a public safety officer being disabled by post-traumatic stress disorder received in the course of, and arising out of, employment as a public safety officer but without an accompanying physical injury."

Chap. 16 – Discipline, incl. Code of Ethics, Social Media, Hazing

File: Chap. 16

IL: RESIDENCY - FF FIRED - 3 YRS RENTED HOUSE IN VILLAGE TO TENANTS – DENIED UNEMPLOYMENT

On Dec. 23, 2021, in John Cannici v. The Department of Employment Security Board of Review, the Court of Appeals of Illinois, First District, held (3 to 0) that the firefighter was properly denied unemployment benefits since he was fired for failure to reside in the Village.

> "The Board's finding that Cannici resided in Orland Park was not against the manifest weight of the evidence because the undisputed evidence showed that, from June 2013 to June 2016, he occupied his house in Orland Park with his family as his principal residence and abode. During those three years, he never slept at the village house, which was occupied by tenants. Although Cannici stored some belongings there, paid the taxes and utilities, and continued to use it as his mailing address, there was no evidence that he actually did anything at his village house other than retrieve his mail from his tenants. He was not that house's resident, as defined in the Village's Code. He was its landlord."

Facts:

> "The Village employed Cannici as a firefighter from 2000 to 2016. In 2000, he bought a home in the village on Broadway Avenue. After marrying, he sold the Broadway Avenue home and in 2003 purchased a house on Norwood Street in the village. Cannici and his wife had children and continued to live in the village house until 2008.
>
> In 2008, Cannici purchased a house in Orland Park. His wife and the children lived in the Orland Park house while Cannici lived in the village house.

In June 2013, Cannici rented the village house to tenants and lived with his family in the Orland Park house. In June 2016, Cannici learned that his residency was being questioned, and he moved back into the village house after the tenants moved out.

***

Also in June 2016, the Village fire chief filed written charges against Cannici, seeking termination of his employment for violating the Village's residency requirement by failing to maintain his principal residence in the village. Following an August 2016 hearing before the Village's board of fire and police commissioners, Cannici's employment was terminated for violating the Village's residency ordinance. Cannici sued the Village over his termination in both federal and state court. His federal action was unsuccessful. *Cannici v. Village of Melrose Park,* 885 F.3d 476 (7th Cir. 2018). His state action also was unsuccessful. *Cannici v. Village of Melrose Park,* 2019 IL App (1st) 181422.

***

The evidence presented at the October 2016 hearing before the IDES referee showed that Cannici had lived in the village since 1975. He was aware of the Village's residency ordinance when he started working as a firefighter in 2000. Also that year, he bought half of a duplex in the village. In 2003, he sold the duplex unit, and he and his wife bought the village house.

After they had children and their son began school, Cannici and his wife ‘decided it would be easier and more practical’ for his wife and children to live in Orland Park because his wife's business was located in Orland Park and his in-laws who provided childcare also lived there. In 2008, the couple bought a second house, in Orland Park. At that time, Cannici's wife and children moved into the Orland Park house. The children attended Orland Park public schools and paid in-district rates. Cannici's wife was registered to vote in Orland Park and also had her car registered there.

***

From 2009 through mid-2013, Cannici lived at and was the sole occupant of the village house. Starting in 2010, he put the village house on the market. He reduced the price several times, but the house did not sell. He said, ‘It stayed on [the market] more or less just because there was no reason *** to take it off. I was going to sell the house and buy something smaller in [the village].’ Cannici did not intend that his wife and children would live in the village, but ‘[t]hey could have.’ In 2011, Cannici learned of the Illinois Supreme Court's decision in Maksym, 242 Ill.2d 3030. The village house remained on the market until May 2013.

In 2013, a neighbor asked Cannici if the neighbor's relatives could move into Cannici's village house because those relatives were having financial difficulties. Cannici agreed, ‘as long as they understood that it was a temporary *** situation.’ The lease agreement for the family said it was a ‘temporary residence’ and reserved most of the basement for Cannici's use. The lease agreement indicated that laundry machines and furniture

belonging to Cannici would stay in the village house. He also kept 'awards ***, pictures, souvenirs, [and] trinkets' in the village house's basement.

From June 2013 to June 2016, Cannici did not sleep at the village house. Unless he was traveling, he slept virtually every night at the Orland Park house. During the Village's August 2016 hearing to terminate Cannici's employment, he was asked whether he had all of his daily clothes and daily living things at the Orland Park house. Cannici answered: 'Well, not all of them, no. But most of them. Some of them.' During the October 2016 IDES referee hearing, Cannici said, 'I kept everything that was in that house before they moved in was, was still in that house when they moved in.' Cannici continued to pay the utilities and taxes for the village house. He continued to use the address of the village house for his mail, including for personal and official business. To retrieve his mail, Cannici had to call the tenants in advance."

Legal Lesson Learned: The Village residency requirement was clear.

Note: See another Court decision from MA: "Judge: MA City Must Enforce Residency Rules" (Dec. 31, 2021).
See also: The Ohio Supreme Court, in Lima v State, June 10, 2009, 2009-Ohio-2597, has held 5-2 that a state law prohibiting general residency requirements for public employees is valid and supersedes local laws to the contrary.

Ohio Revised Code 9.481, Residency requirements prohibited for certain employees, includes following:

> (b) To ensure adequate response times by certain employees of political subdivisions to emergencies or disasters while ensuring that those employees generally are free to reside throughout the state, the electors of any political subdivision may file an initiative petition to submit a local law to the electorate, or the legislative authority of the political subdivision may adopt an ordinance or resolution, that requires any individual employed by that political subdivision, as a condition of employment, to reside either in the county where the political subdivision is located or in any adjacent county in this state."

File: Chap. 16

VA: BC FIRED – ALSO SALESMAN FOR AMBULANCE CO – HELPED BUY COUNTY BRUSH TRUCK – NO RETALIATION

On Dec. 22, 2021, in Clay O'Neal Fitzgerald v. Botetourt County, Virginia, United States Magistrate Judge Robert S. Ballou, U.S. District Court, Western District of Virginia (Roanoke Division), granted summary judgment to the County, finding that he was fired on May 16, 2018 from the County Fire & EMS Department for his involvement as a salesman for Osage Ambulance and its sale of a bush truck to the County with authority. The plaintiff failed to prove that his firing was in retaliation for submitting an age discrimination grievance in 2014 and another complaint to the County Administrator in July 2017.

"I find that no reasonable jury can conclude that Fitzgerald was authorized to purchase the brush truck and that this was a legitimate non-retaliatory reason for Fitzgerald's termination. The County satisfied its burden by presenting a legitimate non-retaliatory reason for the termination, while Fitzgerald failed to satisfy his burden by providing evidence that the unauthorized purchase was a pretext. The County's purchasing policy makes clear that a violation can result in termination. It is not the responsibility of this Court to evaluate whether an explicit policy violation was a good reason for Fitzgerald's termination. DeJarnette v. Corning, Inc., 133 F.3d 293, 298 (4th Cir. 1998)."

Facts:

"Defendant Botetourt County (the 'County') hired Fitzgerald in 2007 as a member of the Department of Fire and EMS ('Department'). He was forty-seven years old at the time and began his career with the County as Fire Officer 2, Instructor 2, and EMT-B…. Fitzgerald found success with the County being promoted to logistics technician in 2010 and then to lieutenant in 2016…. Fitzgerald became battalion chief in 2017, placing him second in command and earning a higher pay grade.

***

In May 2014, Fitzgerald submitted a written grievance to former County Administrator Kathleen Guzi ('Guzi') identifying twelve 'inappropriate comments' which he contends amounted to age discrimination…. Fitzgerald titled the grievance 'Issues That Reflect Age Discrimination and Hostile Workplace Environment Based on Age with Jason Ferguson and Andrew Moore.' At the time, the County did not have a named fire chief, so the County Administrator delegated operational responsibilities within the Department to a committee of fire safety officers which included Jason Ferguson ('Ferguson') and Andrew Moore ('Moore') to whom Fitzgerald reported for EMS and training matters. Fitzgerald contends that Ferguson and Moore made comments which created a discriminatory work environment.

***

In May 2017, County Administrator Gary Larrowe ('Larrowe') hired Matthew Britt ('Britt') as the new fire chief…. Britt wrote an article in September 2016 calling for older firefighters to retire from their jobs to make room for younger workers…. Fitzgerald claims that this article shows Britt's discriminatory bias against older firefighters such as Fitzgerald…. Fitzgerald does not produce evidence that he complained to his supervisors about Britt or this article. [See article: Altruism: How Long Does it Last & How Do We Retain It, Set. 14, 2016.]

***

In July 2017, Fitzgerald complained to Larrowe about hostility and age-related discrimination by Ferguson since 2014…. Fitzgerald met with Larrowe, Britt, and Blackburn and complained generally of feeling marginalized, which he attributed to his age but did not provide evidence to support such allegation…. The County took no action on Fitzgerald's complaint…. Fitzgerald contends that after complaining of age discrimination in 2017 the retaliatory conduct against him began.

***

E. Ambulance Procurement Prohibition

Outside of his employment with the County, Fitzgerald worked as a salesman for an ambulance company which the County had approved because it provided Fitzgerald with specialized knowledge which was beneficial to the County…. Larrowe, however, worried that this work could create a potential conflict of interest between the County and Fitzgerald; so by letter dated April 7, 2017, Larrowe advised Fitzgerald that he could not have any involvement in the County's purchase of ambulances…. Fitzgerald testified that Larrowe told him that this prohibition did not extend to all vehicles and that Chief Britt had said that non-emergency vehicles 'were okay.' Fitzgerald Dep., 130:6.

***

In September 2017, then Chief Britt began to investigate the possibility of the County purchasing a brush truck for the Glen Wilton Voluntary Fire Department…. In that effort, Susan Tincher ('Tincher'), the County's Purchasing Manager, provided Britt on September 29, 2017, quotes from local dealers for the purchase of a brush truck. Tincher then followed up with Britt and Fitzgerald by email dated October 4, 2017, inquiring about the status of moving forward with the purchase…. On November 3, 2017, Britt emailed the specifications for three potential brush trucks to the Glen Wilton Chief for consideration of which vehicle Glen Wilton preferred…. Britt left his employment with the County as fire chief on November 20, 2017. The following day, the Glen Wilton Chief advised Fitzgerald that he preferred the Ford vehicle. Id. at 4.

***

F. The Brush Truck Purchase

In April 2018, the County purchased a brush truck for the Glen Wilton Voluntary Fire Department. Fitzgerald's involvement and the circumstances under which the purchase occurred were questioned as it became apparent that Fitzgerald directed the purchase of the truck without having appropriate authority under County regulations to authorize the purchase.

***

Despite having no authority to authorize the County to move forward with purchasing the brush truck, Fitzgerald continued to pursue that effort after Britt left the Fire Department. To that end, Fitzgerald sent an email on November 22, 2017 to Ferguson, who had budgetary but not spending authority over the fire department budget, confirming the source of the funds to purchase the truck.

***

By email on April 27, 2018, Fitzgerald alerted the Department to the arrival of the brush truck…. On April 30, 2018, Larrowe responded to Fitzgerald's email asking how the truck was paid for, why Fitzgerald was involved in the purchase, and who authorized it…. Fitzgerald replied stating that he inherited the project from Britt who initiated the process of purchasing the truck and that he moved forward with the purchase because 'it never occurred to [him] that Britt would have executed a bid process for something without approval.'

***

The County terminated Fitzgerald on May 16, 2018, in a five-page letter laying out in length six categories of policy violations to justify Fitzgerald's termination…. The first category was Fitzgerald's violation of Personnel Policy 2.73 Purchasing and Procurement for the unauthorized brush truck purchase. Discussion of the unauthorized purchase is mentioned throughout the termination letter…. Specifically, the County noted that Fitzgerald did not 'have the authority to make [the purchase], nor did [he] seek or receive appropriate authorization….' Listed second was a violation of Personnel Policy 2.75 Outside Employment for his employment with Osage Ambulance, which included again his unauthorized purchase of the brush truck."

Legal Lesson Learned: Outside employment can lead to a conflict in interest.

Note: The article by Matthew Britt, prior to his being hired as Fire Chief, raised some challenging issues regarding older firefighters retiring; not surprised that plaintiff referenced it in is age discrimination lawsuit.

"Altruism: How Long Does it Last & How Do We Retain It." Sept. 14, 2016.

"So, what am I asking? I'm asking the senior members to take your much deserved retirement and create opportunities for the next generation of fire service officers. Take that time and dedicate it to your family or other pursuits, but don't be a stranger. Use that wealth of knowledge to come back and educate members through formal training and other opportunities. Your fire service family will always be here."

File: Chap. 16

CA: MEDIC EXPOSED BREAST UNCONSCIOUS FEMALE (19) – CONV. FELONY ASSAULT – JAIL - REGISTER SEX OFFENDER

On Dec. 8, 2021, in The People v. Jared David Evans, the California Court of Appeals, Third District (Sacramento), held (3 to 0; unpublished decision) that the jury correctly found the paramedic (age 32) guilty of felony assault, and was sentenced to 180 days in county jail, and to register as a sex offender According to reports, he did it in front of an intern and reportedly said, "Sorry, man, I had to." The Court also upheld the trial judge's decision to not inform the jury that the intern, who testified at trial had shown EMS personnel nude photos of his girlfriend.

"Here, defendant brought [intern] Morris's attention to Doe's breasts, reached into her shirt, grabbed her breast, exposed it, and made a lewd comment. This is sufficient evidence that defendant committed the touching for the specific purpose of sexual gratification. *** Among other things, defendant argues on appeal that the display of the nude images [by intern of his girlfriend to other EMS] went to Morris's intent and attitude toward women. The argument focuses on admissibility based on intent under Evidence Code section 1101, subdivision (b). But defendant did not argue in the trial court that the evidence was relevant to Morris's intent. He only argued Morris was immature about and lacked respect for women and, therefore, his claim to be an outstanding firefighter lacked credibility. Under the circumstances, defendant forfeited consideration on appeal of

admissibility based on intent. *** Although we nevertheless understand the gist of defendant's arguments regarding the evidence and are not unsympathetic, the trial court did not abuse its discretion in making its evidentiary determination.

Facts:

"Defendant was a firefighter and paramedic with the City of Sacramento. He was also a preceptor for an intern, Chad Morris. A preceptor supervises and evaluates an intern during on-the-job training.

[Patient] Doe suffered from recurrent seizures. On April 1, 2017, she had a seizure. Defendant and Morris responded to an emergency call and found Doe unconscious and lying on the floor. As they put her on a gurney and into the ambulance, she was not responsive to what they were doing. On the ride to the hospital, Morris sat on a bench at Doe's side, and defendant sat in a seat behind her. She was lying on her back, with her head slightly inclined. Morris was taking vital signs and inserting an IV for medication. While Morris was busy doing this, defendant said, 'Come take a look,' while gesturing to Doe's breasts. Morris responded, 'That's all right,' and defendant said, 'Don't be a fucking pussy.' Morris said, 'Nah, I'm good.' Defendant then reached into Doe's shirt. He removed her breast from the shirt and said, 'Those are some big-ass nipples.' After about five seconds, defendant returned Doe's breast to her shirt as Morris continued to render medical care. Defendant laughed and said, 'Sorry bro. I had to do it.'

Even though she was unable to talk or open her eyes, Doe could hear and feel what was going on around her. In the ambulance, she knew there was a man to her side and one behind her, and she heard the one behind her saying she had 'big tits.' She felt a hand go inside her shirt and touch her left breast. She also heard the man behind her say, 'I just had to.' When the ambulance arrived at the hospital, the question was asked, 'What's her age?' When one of the men said '19,' the other one said, 'At least she was legal.'
Morris did not immediately report the incident because he was afraid of failing his internship and ruining defendant's career. After the incident, however, defendant began to give Morris negative evaluations and had Morris take some time off to change his attitude. Eventually, Morris told his internship coordinator about the incident.

An investigation was opened into the incident, and Detective Eric Schneider talked to Doe. During that interview, she said she believed it was the male sitting next to her that had touched her breast. Detective Schneider also interviewed defendant, and defendant denied anyone touched Doe's breast.

***
The evidence was sufficient to support a conviction for violation of section 243.4, subdivision (e)(1).

Footnote 4: Because we conclude the evidence was sufficient to support a finding that the touching was for sexual gratification, we need not consider whether it was also for sexual arousal or abuse."

Legal Lesson Learned: Stupid conduct by this paramedic resulted in felony conviction, jail time, reporting as a sexual offenders and loss of his chosen profession.

> Note: See June 12, 2017 article, "Paramedic And Firefighter Fondle Teen Having Seizures, Jared David Evans Told Intern, 'I Had To.'"
>
> > "According to KCRA Channel 3, Sacramento Fire Chief Walt White discussed the allegations against Jared David Evans. 'When these allegations were brought to the attention of fire administration, we immediately notified the office of public safety and accountability and requested a full law enforcement investigation.' 'The Sacramento Fire Department takes all citizen complaints seriously, and works quickly to take appropriate actions to mitigate them. When this complaint was made to Fire Administration, it was immediately forwarded to Law Enforcement officials and a formal investigation was requested. Although the case is ongoing, and all facts are not yet known, the Sacramento Fire Department wants to assure the public that we are fully cooperating with the investigation and working to bring the matter to a successful conclusion."

Chap. 17 – Arbitration, incl. Mediation, Labor Relations

File: Chap. 17

NV: ARBITRATOR - BACK PAY, BUT NO "MAKE WHOLE" ORDER - 4 YRS BACK PAY – NO PERS CONTRIBUTIONS

On Dec. 23, 2021, in Christopher Van Leuven v. Public Employee Retirement System of Nevada, and Town of Pahrump, the Nevada Supreme Court held (7 to 0) in unpublished decision that the Town did not need to make PERS contribution for the 4 years of back pay. The firefighter was fired in 2012 after an ambulance accident; he won his arbitration and was rehired April 2016, and the arbitrator who then allowed the parties to negotiate the return-to-work settlement (four years back pay but no PERS contributions). He filed a second grievance, but the second arbitrator ruled that PERS contributions were not part of the deal.

> "Importantly, the [second] arbitrator found 'the evidence established that the parties agreed that the settlement would involve something less than a complete restoration to the status quo ante with an adjustment made for disciplinary suspension.' This factual finding is supported by substantial evidence. The settlement agreement specifically listed the compensation Van Leuven would receive. And, it did not include PERS contributions, even though Van Leuven's counsel initially requested this be included in the agreement early in the negotiation process. The Town's Human Resources Director testified about handling a retroactively reinstated employee during the arbitration proceedings. Her testimony indicates that such employees are not provided a lump sum but rather her staff would make the payments per payroll period. Further, the first

arbitrator allowed the parties to agree upon a remedy - but the arbitrator did not order the Town to make Van Leuven whole or provide him with all back wages and benefits.

Notably, too, PERS has since disavowed its own determination that NRS 286.435 applies and asserts that it would not have issued this determination had Van Leuven provided PERS with the second arbitration award."

Facts:

"Appellant Christopher Van Leuven worked as a firefighter paramedic for respondent Town of Pahrump (the Town). In January 2012, the Town terminated Van Leuven's employment as discipline for his involvement in an ambulance accident. Following an arbitration award that required the parties to agree to a lesser disciplinary punishment than termination, the parties entered into a settlement agreement. Under that agreement, Van Leuven was rehired in April 2016 and provided back wages from January 2012, when he was terminated, to March 2016.

In 2017, Van Leuven filed a grievance against the Town after noticing that it had not made contributions to respondent Public Employees' Retirement System (PERS) on his behalf during the time his employment was allegedly wrongfully terminated. The case again went to arbitration, and the arbitrator concluded that the settlement agreement did not require the Town to make PERS contributions for that period.

Van Leuven nevertheless obtained a letter from PERS determining, based on the information Van Leuven submitted, that his return to work constituted a retroactive reinstatement under NRS 286.435.

***

PERS further contends that the letter it sent to Van Leuven determining that he was retroactively reinstated should not be treated as the agency's final determination on this issue because it was not aware of the entire procedural history of this dispute at that time.

***

Therefore, because the district court is bound by the factual findings in the arbitration award-notably that the settlement agreement did not include Van Leuven's PERS contributions and did not provide make-whole relief-the district court did not err when it concluded that NRS 286.435 does not apply. Consequently, because NRS 286.435 does not apply, Van Leuven failed to establish that he is entitled to writ relief on this basis."

Legal Lesson Learned: When negotiating a return-to-work agreement, to avoid future litigation, clearly include in writing that PERS contributions will not be included.

File: Chap. 17

OH: UNFAIR LABOR PRACTICE – UNION'S GRIEVANCE FIX RADIOS – RETALIATION – CITY ORDINANCE BCs 6 TO 3

On Dec. 13, 2021, in State of Ohio, City of Youngstown v. State Employment Relations Board, the Ohio Court of Appeals, Seventh District (Mahoning County) held (3 to 0) that trial court, and SERB properly found that the City's ordinance eliminating three Battalion Chief positions was in retaliation for [Union's] pursuing the radio equipment grievance (2017 new portage radio system; needed fixes at cost of about $285,000). Each battalion chief reduction saves about $130,000 annually.

> "City's alleged inability to pay [$285, 000 to fix the radio problem] did not constitute a managerial business reason for eliminating the positions. The record supports SERB's determination that City's claim that its elimination of bargaining unit positions was a part of City's restructuring or reorganizing plan for the Fire Department was baseless and not a legitimate reason to eliminate the three positions. In fact, City failed to provide details or supporting information for its 'restructuring' plan. Also, the total 2019 call data illustrates that fire calls were not decreasing over the past six years. SERB clearly determined City's proffered reasons for eliminating the positions were pretextual and thus, Ordinance 19-336, i.e., the 'attrition' Ordinance, was an unlawful retaliation against Union for advancing a grievance to arbitration."

Facts:

> "Appellant, City of Youngstown ('City'), appeals a judgment of the Mahoning County Court of Common Pleas affirming an Order by Appellee, State Employment Relations Board ('SERB'). This R.C. 4117.13(D) appeal stems from the filing of an unfair labor practice charge by Appellee, Youngstown Professional Firefighters, IAFF Local 312 ("Union") against City. Union alleged, and SERB and the trial court found, that City violated R.C. 4117.11(A)(1) by threatening to eliminate and subsequently eliminating three Battalion Chief positions in retaliation against Union for pursuing a radio safety equipment grievance to arbitration.
>
> ***
>
> In 2017, City underwent changes to the portable radio program used by the firefighters. Union President Charles Smith and Fire Chief Barry Finley testified at a later SERB record hearing regarding significant and potentially dangerous safety issues caused by the radio equipment.
>
> ***
>
> At the time of the labor management meeting, there were six Battalion Chief positions in the Fire Department. The Battalion Chief is the highest-ranked position in the bargaining unit and the highest compensated. The Department's Standard Operating Guidelines call for each shift to be assigned two Battalion Chiefs which are vital to fire responses. The Fire Department has utilized Battalion Chiefs in this capacity for over 20 years. By eliminating Battalion Chief positions, the second Battalion Chief on each shift would be eliminated, thereby presenting an immediate safety issue.
>
> ***

On February 25, 2021, the trial court affirmed SERB's decision following a hearing. The court found that SERB's decision was supported by substantial evidence in the record and held that SERB correctly found that City violated R.C. 4117.11(A)(1), i.e., that City interfered with and retaliated against Union. Specifically, the court stated:

> The totality of the circumstances in the within appeal establishes that [City's] elimination of the Battalion Chief positions was in retaliation for [Union's] pursuing the radio equipment grievance. The evidence establishes that [City], through threat and subsequent elimination of the Battalion Chief positions, sought to deter [Union] from exercising its right to pursue a grievance. This occurred even though [City] had the economic wherewithal to purchase the radio equipment without cutting bargaining unit positions. This Court is unpersuaded by [City's] restructuring and right-sizing defenses, noting that [City] declined to call any financial expert/accountant at the SERB hearing. As a result, the Court finds those defenses were pretextual.

***

Again, City may restructure if appropriate. However, City may not retaliate. City claims it enacted a reduction in rank through attrition. City's alleged plan was to pay for the radios by using projected savings from the elimination of the Battalion Chief positions through attrition. However, instead of an actual restructuring plan, City eliminated the Battalion Chief positions in retaliation of Union advancing a grievance to arbitration, and only claimed 'restructuring' in the face of the instant unfair labor practice charge in an attempt to hide its patently unlawful conduct.

***

For the reasons stated, SERB properly found that City committed an unfair labor practice by violating R.C. 4117.11(A)(1) and the trial court did not abuse its discretion in affirming SERB's Order. Finding no reversible error, we affirm."

Legal Lesson Learned: Retaliation for pursuing a grievance is an unfair labor practice.

Note: The City of Youngstown has had serious financial issues impacting the fire department. See Feb. 28, 2021 article, "Judge rules city treated fire union unfairly."

> "The administration closed fire stations last June on a rotating basis because the fire department exceeded its yearly overtime budget in the first five months of the year. The union objected, saying the decision was dangerous and the city not filling positions caused the overtime issue.
>
> The city closed stations on a rotating basis for about three months in 2018 because of overtime costs.
>
> The union issued a no-confidence vote against [Fire Chief Barry] Finley in December 2019 after expressing concern about his leadership, and the city closed Fire Station No. 7 on the North Side that same month over the objections of the union."

Chap. 18- LEGISLATION

File: Chap. 18

DC: NEW FED. LAW - DISABLED EMER. RESP. CAN GET PUB. SAFETY OFFICER BENEFITS WHILE PAID SIMPLE TASKS

On Dec. 4, 2021, President Biden signed into law the "Protecting America's First Responders Act of 2021" which assures that first responders and law enforcement have prompt access to federal benefits even if able to perform compensated work that is de minimis, nominal, honorary, or mere reimbursement of incidental expenses. The two sponsors, Congressman Bill Pascrell, Jr. (D-NJ), and Senator Charles Grassley (R-IA), described the statute.

> "Currently, first responders permanently disabled in the line of duty are only eligible for Public Safety Officer Benefits (PSOB) if they can never again perform any compensated work. This high bar leaves behind far too many public safety officers. PAFRA corrects this by ensuring disabled first responders whose work is for therapeutic purposes, involves simple tasks, or provides special accommodations can still receive benefits. The bill also provides for retroactive disability benefits to public safety officers who responded to the September 11, 2001 terrorist attacks, allowing those first responders who became permanently disabled from their heroic work at Ground Zero to re-apply for disability benefits."

> > "Sec. 3: DEFINITIONS WITH RESPECT TO PUBLIC SAFETY OFFICERS'DEATH BENEFITS PROGRAM.
> > (4) 'catastrophic injury' means an injury, the direct and proximate result of which is to permanently render an individual functionally incapable (including through a directly and proximately resulting neurocognitive disorder), based on the state of medicine on the date on which the claim is determined by the Bureau, of performing work, including sedentary work:
> > Provided, That, if it appears that a claimant may be functionally capable of performing work—
> > ''(A) the Bureau shall disregard work where any compensation provided is de minimis, nominal, honorary, or mere reimbursement of incidental expenses, such as—
> > ''(i) work that involves ordinary or simple tasks, that because of the claimed disability, the claimant cannot perform without significantly more supervision, accommodation, or assistance than is typically provided to an individual without the claimed disability doing
> > similar work;
> > ''(ii) work that involves minimal duties that make few or no demands on the claimant and are of little or no economic value to the employer; or
> > ''(iii) work that is performed primarily for therapeutic purposes and aids the claimant in

Legal Lesson Learned: Helpful statute.

Note: The two sponsors, Congressman Bill Pascrell, Jr. (D-NJ), and Senator Charles Grassley (R-IA), also described the increased federal benefits.

> "This bipartisan legislation was sponsored in the House (H.R. 2936) by Rep. Pascrell and in the Senate (S. 1511) by Sen. Grassley. PAFRA makes significant improvements to the Department of Justice's (DOJ) Public Safety Officer Benefits (PSOB) program, which provides first responders who die or are permanently disabled in the line of duty with a federal benefit of $370,000 and education assistance of $1,200 a month to their children or spouse."