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JULY 2022 – FIRE & EMS LAW

NEWSLETTER

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE.]

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10 RECENT CASES – INCLUDING 3 U.S. SUPREME COURT DECISIONS

NEWSLETTERS: If you would like to be added to UC Fire Science listserv, just send Larry an e-mail.

TEXTBOOK: Updating 18 chapters of my textbook (2018 to current). FIRE SERVICE LAW (SECOND EDITION), Jan. 2017:

- **2022: CASE SUMMARIES -** posted at Scholar@UC
- **2022: CURRENT EVENTS -** posted at Scholar@UC
- **2022: FIRE & EMS OFFICER DEVELOPMENT / LEGAL LESSONS LEARNED / AMERICAN HISTORY:** posted at Scholar@UC

File: Chap. 1 - American Legal System, incl. Fire Codes, Investigations, Arson

IL: ANNUAL TESTING FIRE ALARMS REQ. EACH 48 UNITS – CONDO ASSOC. MUST GET OWNERS TO ALLOW TESTER

On June 21, 2022, in The Village of Downers Grove v. Village Square III Condominium Association, the Court of Appeals of Illinois, Second District, held (3 to 0), 2022 IL App (2d) 210098, that the trial court, after a bench trial [no jury] properly upheld the citations. The complex consists of three separate two-story buildings, two that contain 18 units and one that contains 12 units, for a total of 48 units. None of the units shares any common entrances/exits or hallways. Rather, each unit has its own separate entrance/exit at grade level. The fire alarms can only be accessed by unit owner allowing in outside testing company. The trial judge "ultimately found it was required to assess a daily fine and imposed an aggregate fine of $23, 475, which consisted of $75 per day for each of the 313 days between December 21, 2017, and October 29, 2018."

Holding:

> "Defendant also notes testing cannot be performed remotely from outside the units but, rather, requires access to each individual unit. According to defendant, it must receive prior permission to access each unit, which had in the past proved to be 'a lengthy if nigh impossible task.' Therefore, defendant argues, even if the annual-testing requirement was applicable to defendant's buildings, 'the [V]illage is requiring the impossible, and seeks fining the impossible on a day-by-day basis.'
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> We reject this argument. It is better addressed to the Village council, which has the authority to change the Fire Prevention Code. We, on the other hand, must apply the ordinance as written. See, *e.g., People v. Barker,* 2021 IL App (1st) 192588, ¶ 70. Thus, we cannot find the ordinance inapplicable to defendant merely because it is purportedly difficult for defendant to attain compliance.
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> In this case, there is no dispute that defendant removed its original fire protection system and installed a new, approved fire protection system in the 1990s. Thus, defendant was required to test its fire protection system annually and submit the required report. There is likewise no dispute that defendant never submitted the required report, and therefore the trial court correctly found defendant guilty of the violation."

Legal Lesson Learned: The Condo Association needs to educate unit owners, and adopt by laws that they must allow in the alarm testing company.

Chap. 2 – Line Of Duty Death / Safety

U.S. SUP. COURT: FIREARMS – STATE OF NEW YORK "PROPER-CAUSE" REQUIREMENT UNCONSTITUTIONAL

On June 23, 2022, in New York State Rifle & Pistol Association, et al. v. Bruen, Superintendent of New York State Police, the U.S. Supreme Court held (6 to 3) that the State's requirement that residents must show a "proper-cause" to be able to carry a firearm violates their Second Amendment right to bear arms in public for self-defense. Brandon Koch, Rensselaer County and Robert Nash, Averill Park, are both members of the New York Rifle & Pistol Association and were denied licenses to carry a firearm in public since they didn't show any "special danger" and could only receive restricted licenses for only hunting and target practice.

Holding (opinion by Justice Thomas):

> "In 43 States, the government issues licenses to carry based on objective criteria. But in six States, including New York, the government further conditions issuance of a license to carry on a citizen's showing of some additional special need. Because the State of New York issues public-carry licenses only when an applicant demonstrates a special need for self-defense, we conclude that the State's licensing regime violates the Constitution.
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> In Heller [District of Columbia v. Heller, 554 U. S. 570 (2008)], and McDonald [McDonald v. Chicago, 561 U. S. 742 (2010)], we held that the Second and Fourteenth Amendments protect an individual right to keep and bear arms for self-defense. In doing so, we held unconstitutional two laws that prohibited the possession and use of handguns in the home. In the years since, the Courts of Appeals have coalesced around a 'two-step' framework for analyzing Second Amendment challenges that combines history with means-end scrutiny. Today, we decline to adopt that two-part approach. In keeping with Heller, we hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.' Konigsberg v. State Bar of Cal.,366 U. S. 36, 50, n. 10 (1961).

Dissent [Opinion by Justice Breyer].

> "In 2020, 45,222 Americans were killed by firearms. See Centers for Disease Control and Prevention, Fast Facts: Firearm Violence Prevention (last updated May 4, 2022) (CDC, Fast Facts), https://www.cdc.gov/violenceprevention/firearms/fastfact.html. Since the start of this year (2022), there have been 277 reported mass shootings—an average of more than one per day.
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> The question before us concerns the extent to which the Second Amendment prevents democratically elected officials from enacting laws to address the serious problem of gun violence. And yet the Court today purports to answer that question without discussing the nature or severity of that problem."

Legal Lesson Learned: Fire & EMS Department can post signs and issue policies prohibiting any firearms in their buildings, or apparatus, including by emergency responders.

> Note this article: "What the Supreme Court's Gun Ruling Means for New York" (June 24, 2022);Within minutes of the ruling's release, Governor Kathy Hochul, who called the ruling "shocking" and "frightful in its scope," announced that she would call a special session of the state legislature, likely in the next few weeks, to respond. Just a few days ago, Hochul signed a package of new gun-control laws—including raising the minimum age for buying an AR-15-type rifle from eighteen to twenty-one—in response to the racist mass shooting in Buffalo. New York has been one of the few states able to pass robust gun-control measures in response to mass shootings in recent years, and now its lawmakers will be tasked with coming up with a replacement for the Sullivan Act. This will likely include declaring public spaces such as schools and hospitals "sensitive spaces" where guns are barred, even for those with permits. Much of the focus in the debate will surely be on New York City, which saw a spike in shootings last year, and where arguments about crime and violence have lately been dominating the city's interior monologue. When asked, on Thursday, whether New York City's subways would qualify as 'sensitive spaces,' Hochul replied, 'In my opinion, they are.'"

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

U.S. SUPREME COURT: IMMIGRATION - PRES. BIDEN CAN CANCEL PRES. TRUMP "REMAIN IN MEXICO" PROTOCOLS

On June 30, 2022, in Biden et al. v. Texas, et al., the U.S. Supreme Court held (5 to 4) that President Biden has the "discretionary" authority from Congress to end President's Trump's Migrant Protection Protocols (MPP). where because of the "immigration crisis" at the border some non-Mexican immigrants were immediately returned to Mexico to await later processing. The State of Texas and Missouri filed lawsuit in Federal Court in Dallas and won a nationwide injunction against shutting down the MPP protocols. since the DHS did not issue adequate explanation for their cancellation of MPP as required by the Administrative Procedures Act. For example, in May, 2022, 1,460 migrants were returned to Mexico through MPP, according to DHS figures. [Note: During that same month, more than 100,000 migrants were expelled using Title 42; emergency action to stop communicable diseases, such as Covid.] To comply with APA, on June 1, 2021, DHS Secretary Mayorkas issued a memorandum officially terminating MPP, but the Dallas Federal judge and the Court of Appeals for 5th Circuit found it also was inadequate explanation. On October 29, the Secretary of DHS released a four-page memorandum that again announced the termination of MPP, along with a 39-page addendum explaining his reasons for doing so (the October 29 Memoranda). The Court of Appeals denied government's appeal, and the U.S. Supreme Court heard the case on an expedited basis.

Holding [opinion by Chief Justice John Roberts; also Justice Stephen Breyer, Justice Brett Kavanaugh, Justice Elena Kagan, and Justice Sonia Sotomayor]

"Section 1225(b)(2)(C) provides: 'In the case of an alien . . . who is arriving on land . . . from a foreign territory contiguous to the United States the [Secretary] may return the alien to that territory pending a proceeding under section 1229a.' Section 1225(b)(2)(C) plainly confers a discretionary authority to return aliens to
Mexico during the pendency of their immigration proceedings.

***

In sum, the contiguous-territory return authority in section 1225(b)(2)(C) is discretionary—and remains discretionary notwithstanding any violation of section 1225(b)(2)(A). To reiterate: we need not and do not resolve the parties' arguments regarding whether section 1225(b)(2)(A) must be read in light of traditional principles of law enforcement discretion, and whether the Government is lawfully exercising its parole authorities pursuant to sections 1182(d)(5) and 1226(a). We merely hold that section 1225(b)(2)(C) means what it says: 'may' means 'may,' and the INA itself does not require the Secretary to continue exercising his discretionary authority under these circumstances."

Dissent [Justice Samuel Alito writing an opinion; also dissenting were Justice Amy Barrett, Justice Neil Gorsuch, and Justice Clarence Thomas]

"In fiscal year 2021, the Border Patrol reported more than 1.7 million encounters with aliens along the Mexican border.1 When it appears that one of these aliens is not admissible, may the Government simply release the alien in this country and hope that the alien will show up for the hearing at which his or her entitlement to remain will be decided? Congress has provided a clear answer to that question, and the answer is no. By law, if an alien is 'not clearly and beyond a doubt entitled to be admitted' the alien 'shall be detained for a [removal] proceeding.' 8 U. S. C. §1225(b)(2)(A) (emphasis added)."

Legal Lesson Learned: Immigration and release of immigrants into our nation prior to review by an Immigration administrative law judge is a "hot topic" for the U.S. Supreme Court and our Nation.

Note: See article, **"Biden handed big immigration win by Supreme Court but challenges remain" (June 30, 2022);**
See also: **"The Trump Administration used Title 42 to designate hundreds of thousands of migrants for "expulsion," arguing that allowing these migrants to enter the U.S. may increase the spread of COVID-19."**

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

DC: JAN. 6, 2021 ATTACK ON CAPITOL – DEF. STAND TRIAL "OBSTRUCT, IMPEDED, INTERFERE" WITH POLICE

On June 22, 2022, in United States of America v. Riley June Williams, U.S. District Court Judge Amy Berman Jackson, U.S. District Court, District of Columbia, denied the defendant's motion her eight-count indictment, including charge of obstructing law enforcement officers. "This case is one of many arising out of the events at the United States Capitol on January 6, 2021, and all

of the legal challenges Williams raises in her motions have been considered and rejected by other courts in this district."

She was arrested on Jan. 18, 2021 in Harrisburg, PA; the FBI Statement of Facts includes:

> "In the days following the January 6, 2021, events, a witness ('W1') made several phone calls into the FBI's telephone tip line related to the U.S. Capitol attacks. I have reviewed documentation of several of those calls. In them, the caller stated that he/she was the former romantic partner of RILEY JUNE WILLIAMS ("WILLIAMS"), that he/she saw WILLIAMS depicted in video footage taken on January 6, 2021, from inside the U.S. Capitol Building. W1 stated that WILLIAMS can be seen directing crowds inside the U.S. Capitol Building up a staircase. The caller specified the uniform resource locator ("url") for a YouTube video that he/she was describing https://youtube.com/watch?v=jJiSmVktty4&feature=youtu.be. W1 also claimed to have spoken to friends of WILLIAMS, who showed W1 a video of WILLIAMS taking a laptop computer or hard drive from Speaker Pelosi's office. W1 stated that WILLIAMS intended to send the computer device to a friend in Russia, who then planned to sell the device to SVR, Russia's foreign intelligence service. According to W1, the transfer of the computer device to Russia fell through for unknown reasons and WILLIAMS still has the computer device or destroyed it. This matter remains under investigation." [See also another video and screen shoots of the defendant.]

Holding:

> "[The statute]:
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> > Whoever commits or attempts to commit *any act to obstruct, impede, or interfere with any fireman or law enforcement officer lawfully engaged in the lawful performance of his official duties incident to and during the commission of a civil disorder* which in any way or degree obstructs, delays, or adversely affects commerce or the movement of any article or commodity in commerce or the conduct or performance of any federally protected function--Shall be fined under this title or imprisoned not more than five years, or both. 18 U.S.C. § 231(a)(3) (emphasis added).
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> The phrase "incident to and during the commission of a civil disorder" is not vague.
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> [T] e term 'civil disorder' is defined in the statute to be 'any public disturbance involving acts of violence by assemblages of three or more persons, which causes an immediate danger of or results in damage or injury to the property or person of any other individual." 18 U.S.C. § 232(1). This series of requirements belies defendant's suggestion that the term is devoid of limiting principles to guide its application; the event at issue must involve a group of three or more persons, acts of violence, *and* actual, or an immediate danger of, property damage or personal injury. *See McHugh*, 2022 WL 296304, at *15. Further, defendant misreads the statute when she professes to be confused about whether the individual charged must have participated in the civil

> disorder; the reference to a civil disorder specifies the type of 'official duties' the victim *officer* must be engaged in performing for an assault or interference to be actionable under this particular statute. It does not characterize the prohibited act of the alleged perpetrator. Thus, section 231(a)(3) is not void for vagueness."

Legal Lesson Learned: The defendant will now either go to trial or take a plea agreement.

> Note: Defendant has been in news recently (Jan. 18, 2022): "January 6 defendant denies boyfriend plotted to shoot up synagogue. Lawyers for Riley Williams, who is accused of stealing Pelosi's laptop, submit filing acknowledging her partner served prison time but deny it was for alleged mass shooting plan."

Chap. 4 – Incident Command, incl. Training, Drones, Communications
Chap. 5 – Emergency Vehicle Operations

File: Chap. 6, Employment Litigation

U.S. SUP. CT: USERRA – TX STATE TROOPER RETURNING FROM IRAQ – LUNG ISSUES – CAN SUE IN STATE COURT

On June 29, 2022, in Torres v. Texas Department of Public Safety, the U.S. Supreme Court held (4 to 0) that the former State Trooper can sue his employer in state court for violation of USERRA [Uniformed Services Employment and Reemployment Rights Act of 1994]; he is not required to sue in federal court. Le Roy Torres returned from active military service in Iraq with lung issues from "burn pits" and but requested to be placed in a different position other than as a state trooper, since his lung damage precluded him from performing all of his duties. DPS declined the request and offered him a temporary position as a state trooper, stating that if he did not report to duty, his employment would be terminated. Torres resigned. He sued in state court, but Texas court of appeals said that he only remedy is in federal court. The lawsuit will now proceed in State court and a jury will be asked to award damages.

Holding [Opinion by Justice Breyer; one of his last before retiring].

> "Petitioner Le Roy Torres enlisted in the Army Reserves in 1989. In 2007, he was called to active duty and deployed to Iraq. While serving, Torres was exposed to toxic burn pits, a method of garbage disposal that sets open fire to all manner of trash, human waste, and military equipment. Torres received an honorable discharge. But he returned home with constrictive bronchitis, a respiratory condition that narrowed his airways and made breathing difficult. These ailments, Torres alleges, changed his life and left him unable to work at his old job as a state trooper. Torres asked his former employer, respondent Texas Department of Public Safety (Texas), to accommodate his condition by reemploying him in a different role. Texas refused to do so. Torres sued Texas in state court. He argued that Texas had violated USERRA's mandate that state employers re-hire returning service members, use 'reasonable efforts' to accommodate any service-related disability, or find an "equivalent" position (or its 'nearest approximation') where

such disability prevents the veteran from holding his prior position. 38 U. S. C. §4313(a)(3). Texas moved to dismiss the suit by invoking sovereign immunity.

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For one thing, the Constitution's text, across several Articles, strongly suggests a complete delegation of authority to the Federal Government to provide for the common defense. Unlike most of the powers given to the National Government, the Constitution spells out the war powers not in a single, simple phrase, but in many broad, interrelated provisions.

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We consequently hold that, as part of the plan of the Convention, the States waived their immunity under Congress' Article I power '[t]o raise and support Armies' and 'provide and maintain a Navy.'

***

But USERRA's text is clear: Congress sought to authorize suits against state employers. The very provision to which the dissent cites is entitled 'Enforcement of rights with respect to a State or private employer.' 38U. S. C. §4323. USERRA elsewhere expressly 'supersedes any State law . . . that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.' §4302(b). Congress' clarification that suits proceed 'in a State court of competent jurisdiction in accordance with the laws of the State' merely addresses the fact that USERRA suits must be brought in state (rather than federal) court. §4323(b)(2). Under Supremacy Clause principles, Texas courts may not enforce contrary state laws to block these suits."

Dissent [opinion by Justice Thomas].

"When it was originally enacted, USERRA authorized covered employees to sue States in federal district court. See 38 U. S. C. §4323(b) (1994 ed.). In 1996, this Court decided Seminole Tribe, holding that Congress could not abrogate state sovereign immunity in federal courts using its Article I powers. See 517 U. S., at 72–73. In response to Seminole Tribe, Congress amended USERRA in 1998, and the statute now provides: 'In the case of an action against a State (as an employer) by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State.' 4323(b)(2) (emphasis added). USERRA's requirement that employee damages actions be 'in accordance with the laws of the State' would seem to include a State's 'laws' that render it immune from suit in the State's own courts, as well as any 'laws' that expressly waive such immunity. See, e.g., Tex. Govt. Code Ann. §311.034 (West 2013); Prairie View A & M Univ. v. Chatha, 381 S. W. 3d 500, 512 (Tex. 2012). In other words, there is nothing in the text of USERRA necessarily implying that Congress intended to require nonconsenting States to defend themselves in their own courts."

Legal Lesson Learned: Fire & EMS departments must comply with USERRA, and failure to comply can lead to lawsuits in State court with a jury awarding damages.

File: Chap. 7 – Sexual Harassment, incl. Pregnancy Discrimination, Gay Rights
File: Chap. 8 – Race / National Origin Discrimination
File: Chap. 9 – Americans With Disabilities Act
File: Chap. 10 – Family Medical Leave Act, incl. Military Leave
File: Chap. 11 – Fair Labor Standards Act

File: Chap. 12 [also filed, Chap. 17]

OH: FIRE CHIEF "RETIRE / REHIRE" NEXT DAY IS LAWFUL – CIVIL SERVICE POSTING JOB ONLY WHEN A "VACANCY"

On June 27, 2022, in State of Ohio ex re. The International Association of Fire Fighters, Local 1536, AFL-CIO v. John Barbush, In His Official Capacity As Mayor And Director Of Public Safety, et. al., and James G. Powers, the Court of Appeals of Ohio, Eleventh District (Lake County), held (2 to 1) that trial court properly held that there was no "vacancy" in the Fire Chiefs position since he retired on Jan. 6, 2020, and was rehired the next day. Local 1536 argued [and the Dissenting Judge agreed] that the position should have been submitted the City's Civil Service Commission, and the position filled through a competitive promotional examination process where four Captains were eligible to apply.

Holding:

> "In the present matter, there was no such departure, since there is no dispute that [Fire Chief James] Powers retired but was reappointed to his office the next day. This is not the typical departure that creates a permanent absence from the office. Temporary separations from a position where it is evident the individual was not intending to leave that position have not been found to create a vacancy.
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> We also recognize the [City's] argument that both the management rights clause in the collective bargaining agreement and R.C. 4117.08 allow the employer to make determinations regarding retention of employees in positions outside of the bargaining unit, such as the fire chief. While this alone does not circumvent the obligation to follow civil service requirements where otherwise necessitated by law, given that we find there was no vacancy warranting the application of R.C. 124.48, there is no applicable legal precedent provided demonstrating the decision to retain Powers was outside of appellees' authority.
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> Local 1536 cites to *Dore* in support of the proposition that a fire chief who resigned could not be reinstated in that position, emphasizing that in *Dore* [*Dore v. Miller*, 9th Dist. Lorain No. 03CA008416, 2004-Ohio-4870, ¶ 12;] a chief who resigned to receive a pension and was subsequently reemployed by city administration as a chief violated R.C.

124.50. We find this case is distinguishable. In *Dore,* the fire chief submitted an unconditional letter of resignation, relinquished the position on a stated date, was on non-payroll status for 24 days, an acting fire chief was appointed, the chief received pension, and he failed to rescind his resignation. *Id.* at ¶ 13-14. In contrast, in the present matter, Powers returned to office the day following his retirement and acted consistently with remaining in the position, rather than the chief in *Dore* who was removed from payroll and opted not to rescind his resignation. As emphasized in *Dore,* intention to resign is necessary to find R.C. 124.50 applicable and that intention is not present here."

Dissent:

"Firefighters and police officers are front-line, first responders. They are not paid large salaries for the risks they take to maintain public safety. Moreover, as public servants, they might easily be unjustly thwarted or illegitimately advanced in their positions through the vagaries of politics, nepotism, or other improper influences. The General Assembly, via enacting the procedures set forth in the civil service code, attempted to avoid or certainly minimize these problems. The civil service promotional process provides a benefit of certainty to the advancement process upon which firefighters and police officers should be able to rely. Although the chief may indeed be the best individual to hold the esteemed post from which he retired, by virtue of his retirement, I am compelled to conclude the mechanisms of R.C. Chapter 124 (in particular R.C. 124.48 and R.C. 124.50) were triggered."

Legal Lesson Learned: In Ohio, other fire chiefs have also done "retire / rehire."

For example, see: **"Fairfield able to rehire retired fire chief" (March 15, 2011)**: **"West Carrollton to rehire fire chief after Valentine's week retirement" (Feb. 13, 2019)**

File: Chap. 12 – Drug Free Workplace

NJ: RANDOM DRUG TEST - "INDUSTRY STANDARDS" FOR EQUIPMENT CALIBRATION UNCLEAR - FF REINSTATED

On June 28, 2022, In The Matter Of Eric Beagin, City of Paterson, Fire Department, the Superior Court of New Jersey, Appellate Division, held (2 to 0) the Court stated that the Civil Service Commission's decisions [reversing Administrative Law Judge who found calibrations of drug testing equipment questionable] "are not supported by sufficient, credible evidence in the record and are arbitrary, capricious, and unreasonable. The urine sample was sent to the New Jersey State Toxicology Laboratory (State Lab) and on July 17, 2015, the State Lab reported Beagin's random urine screen positive for oxycodone at 114 ng/mL, 14 nanograms over the State Lab's defined cutoff of 100 ng/mL. He was immediately suspended. On March 11 and 15, 2019, a hearing was held before ALJ Celentano. Dr. Robert Havier, with State Lab for 40 years and Acting Director for 8 years, was cross examined about "industry standards" on calibrating testing equipment used by federal government in testing military, but FD never had him write a report

on those standards. The ALJ recommended Beagin be reinstated to the position of firefighter. The Civil Service Commission rejected the ALJ's recommendation, placing burden on the firefighter to prove "industry standards" were not followed.

Holding:

> "The CSC's decision is erroneous because it 1) misunderstood Dr. Havier's testimony regarding application of the twenty percent standard, never addressing the issue of whether the testing equipment was calibrated to be biased high, and 2) shifted the burden to Beagin to prove how the industry standard is applied.
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> The record establishes the calibrators for expected concentrations of 200, 50, and 25 ng/mL respectively all produced a straight line. Therefore, we can accurately conclude Beagin's sample was positive for oxycodone above 50 but below 200 ng/mL. However, the cutoff for oxycodone is 100 ng/mL. Dr. Havier admitted no calibrator of 100 ng/mL produced a result that could be plotted in the straight line produced by the 200, 50 and 25 ng/mL calibrators. Instead, the 100 ng/mL concentration utilized to calibrate the machine, and not discarded, produced an initial result of 116.4 ng/mL, then 115.3 when reinjected. Beagin's test result of 114.5 ng/mL, although above the 100 ng/mL cutoff, plotted below the concentrations for oxycodone. Despite cross-examination on this issue, Dr. Havier offered no testimony as to why Beagin's lower result was not deemed negative given the higher results of the calibrators utilized to plot the linear relationship."

Legal Lesson Learned: Since the main issue was "industry standards" on calibration of testing equipment, the State Lab expert should have been asked to provide a report to the ALJ on those standards.

> Note: See article after ALJ decision: "Judge orders Paterson firefighter terminated for failing drug test reinstated" (Dec. 9, 2019).

File: Chap. 12, Drug Free Workplace

U.S. SUP. COURT: THREE "PAIN MILL" DOCTORS – RE-TRIAL - MUST PROVE KNEW ACTING IN "UNAUHORIZED MANNER"

On June 27, 2022, in Xiulu Ruan v. United States, the U.S. Supreme Court held (9 to 0) that a Mobile, Alabama pain mill doctor, Xiulu Ruan, who was sentenced in to 21 years in federal prison in 2017 and pain mill doctor from Arizona and Wyoming, Dr. Shakeel Kahn, 25 years in prison, may be entitled to new trials because the jury instructions did not clearly state the Government must prove they were acting in an "unauthorized manner" when issuing thousands of proscriptions, including for fentanyl. Dr. Ruan's partner, Dr. Patrick Couch, 20 years in prison, had his conviction also set aside, by separate Court order, and will likely also get a new trial.

In 2017, the Mobile, Alabama doctors were not only sentenced to prison, but also "ordered to pay restitution in the following amounts: $6,282,023.00 to Medicare, $3,649,092.97 to Blue Cross/Blue Shield of Alabama, $2,285,170.70 to Tricare, and $1,695,929.00 to United Heath Group. They also forfeited to the United States several houses, beach condos, and bank accounts, as well as 23 luxury cars, including multiple Bentleys, Lamborghinis, Mercedes, and Ferraris. In addition to the forfeited property, each doctors agreed to an additional $5,000,000.00 money judgment. The United States is currently in the process of preparing to sell at auction the forfeited vehicles and property." Read more about the case against the doctors.

Holding (opinion by Justice Breyer):

> "Registered doctors may prescribe these substances to their patients. But, as provided by regulation, a prescription is only authorized when a doctor issues it 'for a legitimate medical purpose . . . acting in the usual course of his professional practice.' 21 CFR §1306.04(a) (2021).
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> In each of these two consolidated cases, a doctor was convicted under §841 for dispensing controlled substances not 'as authorized.' The question before us concerns the state of mind that the Government must prove to convict these doctors of violating the statute. We hold that the statute's 'knowingly or intentionally' mens rea applies to authorization. After a defendant produces evidence that he or she was authorized to dispense controlled substances, the Government must prove beyond a reasonable doubt that the defendant knew that he or she was acting in an unauthorized manner, or intended to do so.
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> The Government argues that we should affirm Ruan's and Kahn's convictions because the jury instructions at their trials conveyed the requisite mens rea. Alternatively, the Government argues that any instructional error was harmless. But the Court of Appeals in both cases evaluated the jury instructions under an incorrect understanding of §841's scienter requirements. We decline to decide in the first instance whether the instructions complied with the standard we have set forth today. Cf. Rehaif, 588 U. S., at ___ (slip op., at 11). We leave that and any harmlessness questions for the courts to address on remand."

Legal Lesson Learned: Legal Lesson Learned: This decision may impact numerous other "pain mill" physicians.

> **Note: "Mobile doctor's Supreme Court win could impact other 'pill mill' convictions" (June 27, 2022) – VIDEO.** "The justices sent the case against Dr. Xiulu Ruan back to the Atlanta-based 11th U.S. Circuit Court of Appeals, which likely will instruct a federal judge in Mobile to order a new trial. A spokesman for the U.S. Attorney's Office in Mobile declined to comment."

Regarding Dr. Shakeel Kahn in Wyoming, see this article: "Federal Appellate Court Upholds Former Casper Doctor's Drug Conspiracy Verdict" (Feb. 23, 2021): In late 2016, federal authorities searched the Kahns' properties in Casper and Arizona, and seized financial and business records, cars, firearms and more than $1 million in cash.

File: Chap. 13

TX: MEDIC VIDEOED KICKING HOMELESS MAN – LAWSUIT PROCEED – ALLEGED FD POLICY NOT TERMINATING EMS

On June 23, 2022, in Kyle Vess v. City of Dallas, a municipal corporation, and Brad Alan Cox, U.S. Senior District Court Judge Sidney A. Fitzwater, U.S. District Court for the Northern District of Texas, denied the City's motion to dismiss, and also declined to dismiss all of claims against the paramedic. "Taking the facts alleged in the SAC [Second Amended Complaint] as true, the court concludes that Vess has plausibly pleaded that this policy 'of protection for previously disciplined personnel by refusing to terminate or separate from employment individuals unfit to serve as members of the Dallas Fire Department despite good cause for termination and the risk these individuals pose to the public,' SAC ¶ 45(d), was the moving force behind Cox's actions. The Court also noted that Vess alleges that [Dallas Police Investigations Unit] hampered the investigation because it did not turn over exculpatory evidence to Vess's criminal defense attorney until two years after the events in question and not until after this lawsuit was filed. Further, DPIU did not take statements from DFD personnel when it was investigating Vess and Cox's confrontation; it only took statements from police officers who were on the scene."

> "In August 2019 Cox and other DFD personnel were called to extinguish a grass fire.]When Cox and other DFD personnel arrived, Vess, who is mentally ill, was walking near the fire. Due to Vess's proximity to the fire, Cox thought Vess was responsible for starting it.
>
> Cox and other DFD personnel attempted to detain Vess. Meanwhile, other DFD personnel called the Dallas Police Department ('DPD') for assistance. Cox confronted Vess in an effort to detain him. Something provoked Vess, however, and he errantly swung at Cox, who swung back at Vess and hit him. According to the second amended complaint ('SAC'), Cox then beat Vess 'senselessly' and subdued him. SAC ¶ 13. After subduing Vess, Cox continued to beat him, kicking him six times while he was on the ground. It was necessary for another firefighter to restrain Cox.
>
> But according to the SAC, Cox was not finished. DPD officers eventually arrived and found Vess lying on the ground on his back, 'clearly subdued.' SAC ¶ 13. The DPD officers, together with Cox and a group of other firefighters, surrounded Vess as he continued to lie on the ground. Cox taunted Vess, telling him to '[g]et up again, get up

again." Id. ¶ 14. When Vess lifted his head off the ground, Cox kicked him in the right side of his head with a steel-toed boot. Vess was initially knocked to the ground, but then stood up in a 'fight or flight' response to confront Cox. Before Vess could confront Cox, however, another officer used a taser to incapacitate Vess. Cox's actions caused Vess to suffer 'a fractured orbital socket on his face, a fractured sinus, cracked teeth, and . . . facial paralysis on the right side of his face." Id. ¶ 17. Vess also suffered an exacerbation of a prior brain injury.

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[Plaintiff also alleges the] City attempted to avoid disciplining Cox for his encounter with Vess. DFD did not conduct an internal affairs investigation, and the Dallas Public Integrity Unit ('DPIU') cleared Cox of any wrongdoing. Both entities "worked to ensure that no further or deeper investigation was done because both had a practice of concealing internal disciplinary measures from the public. SAC ¶ 24. The office of the Dallas County District Attorney did not pursue an indictment of Cox, later 'indicated remorse' for not having done so, and 'admitted that a thorough investigation was not undertaken.'"

Holding:

"Taking the facts alleged in the SAC [Second Amended Complaint] as true, the court concludes that Vess has plausibly pleaded that this policy "of protection for previously disciplined personnel by refusing to terminate or separate from employment individuals unfit to serve as members of the Dallas Fire Department despite good cause for termination and the risk these individuals pose to the public," SAC ¶ 45(d), was the moving force behind Cox's actions. "The 'moving force' inquiry imposes a causation standard higher than 'but for' causation." *Mason v. Lafayette City-Par. Consol. Gov't*, 806 F.3d 268, 280 (5th Cir. 2015). There must be a "direct causal connection . . . between the policy and the alleged constitutional deprivation." *Id.* (quotation omitted). Here, Vess has plausibly pleaded that this policy was known throughout the department and that the policy caused Vess's injuries."

Legal Lesson Learned: Serious allegations; case will now proceed to pre-trial discovery.

Note: See articles:

"Court Shoots Down Dallas' Request to Toss Out Lawsuit Over Paramedic Kicking Man in Head" (June 28, 2022).

After Police Review, No Charges Filed Against Former Dallas Paramedic Who Kicked Mentally Ill Man (March 7, 2022).

New Video Shows Dallas Paramedic Repeatedly Kicking Mentally Ill Man Before Police Show Up (Oct. 19, 2021).

File: Chap. 14, Physical Fitness, incl. Heart Health

File: Chap. 15

IL: PTSD - CAPTAIN RESPONDED TO DOG ATTACK ON CHILD - LINE OF DUTY PENSION, AND WORKERS COMP PPD

On June 27, 2022, in City of Springfield v. The Illinois Workers' Compensation Commission (Robert Talbott), the Court of Appeals of Illinois, Fourth District (Workers' Compensation Commission Division), held (5 to 0), 2022 IL App (4th) 210338WC-U, that the Commission properly held that Captain Robert Talbott, who was awarded a line-of-duty disability pension on June 30, 2017, was also eligible to receive workers comp PPD [permanent partial disability] award $721.66 per week for 250 weeks; case remanded to Commission to re-calculate award. The claimant developed PTSD following the dog-attack incident and it was causing emotional symptoms that were preventing him from returning to work. Captain Robert Talbott on April 11, 2015 responded to a terrible dog bite scene, that contributed with subsequent diagnosis of PTSD. Claimant was awarded a line-of-duty disability pension on June 30, 2017. The City challenged an award of "permanent partial disability" arguing he could work in other professions, such as his 14 years part-time work at a funeral home.

> "At about 12:15 p.m., claimant's crew responded to a call involving a dog attack on a child. As they arrived at the scene, they were met by the child's stepmother. She stated that the victim was in the backyard and the dog was secured in a bedroom. Claimant and his crew proceeded immediately to the backyard. It was a large backyard, and they did not immediately see the victim, as there was an intervening hill crest. Another young girl was standing on the crest, and they approached. They observed a young girl lying on the ground. Claimant stated that his 'first thought was she had already passed away,' due to the wounds he observed and the fact that she was not moving. Claimant explained:
>
> 'She had bite marks on both arms, both legs, on her thoracic cavity, her chest, side of her chest, and a very large laceration of her scalp area. Her hair [had] been scalped. She-I think it would probably be about four or five inches if you put a ruler to it. It was bigger than my hand laying open, completely matted with leaves, dirt.'
>
> However, they assessed her and found that she was still alive. They provided treatment to her. An ambulance arrived about two minutes later. The victim was loaded onto a backboard while claimant held her head. The ambulance then removed the victim from the scene."

Holding:

> "We now turn to [City's] contention that claimant did not prove he could not work in some position other than firefighting. The Commission found that claimant 'was unanimously determined to be medically unable to return to work as a firefighter by Dr Ganellen, Dr. Pan, and Dr. Killian.' Respondent does not dispute this. The Commission

> further found that, '[d]ue to his anxiety, [claimant] also stopped working at his second job at [the funeral home] from September 2015 until February 18, 2018.' Thus, the Commission found that claimant was disabled from employment other than firefighting as well. We note that when claimant returned to the funeral home in 2018, Flammini [Vincent Flammini, a psychotherapist] counseled him about 'self-care, potential triggers, and how to manage.' Thus, even at this relatively late date, Flammini was concerned about claimant returning to employment in a field other than firefighting. Flammini's concerns turned out to be prescient, for, by May of that year, claimant was experiencing increased PTSD, and he counseled claimant to reduce his hours. These facts clearly support the Commission's conclusion that claimant was not capable of work besides firefighting."

Legal Lesson Learned: PTSD can lead to a line-of-duty disability retirement and a permanent partial disability award.

File: Chap. 16, Discipline

File: Chap. 17 [also filed, Chap. 6]

OH: FIRE CHIEF "RETIRE / REHIRE" NEXT DAY IS LAWFUL – CIVIL SERVICE POSTING JOB ONLY WHEN A "VACANCY"

On June 27, 2022, in State of Ohio ex re. The International Association of Fire Fighters, Local 1536, AFL-CIO v. John Barbush, In His Official Capacity As Maor And Director Of Public Safety, et. al., and James G. Powers, the Court of Appeals of Ohio, Eleventh District (Lake County), held (2 to 1) that trial court properly held that there was no "vacancy" in the Fire Chiefs position since he retired on Jan. 6, 2020, and was rehired the next day. Local 1536 argued [and the Dissenting Judge agreed] that the position should have been submitted the City's Civil Service Commission, and the position filled through a competitive promotional examination process where four Captains were eligible to apply.

Holding:

> "In the present matter, there was no such departure, since there is no dispute that [Fire Chief James] Powers retired but was reappointed to his office the next day. This is not the typical departure that creates a permanent absence from the office. Temporary separations from a position where it is evident the individual was not intending to leave that position have not been found to create a vacancy.
>
> ***
>
> We also recognize the [City's] argument that both the management rights clause in the collective bargaining agreement and R.C. 4117.08 allow the employer to make

determinations regarding retention of employees in positions outside of the bargaining unit, such as the fire chief. While this alone does not circumvent the obligation to follow civil service requirements where otherwise necessitated by law, given that we find there was no vacancy warranting the application of R.C. 124.48, there is no applicable legal precedent provided demonstrating the decision to retain Powers was outside of appellees' authority.

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Local 1536 cites to *Dore* in support of the proposition that a fire chief who resigned could not be reinstated in that position, emphasizing that in *Dore* [*Dore v. Miller*, 9th Dist. Lorain No. 03CA008416, 2004-Ohio-4870, ¶ 12] a chief who resigned to receive a pension and was subsequently reemployed by city administration as a chief violated R.C. 124.50. We find this case is distinguishable. In *Dore,* the fire chief submitted an unconditional letter of resignation, relinquished the position on a stated date, was on non-payroll status for 24 days, an acting fire chief was appointed, the chief received pension, and he failed to rescind his resignation. *Id.* at ¶ 13-14. In contrast, in the present matter, Powers returned to office the day following his retirement and acted consistently with remaining in the position, rather than the chief in *Dore* who was removed from payroll and opted not to rescind his resignation. As emphasized in *Dore,* intention to resign is necessary to find R.C. 124.50 applicable and that intention is not present here."

Dissent:

"Firefighters and police officers are front-line, first responders. They are not paid large salaries for the risks they take to maintain public safety. Moreover, as public servants, they might easily be unjustly thwarted or illegitimately advanced in their positions through the vagaries of politics, nepotism, or other improper influences. The General Assembly, via enacting the procedures set forth in the civil service code, attempted to avoid or certainly minimize these problems. The civil service promotional process provides a benefit of certainty to the advancement process upon which firefighters and police officers should be able to rely. Although the chief may indeed be the best individual to hold the esteemed post from which he retired, by virtue of his retirement, I am compelled to conclude the mechanisms of R.C. Chapter 124 (in particular R.C. 124.48 and R.C. 124.50) were triggered."

Legal Lesson Learned: In Ohio, other fire chiefs have also done "retire / rehire."

For example, see: **"Fairfield able to rehire retired fire chief" (March 15, 2011)**
"West Carrollton to rehire fire chief after Valentine's week retirement" (Feb. 13, 2019)