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AUGUST 2021 – FIRE & EMS LAW Newsletter

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE.]

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9/18/2021 (9 am – 11:30 am): CHEMICAL SAFETY / EMERGENCY RESPONDERS seminar [see Flyer at end of this Newsletter]. Watch live feed on YouTube.

FIRE & EMS OFFICER DEVELOPMENT – see Prof. Bennett's new online text for Fire Officer I, II, III, IV via Scholar@UC.

RECENT CASES: See online library of cases via Scholar@UC.

FIRE & EMS LAW – MONTHLY NEWSLETTERS. If you would like to receive free newsletter, just send me an e-mail.

AUGUST NEWSLETTER: 8 RECENT CASES REVIEWED

Chap. 1 – American Legal System, incl. Fire Codes, Fire Invest.

File: Chap. 2 – Line Of Duty Death / Safety

MO: FF INJURED BY FALLING BRICKS – PTSD - BUT NOT TOTALLY & PERMANENTLY DISABLED

On July 20, 2021, in Michael Taylor v. The Board of Trustees of the Firefighters' Retirement Plan of St. Louis, the Missouri Court of Appeals (Eastern District – Division Four) held (3 to 0) that the Retirement Board correctly denied his claim for total and permanent disability benefits (25% of his average final compensation), with one doctor describing "symptom magnification." Taylor testified he was working as a stationary engineer trainee for the City of St. Louis at a water purification facility and that his PTSD symptoms were not preventing him from performing that job. The Board found the Taylor's failure to return to work as a firefighter was caused by his "unwillingness to return to work."

> "Taylor's argument is premised on the erroneous belief that the Board interpreted the 'resulting from bodily injury' requirement contained in section 4.19.070(B)(2) to exclude mental disabilities. Contrary to Taylor's assertion, the Board did not deny his claim on that basis; it instead found he failed to carry his burden of proof to establish three of the requirements of section 4.19.070(b)(2)—specifically, that (1) he incurred a total and permanent disability, (2) his health condition 'resulted from bodily injury,' and (3) his health condition rendered him totally and permanently disabled from working as a firefighter."

Facts:

> "Taylor worked as a firefighter for the City of St. Louis for over ten years. In April 2017, he responded to the scene of a fire and was injured when falling bricks knocked him to the ground. On August 20, 2018, he filed an application for disability retirement benefits with the Firefighters' Retirement Plan. In his application, Taylor stated: 'A [three] story brick wall collapsed on me, and rendered me unconscious.'
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> ***
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> On the day of the incident, Taylor was transported to the emergency room at St. Louis University Hospital, where he was treated for various physical injuries. After being released from the emergency room, he received further treatment from Dr. James Doll, a physiatrist. Taylor first saw Dr. Doll on May 31, 2017 and reported his symptoms as insomnia, frequent headaches, numbness and tingling in his right arm, joint pain, and swelling of his joints and limbs. Dr. Doll treated Taylor for cervical and right shoulder strain and prescribed physical therapy and work conditioning beginning in June 2017. During work conditioning, Taylor had the ability to perform all necessary tasks with no difficulty. When Dr. Doll mentioned Taylor returning to work, Taylor stated 'there was no way he could possibly perform the requirements of his work activities.' Dr. Doll reported that Taylor progressed 'extremely slowly' in the work conditioning program. He

also found Taylor's ‘level of motivation [to be] questionable’ and noted inconsistencies between Taylor's ‘self-assessments, his subjective complaints, his physical examination findings and his actual performance during his work conditioning sessions.’ On June 3, 2018, Dr. Doll found that Taylor had reached maximum medical improvement and did not need restrictions on his physical activities as a result of his cervical and shoulder injuries. He opined that Taylor had suffered no permanent partial disability as a result of his injuries.

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On September 25, 2017, Taylor was evaluated by Dr. Robert Fucetola, the chief of clinical neuropsychology at Washington University School of Medicine. Dr. Fucetola opined that Taylor did not exhibit any ‘serious psychological pathology,’ noting that Taylor denied ‘clinically significant symptoms of depression, anxiety, or stress/worry.’ He concluded Taylor's "symptoms did not meet [the] threshold criteria for [PTSD] as there were no clinically significant symptoms of anxious arousal, dissociative symptoms, or significant depression and anger.’ He also found ‘no evidence of a major mental disorder’ but did diagnose Taylor with ‘Adjustment Disorder with Anxiety.’

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Taylor attended 40 counseling sessions with Craig Politte, a licensed professional counselor, between October 16, 2017 and September 5, 2018. Mr. Politte's notes indicated a significant number of Taylor's sessions were devoted to discussions about his anger with his workers' compensation doctors and his anger and distrust of the fire department and its employees. Although he is not a medical doctor, Mr. Politte suggested in his notes and correspondence that Taylor was suffering from PTSD.

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The Board denied Taylor's claim at an informal hearing on January 31, 2019, concluding: (1) Taylor's failure to return to work was caused by his ‘unwillingness to return to work’ as shown by his lack of effort in physical therapy; and (2) based on the opinion of Dr. Fucetola, Taylor was ‘not suffering from any permanent psychological disability.’

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Section 4.19.070(B)(2), which pertains to ‘Line of Duty’ disability benefits for firefighters, provides:

> A participant who incurs a termination of employment because of a total and permanent disability resulting from bodily injury incurred while engaged in the actual performance of duty as a firefighter in response to an emergency call that renders the participant totally and permanently unable to continue his employment as a firefighter, but not other gainful employment . . . , shall receive a disability income while so disabled equal to twenty-five percent of his average final compensation . . .

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For the foregoing reasons, the judgment is affirmed.”

Legal Lesson Learned: The firefighter failed to prove his suffered from "total and permanent" disability result from the on duty injury.

File: Chap. 3, Homeland Security

VA: GUN CONTROL - 4th CIRCUIT - 18-20 YEAR OLDS HAVE RIGHT TO BUY HANDGUNS FROM LICENSED GUN DEALERS

On July 15, 2021, in Tanner Hirschfeld; Natalia Marshall v. Bureau of Alcohol, Firearms, Tobacco & Explosives, the U.S. Court of Appeals for the 4th Circuit (Richmond, VA) held (2 to 1) that Congress in passing the Omnibus Crime Control and Safe Streets Act of 1968 violated the 2nd Amendment rights of 18-20 year olds to purchase handguns or ammunition from federally licensed gun dealers. The Court reviewed the history of the Bill of Rights; in 1791 when the first 10 Amendments were ratified by states, all 14 states uniformly required all males 18 and older to join the state militia and to have their own firearms. Recognizing violent crime by youth is an important societal issue, less than 1% of those under 21 commit violent crimes.
4th Circuit [opinion by Circuit Judge Julus N. Richardson].

> "Despite the weighty interest in reducing crime and violence, we refuse to relegate either the Second Amendment or 18- to 20-year-olds to a second-class status.
>
> ***
>
> So while 18- to 20-year-olds may commit a disproportionate share of violent crime, an exceedingly small percentage, around 0.3% and definitely less than 1%, of the 13 million young adults in this group commit those crimes. This alone cannot justify restricting the entire group's rights.
>
> ***
>
> The [Founding] Founders set age requirements for Congress and the Presidency, but they did not limit any rights protected by the Bill of Rights to those of a certain age. See U.S. Const. art. I, § 2 (age 25 for the House); id. art. I, § 3 (age 30 for the Senate); id. art. II, § 1 (age 35 for the President); cf. id. amend. XXVI (setting voting age at 18). In other words, the Founders considered age and knew how to set age requirements but placed no such restrictions on rights, including those protected by the Second Amendment."

Facts:

> "Nineteen-year-old Natalia Marshall had good reason to seek protection. She had been forced to obtain a protective order against her abusive ex-boyfriend who, since the issuance of the order, had been arrested for unlawful possession of a firearm and controlled substances. He was released on bail but never came to court, leading to the issuance of a capias for his arrest. Along with the threat from her ex-boyfriend, Marshall works as an equestrian trainer, often finding herself in remote rural areas where she interacts with unfamiliar people. Having grown up training with guns, she believes that a

handgun's ease of carrying, training, and use makes it the most effective tool for her protection from these and other risks. But because Marshall was 18 when she tried to buy a handgun, a federal law prevented her from buying from a licensed dealer who would perform a background check to verify that she was not a felon or other prohibited person. She preferred using a licensed dealer because they tend to have a wider supply, a good reputation, and a guarantee that the guns have not been used, stolen, or tampered with. She is now 19 and remains unable to buy a handgun from a federally licensed dealer for self-defense."

Dissent (Circuit Judge James A. Wynn):

"Today, my good colleagues in the majority break new ground by invalidating a modest and long-established effort to control gun violence. The majority holds that Congress may not enact a law making 21 the minimum age to purchase handguns from federally licensed gun dealers. But the majority's decision to grant the gun lobby a victory in a fight it lost on Capitol Hill more than fifty years ago is not compelled by law. Nor is it consistent with the proper role of the federal judiciary in our democratic system.

Legal Lesson Learned: This decision does not restrict Fire & EMS Departments from banning firearms on their property or apparatus. It is highly likely the U.S. Department of Justice will ask all 15 of the judges on the 4th Circuit to reconsider the decision (en banc decision) since the 5th Circuit and lower courts have upheld the ban.

Note: See article on the decision: "Handgun sale ban to under 21-year-olds is unconstitutional, appeals court says." (July 13, 2021.)

> "Other courts had previously upheld the federal age minimums, as well as more expansive age limits that have been passed by states. Just last month, a federal judge upheld Florida's ban on firearm sales to those under 21."

July 18, 2021: "Opinion: A federal appeals court decision on handguns opens the door to more violence."

"That act of judicial arrogance, if affirmed on appeal, would likely accelerate the current spike in homicides, many of them committed with handguns by individuals under the age of 21. And it comes as Americans are embarked on a record-setting gun-buying spree, which began during the pandemic and shows no sign of waning."

Aug. 2, 2021: 'Something has to be done.' Lawsuit filed against maker of 100-round magazine used in Dayton mass shooting."

"Two years ago, Connor Betts used a high-powered rifle to kill nine people and wound many others in a crowded entertainment district in Dayton, Ohio. The tragedy unfolded in about 30 seconds. The 24-year-old used an assault-style rifle that had a 100-round, double-drum magazine attached, allowing him to fire multiple rounds without reloading. Attorneys for several of the families of those killed are suing the company that manufactured the double-drum magazine, saying it has no real protocols or oversight in place to ensure that its product isn't used in a mass shooting. *** The lawsuit was filed in

Nevada state court against Nevada-based Kyung Chang Industry USA and its related South Korean company."

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

File: Chap. 6, Employment Litigation

CT: HEART ATTACK - STATUTORY PRESUMPTION FOR "MEMBERS" MUNICIPAL FD - PART-TIMERS COVERED

On July 27, 2021, in Christopher A. Clark v. Town of Waterford, Cohanzie Fire Department, the Court of Appeals of Connecticut held (3 to 0) that Workers' Compensation Commissioner correctly held that the part-time firefighter was a "uniformed member" of a municipal fire department who passed a pre-hire medical exam and therefore covered under the Heart and Hypertension Act, even if he wasn't eligible for retirement pension since he didn't work an average of 20 hours per week or more.

> "On appeal before us, the town claims that the board erred when it affirmed the commissioner's award because it failed to apply the definition of the term *member* provided in § 7-425 (5) when considering whether the plaintiff was 'a uniformed member of a paid municipal fire department'' eligible for benefits pursuant to § 7-433c. We disagree.
>
> ***
> Consequently, § 7-433c requires all municipal employers, as defined in General Statutes § 7-467, to pay compensation and medical care to any 'uniformed member of a paid municipal fire department or regular member of a paid municipal police department' who suffers any condition or impairment of health caused by hypertension or heart disease resulting in death or temporary or permanent, total or partial disability, or dependents, as the case may be."
>
> Facts:
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> > [From July 15, 2020 opinion of Compensation Review Board, Workers' Compensation Commission, which ruled for the firefighter (2 to 1)]
> >
> > "At [his hearing before a Workers Comp. Commissioner on March 8, 2019] the claimant testified that he was hired as a part-time firefighter by the respondent municipality on May 24, 1992. His duties included answering the telephone at the fire station, cleaning the fire station, responding to medical and fire emergencies, and performing day-to-day maintenance of the fire apparatus. At the time the claimant was hired, he also worked for Health Resources, a contractor at the Millstone nuclear power station. Although his employment at Millstone was 'more or less' full time at the beginning, his hours were reduced as time went on.

Findings, ¶ 1.k., quoting March 7, 2019 Transcript, p. 21. The claimant also drove for Waterford Ambulance on an as-needed basis.

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In his position as a firefighter, the claimant wore a uniform consisting of a shirt, badge, belt, pants and black shoes; he was also issued protective fire gear in case he had to respond to a fire call. His uniform was the same as the uniform worn by the other firefighters. He was paid for the work he performed while employed by the respondent. The claimant's shifts were affected by the time of year, the vacation and sick time used by the full-time firefighters, and the injuries sustained by the full-time staff. In some weeks, he would work multiple shifts, while in other weeks, he might not receive any assignments. As a part time employee, he was not eligible for holiday or vacation pay or pension benefits.

Prior to being hired as a part-time firefighter, the claimant underwent and passed a pre-employment physical examination. He worked as a part-time firefighter for five years; in 1997, he was hired as a full-time firefighter by the respondent. The responsibilities of the part time and full-time firefighters were the same; neither the claimant's duties nor his uniform changed when he became full-time.

On or about June 24, 2017, the claimant 'suffered an NSTEMI type of myocardial infarction that resulted in his having quadruple bypass surgery on June 29, 2017.' Findings, ¶ 1.i. The commissioner took administrative notice of a form 30C (notice of claim) received by the Workers' Compensation Commission on August 14, 2017, in which the claimant asserted a claim for benefits pursuant to § 7-433c. The commissioner also took administrative notice of the fact that the town of Waterford is a municipality organized under the laws of the state of Connecticut.

Noting that the provisions of § 7-433c do not define the term 'member' or distinguish between part time and full time status, the commissioner determined that the claimant's date of hire was May 24, 1992. The commissioner concluded that because the claimant had been employed by the municipality prior to July 1, 1996 [when this statute was repealed], he was entitled to heart and hypertension benefits pursuant to the provisions of § 7-433c. The commissioner therefore ordered the respondent to accept as compensable the claimant's myocardial infarction of June 24, 2017.

***

In light of the claimant's testimony, we find it difficult to distinguish between the risks and responsibilities attendant upon being a part time firefighter as opposed to a full time firefighter. As such, we are not persuaded that the legislature intended that eligibility for heart and hypertension benefits should rest upon what is, in our estimation, an almost meaningless distinction."

Court's decision:

> "Though the plain language of § 7-433c is clear and we therefore need not go further, we note that the town's interpretation also leads to an absurd result that heart and hypertension benefits are available only to uniformed firefighters employed and paid by municipalities that participate in the retirement fund. Firefighters working for a municipal employer not participating in the voluntary, state administered retirement fund would be ineligible for heart and hypertension benefits, regardless of the number of hours they worked per week. Section 7-425, by its own terms, does not require such a result. On the contrary, § 7-425 explicitly provides that the definitions set forth therein shall apply ''except as otherwise provided." We conclude that the use of the term *member* in § 7-433c is one of the exceptions expressly contemplated by § 7-425, itself. The board, therefore, properly affirmed the commissioner's decree that the town accept the plaintiff's heart disability as a compensable injury under § 7-433c. The decision of the Compensation Review Board is affirmed."

Legal Lesson Learned: Statutory presumptions for heart attacks are very helpful, and in Connecticut now applies to career, part-time, and volunteer firefighters who have passed a pre-employment physical.

Note:
Check the law in your state: IAFF Presumptive Health Initiative:

> "Connecticut's Heart and Hypertension Act was signed into law in 1977, and allows firefighters and police officers with hypertension and heart disease to receive benefits equivalent to those found in workers' compensation without the burden of proving that the condition was in fact caused by their work. Eligibility for compensation under the Heart and Hypertension Act requires that the recipient be a current or former police officer or firefighter, and that a pre-employment physical was conducted that showed no signs of either hypertension or heart disease."
>
> Volunteer firefighters are now also covered, "provided such member had previously successfully passed a physical examination by a licensed physician appointed by such department or ambulance service which examination failed to reveal any evidence of such condition."

April 13, 2021: Watch Appellate argument in this case via YouTube.

File: Chap. 6, Employment Litigation

LA: DISTRICT CHIEF'S HEARING LOSS – ENTITLED TO HEARING AID, BUT NO PARTIAL DISABILITY PAYMENTS

On March 24, 2021, in James J. Hartman, Jr. v. St. Bernard Fire Department, the Supreme Court of Louisiana held (7 to 0) that since the District Chief continues to work, and has suffered no wage loss, he is only entitled to hearing aids under Louisiana 1986 statute that requires proof of a single event that causes immediate trauma (like an explosion) to be eligible for permanent partial disability benefits.

> "In the case of indemnity benefits for occupational hearing loss, through the enactment of La. R.S. 23:1221(4)(p), the legislature has drawn a distinction between cases in which a single exposure to noise (such as an explosion) causes immediate trauma in employees exposed to it, and those in which the hearing loss is gradual and cumulative, caused by repeated exposures. This distinction is not arbitrary; nor does it deprive an employee suffering from noise-induced hearing loss of due process or equal protection of the law. Rather, it reflects a policy decision that is uniquely the province of the legislature to make."

Facts:

> "James J. Hartman, Jr. has been employed by the St. Bernard Parish Fire Department since May 25, 1990, and (as of the date of the filing of his claim) remains on the job, serving as a District Chief. He has never been disabled from performing the duties of his position.
>
> During the course of his employment with the Fire Department, Mr. Hartman was exposed to injurious levels of noise, which resulted in permanent hearing loss. The Department was informed of Mr. Hartman's hearing loss on September 20, 2006. He underwent audiograms on January 24, 2008, April 10, 2014, March 1, 2017, and September 27, 2017. Each test showed a gradual increase in hearing loss. The last audiogram, performed by Dr. Daniel Bode on September 27, 2017, shows a 42.2% binaural hearing loss. Dr. Bode opined that repeated exposure to loud noises for extended periods of time (specifically, from 1990-2017) was 'likely a contributing factor to [Mr. Hartman's] bilateral sensorineural hearing loss.'
>
> ***
> On December 10, 2019, a judgment was rendered in favor of the Fire Department, dismissing Mr. Hartman's claim. In that judgment, the Office of Workers' Compensation judge determined that Mr. Hartman's hearing loss is a cumulative hearing loss that occurred over time as a result of his exposure to injurious noise, and not the result of a single traumatic event such as would entitle him to permanent partial disability benefits under La.R.S. 23:1221(4)(p). In written reasons, the judge explained:
>
> > Upon reviewing the medical evidence and medical testimony, the Court concludes that Claimant's hearing loss is a cumulative hearing loss not covered under La. R.S. 23:1221(4)(p) which provides benefits to an employee who suffers a permanent hearing loss *solely due to a single traumatic accident* (emphasis

added). ... Unfortunately, as written, La. R.S. 23:1221(4)(p) does not provide benefits for cumulative hearing loss.

Mr. Hartman appealed and the Court of Appeal, Fourth Circuit, affirmed. Hartman v. St. Bernard Parish Fire Department & Fara, 20-0103 (La.App. 4 Cir. 5/20/20), 301 So.3d 562. Like the Office of Workers' Compensation judge, the court of appeal rejected the contention that Mr. Hartman is entitled to permanent partial disability benefits pursuant to La. R.S. 23:1221(4)(p). *Id.*"

Court's decision:
"Despite the plain words of the statute, relying on Arrant's description of the injury process (each single burst of sound is a trauma that causes immediate injury qualifying as an accident), Mr. Hartman argues that his hearing loss is the result of a series of single traumatic accidents, entitling him to benefits under the statute. In short, Mr. Hartman would require the court re-write the language of La. R.S. 23:1221(4)(p) so as to provide disability benefits for permanent hearing loss 'solely due to a *series* of single traumatic accidents,' or to '*multiple* single traumatic accidents.' This the court is not free to do. Had the legislature intended to extend disability benefits for a "series" of traumatic accidents or "multiple" traumatic accidents, it could easily have done so by using those exact words. It did not. That the legislature deliberately chose to restrict the scope of partial permanent disability benefits by limiting compensability to permanent hearing loss caused by a single traumatic accident—and not a series of accidents—is confirmed by the 1986 amendment of La. R.S. 23:1221(4)(p). Prior to its amendment, La. R.S. 23:1221(4)(p) provided, in pertinent part, that '[i]n cases not falling within any of the provisions already made, ... where the usefulness of a physical function is seriously impaired, the court may allow such compensation as is reasonable ....' Through 1985 La. Acts 926 § land 945 § 1, the legislature inserted the current language expressly limiting benefits to "permanent hearing loss solely due to a single traumatic accident." Thus, while Mr. Hartman's noise-induced hearing loss might arguably have entitled him to benefits under the pre-amendment version of La. R.S. 23:1221(4)(p), with the passage of the 1986 amendment, the legislature made clear its intent to restrict benefits to a certain type of hearing loss, drawing a distinction between cases in which a single exposure—such as a violent explosion—produces immediately apparent trauma in employees exposed to it, and those in which the loss is gradual and cumulative, produced by repeated exposure to hazardous levels of noise.

***
As the court of appeal in the Arrant case correctly recognized, upon proof of impairment of function, employees suffering from occupational noise-induced hearing loss *are* entitled to compensation under the LWCA, even if only under La. R.S. 23:1203,[4] which obligates the employer to furnish medical and vocational rehabilitation expenses, prosthetic devices and other expenses. Arrant v. Graphic Packaging Intern., Inc., 48,197 at 16 (La.App. 2 Cir. 9/25/13), 127 So.3d 924, 933, aff'd., 13-2878 (La. 5/5/15), 169 So.3d 296. Indeed, Mr. Hartman stipulated that his employer, the Fire Department, currently provides him with such medical benefits for his hearing loss pursuant to La. R.S. 33:2581.1…"

Legal Lesson Learned: Hearing loss is an issue in the fire service; wearing headphones on all emergency runs and while operating loud equipment and apparatus can help.

Chap. 7, Sexual Harassment

MA: STATE CIVIL SERVICE COMMISSION ORDERS 3 FF REHIRED – FIRE CHIEF TO BE DISCIPLINED 2016 INCIDENT

On May 21, 2021, in Kyle Miltimore, Rebecca Boutin, David Kennedy v. Westfield Fire Commission, the state Civil Service Commission held (5 to 0) that "Westfield Fire Commission has not shown, by a preponderance of the evidence, that there was just cause for terminating the Appellants from their employment." The two male firefighters and female Captain Rebecca Boutin were terminated in December 2019 upon recommendation of outside lawyer hired by the City. Female Captain to serve 30-day suspension, however, for incorrectly telling others that the then-Deputy Chief (now Fire Chief) was going to be arrested for rape. All to be put back on payroll, but not return to work until Fire Chief is disciplined for admittedly grouping a female nurse off duty after a 2016 St. Patrick's Day parade and the Commission's other requirements for a "safe work environment" are in place.

> "McDonald's [Investigating attorney Dawn McDonald, Esq.] conclusion that the Appellants damaged the morale of the Westfield Fire Department is without merit and can be addressed summarily. As discussed in more detail below regarding disparate treatment, any purported poor morale in the Department cannot be traced back exclusively to the Appellants, but, rather, was attributable to many factors, including, in substantial part, the conduct of the individual who the Westfield Fire Commission has now chosen to lead the Department – Patrick Egloff.
>
> ***
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> McDonald reports that Egloff admitted to the assault on Ms. N ('grabbed her by the vagina'). Specifically, McDonald's report states:
>
> "At some point during the day [out drinking after 2016 St. Patrick's Day Parade] Deputy Egloff went up to [Ms. N] and grabbed her by the vagina. [Ms. N] immediately shoved him off and yelled at him, words to the effect that if he ever laid hands on her again, she would knock him out. He apologized, [Ms. N] accepted his apology and everyone continued with the festivities and having a good time. Egloff admits to this incident and further states that a few days later he again called [Ms. N] to profusely apologize for his conduct. He is embarrassed, ashamed and full of remorse at his behavior. [Ms. N] verifies this account and states that as far as she was concerned, it was one drunken incident, it was dealt with and over that day, and there was nothing further to apologize for." [See page 30 of the opinion.]

Commission's Orders:

> "[T]he Commission hereby opens an investigation into actions necessary to ensure a safe working environment for the Appellants. Mandatory actions by the Westfield Fire Commission shall include, but not be limited to:
>
> A. Appropriate disciplinary action against Patrick Egloff for his admitted misconduct.
> B. Completion of a fair, objective, unbiased, independent investigation regarding any allegations of disputed misconduct by Patrick Egloff, followed by the imposition of discipline for any proven misconduct.
>
> C. Development and implementation of a comprehensive program to prevent and address sexual harassment in the Westfield Fire Department, including required sexual harassment training by a qualified outside expert to be completed by all WFD personnel and all Westfield Fire Commissioners.
>
> Until these actions are taken to ensure the safety of the Appellants, any request by the Appellants to be placed on paid administrative leave shall be allowed by the Fire Commission."

Concurring Opinion by Commissioner Cynthia Ittleman:

> "While I concur with the majority's opinion, I respectfully submit that Ms. Boutin's modified discipline should be far less than 30 days. As was established by a preponderance of the evidence in this decision, Ms. Boutin told at least two (2) people that then-Deputy Fire Chief Egloff was going to be arrested for rape when there was no basis for that statement. Ms. Boutin's comments in that regard were wholly inappropriate and inexcusable, warranting suitable discipline. However, prior to making those comments, Ms. Boutin was also a victim of Chief Egloff's reprehensible conduct, which was undoubtedly a cause of the stress for which she sought and obtained leave."

Legal Lesson Learned: Admitted sexual misconduct by a senior fire officer is particularly shocking, and discipline must now be imposed.

> Note: See May 24, 2021 article, "Termination of 3 Westfield firefighters vacated, commission orders investigation of chief."
>
> > "The three firefighters were fired back in December 2019 by the Westfield Fire Commission, following an independent report conducted by Attorney Dawn McDonald into the sexual harassment allegations. McDonald's report also recommended that Egloff should not be promoted to the chief for other reasons."

File: Chap. 8, Race Discrimination

OH: SHIFT CHANGE TO HAVE ONE "WHITE" OFFICER ON DUTY – LAWSUIT BY 5 BLACK EMS CAPTAINS REINSTATED

On July 26, 2021, in Michael Threat; Margarita Noland-Moore; Pamela Beavers; Lawrence Walker; Reginald Anderson v. City of Cleveland, Ohio; Nicole Carlton, Personally and in her official capacity as Commissioner, the U.S. Court of Appeals for 6th Circuit (Cincinnati) held (3 to 0) that trial court improperly held shift change was not a "materially adverse employment action" since Captain Reginald Anderson he was only transferred to nights for five months. The 6th Circuit disagreed and reinstated his lawsuit; it also ordered the trial judge to reconsider the claims by the other 4 Captains that the city's race-based assignment policy adversely affected them.

> "Do discriminatory shift changes based on race violate Title VII of the Civil Rights Act of 1964? We think so.
>
> ***
>
> There also is little room for debate that the city treated the black captains differently 'because of' their 'race.' [Cleveland EMS Commission Nicole] Carlton admitted that she switched out a black captain for a white one to adjust the shift's racial makeup. That counts as direct evidence of discrimination based on race.
>
> ***
>
> In this instance, employer-required shift changes from a preferred day to another day or from day shifts to night shifts exceed any de minimis exception, any fair construction of the anchoring words of Title VII, and for that matter any Article III injury requirement. Whether we refer to claims of discrimination based on race in 'terms' or 'privileges' of employment or to claims of discrimination based on race in 'materially adverse' terms of employment, the conclusion is the same: They state a cognizable claim under Title VII when they refer to shift changes of this sort and under these circumstances."

Facts:

> Reginald Anderson, Pamela Beavers, Margerita Noland-Moore, Michael Threat, and Lawrence Walker work for the City of Cleveland in its Emergency Medical Service division. They are captains in the division, they belong to the same union, and, pertinent to this dispute, they are black.
>
> Each fall, captains bid on their schedules for the upcoming year, choosing different days to work and opting for day or night shifts. The city uses a seniority-based bidding system to assign shifts, giving longer-tenured captains shift preference. The collective bargaining agreement also allows Nicole Carlton, the city's EMS Commissioner, to transfer up to four captains to a different shift, even if it conflicts with a captain's first choice.
>
> ***
>
> [From U.S. District Court Judge James S. Gwin decision (July 31, 2020):
>
> > In each pay period, EMS schedules are divided into "A" days or "B" days. Each of these schedules is further divided into day shift or night shift. EMS Captains bid on their schedules, choosing "A" or "B" days and day or night shift.

> Generally, Cleveland uses seniority to assign schedules. But Plaintiffs' contract with Defendant Cleveland allows the EMS Commissioner to transfer up to four captains to a different schedule even when a transfer would not be consistent with captain seniority.

***

In 2017, the captains bid on shift assignments for 2018. The bidding process generated a schedule in which Anderson, Noland-Moore, and Walker were slated to work a day shift together. That meant only black captains would staff the shift. Exercising her power under the collective bargaining agreement, Carlton removed Anderson from that day shift and replaced him with a white captain to "diversify the shift[]." R.29 at 69. As it happens, the white captain's family visitation agreement prevented him from working that shift.

The scheduling conflict spurred [Captain Michael] Threat to phone Carlton on behalf of all the captains. Threat explained the scheduling predicament and voiced his frustration with race-based assignments.

***

When these informal discussions went nowhere, Threat filed a discrimination charge with the Ohio Civil Rights Commission and with the federal Equal Employment Opportunity Commission on behalf of himself and his fellow black captains. Carlton, meanwhile, asked the captains to rebid their preferences. But the rebidding generated a schedule in which Anderson was slated for a day shift staffed only by black captains. Carlton reassigned Anderson to a night shift. She did so to 'create diversity' among what otherwise would have been a day shift staffed entirely by black captains. *Id.* at 83.

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The conflict festered. A local news station ran a story about the shift situation. The story quoted Carlton's statements at a grievance hearing between the union and the city. In response, the city filed an unfair-labor-practice charge with the Ohio Employment Relations Board, alleging that the union violated Ohio's Collective Bargaining Act. According to the charge, several captains waged a media campaign against the city by leaking audio recordings. The State Employment Relations Board investigated the city's unfair-labor-practice charge and made a preliminary finding in the city's favor. The Board directed the city and the union to work out their differences in mediation. The union agreed to refrain from disseminating recordings of conversations held during grievance meetings.

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In 2019, the captains sued the city and Carlton in federal court. They brought discrimination and retaliation claims under Title VII and Ohio law, § 1983 claims based on the federal constitution, and claims for intentional infliction of emotional distress under Ohio law.

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[T]he city decided when Anderson had to work based on his race-and in the process discriminated against him based on race with respect to his terms and privileges of employment. The race-based shift change controlled when and with whom he worked, prohibited him from exercising his seniority rights, and diminished his supervisory responsibilities when the city imposed the night shift on him. All told, the action amounted to discrimination with respect to his terms and privileges of employment under § 703(a)(1).

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In this instance, employer-required shift changes from a preferred day to another day or from day shifts to night shifts exceed any de minimis exception, any fair construction of the anchoring words of Title VII, and for that matter any Article III injury requirement. Whether we refer to claims of discrimination based on race in 'terms' or 'privileges' of employment or to claims of discrimination based on race in 'materially adverse' terms of employment, the conclusion is the same: They state a cognizable claim under Title VII when they refer to shift changes of this sort and under these circumstances.

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One loose end remains on this claim. In contrast to Captain Anderson, the city did not alter the shifts of the other claimants. They brought claims for unlawful discrimination on the ground that the city's race-based assignment policy affected their bidding schedule, controlled when and with whom they worked, reduced the benefits of seniority, and diminished their supervisory responsibility. The district court did not review this theory, and we will allow it to do so in the first instance on remand."

Legal Lesson Learned: Using race to "balance a shift" is an invitation to a lawsuit; this case needs to be settled.

See also Ohio Civil Rights Commission ruling. "I-Team: Race and sex used to schedule EMS bosses." (Aug. 3, 2018). CLEVELAND — The FOX 8 I-Team has uncovered an explosive ruling by the Ohio Civil Rights Commission finding that Cleveland EMS "more likely than not" assigned work shifts to Captains on the "basis of race and sex." The Commission found it "PROBABLE" the city "has engaged in an unlawful discriminatory practice."

Note: See article on the 6th Cir. decision. "Court rules in favor of five Cleveland EMS Captains who claimed discrimination against their boss." (July 27, 2021.) "Carlton admitted under oath that she required Black Captains to face a shift change when the shift was all Black when "there's never been a change made when there's an all-Caucasian shift, to make it a not all Caucasian shift."

See also: "DOJ Says Black EMS Captains Can Prove Bias Without Material Harm." (July 13, 2021.)

File: Chap. 9, ADA

PA: VOL. FF LEFT ARM, RIGHT LEG AMPUTATED 2007 – DISABILITY INSUR. END 2017 – NOW WORKING AS MEDIC

On July 20, 2021, in Chase Frost v. Provident Life And Accident Insurance Company, U.S. District Court Judge Jan Dubois, Eastern District of Pennsylvania, held that the insurance company was authorized to terminate the FF from disability benefits in 2017 since he was able to return to work. In 2016, plaintiff was hired by the City of Philadelphia as a Fire Services Paramedic cadet (but then was fired after failing a re-test).

> "Plaintiff further alleged in that case [lawsuit against City of Philadelphia for firing him] that he was 'a registered Paramedic with the National Registry of Emergency Technicians [], certified as a Paramedic with the Pennsylvania Department of Health, has over five (5) years of experience and education as a Paramedic, and has well over 1, 100 hours of field internship experience.'*Id*. ¶ 29.
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> On June 17, 2019, Judge Baylson [in the Philadelphia case] granted the City's Motion, concluding that: (1) although plaintiff "was qualified to perform the position of FSP [i.e., Fire Services Paramedic] cadet" with reasonable accommodations, (2) he failed to show that the City's justification for terminating him-the fact that he 'fail[ed] a retest' at the Fire Academy-was pretextual. 2019 WL 2516987, at *6-8.
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> For the foregoing reasons, collateral estoppel bars plaintiff from relitigating the issue of whether he is able to perform an occupation with reasonable accommodations."

Facts:

> "At the time of the accident, plaintiff was insured under an Emergency Responder Blanket Accident Insurance Policy (the 'Policy') issued by defendant. The Policy provides for payment of disability benefits for five years if the insured is unable to perform his own occupation. Administrative Record ('AR') at 82. After payment of disability benefits for five years, benefits are payable under the Policy only if an insured "is not able to engage in any gainful occupation in which he . . . might reasonably be expected to engage because of education, training, or experience." Def's Statement of Undisputed Facts ('Def.'s SUF') ¶ 4 (quoting AR at 82). Pursuant to the Policy, defendant began paying disability benefits to plaintiff in 2007. AR at 42. Defendant stopped paying disability benefits to plaintiff in 2017, claiming that he "no longer meet[s] the definition of disability as defined in the policy.' *Id.* at 944.
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> As discussed *supra*, Judge Baylson has issued a ruling on this issue-plaintiff is able to perform the duties of Fire Services Paramedic, a gainful occupation, with reasonable accommodations. In view of his years of experience and education as a paramedic, this Court concludes that Fire Services Paramedic is an occupation in which plaintiff might be expected to engage with accommodations because of his education, training, and experience. Accordingly, plaintiff is not entitled to disability benefits under the Policy."

Legal Lesson Learned: Plaintiff's continuing work experience as a paramedic was reasonable basis to stop disability payments.

Chap. 10 – Family Medical Leave Act, incl. Military Leave
Chap. 11 – Fair Labor Standards Act, incl. Equal Pay Act
Chap. 12 – Drug-Free Workplace
Chap. 13 – EMS, incl. Community Paramedicine, Corona Virus
Chap. 14 – Physical Fitness, incl. Light Duty
Chap. 15 – CISM, incl. Peer Support, Mental Health
Chap. 16 – Discipline, incl. Social Media

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

DE: STATION BROWNOUTS - FIRE CHIEF SCHEDULE CHANGE 24/72 TO 24/48 – NEW CBA MUST BE SPECIFIC

On June 28, 2021, in International Association of Firefighters, Local 1590 v. City of Wilmington, the Court of Chancery of the State of Delaware (Vice Chancellor Paul A. Fioravanti, Jr.) ordered the case back to the Public Employee Relations Board because the city's final offer only described the new schedule (24/48 schedule with 17 Kelly Days) "as an example" in the Collective Bargaining Agreement. Judge agreed with IAFF that this gave the Fire Chief inappropriate discretion to change the schedule in future without collective bargaining.

> "The City's LBFO, however, did not establish a 24/48 schedule. Although the BIA Decision states that the City's proposal 'specifically' called for a 24/48 schedule to replace the 24/72 schedule, the plain language of the City's LBFO does not support that construction. The City's LBFO struck the language from the 2016 CBA that outlined a 24/72 schedule, but did not replace it with analogous language providing a 24/48 schedule. Tab 4 at 1, 10. Instead, the City's LBFO provided that firefighters would work a shift of an unspecified length 'as determined off 'under a work schedule as established by the Chief of Fire.' Id. To be sure, the City's LBFO stated, '[a]s an example,' that the Chief of Fire could 'implement a three[-]platoon system with a Complete Tour of Duty of [24] hours on, followed by [48] hours off.' Id. at 10. But that schedule is expressly identified only as 'an example,' and the City's LBFO does not bind the Chief of Fire to any particular work schedule, even from the outset of the new system's implementation.
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> "The Executive Director [of the PERB] erred by performing her statutory analysis only on the unwritten 'essence' of the City's LBFO [Last Best Final Offer]….The PERB's affirmance of the BIA Decision therefore constituted an error as a matter of law. For the foregoing reasons, the PERB's decision affirming the BIA Decision is hereby reversed. The parties' dispute is remanded to the PERB for further proceedings consistent with this Order."

Facts:

"The City's Department of Fire (the "Department") employs approximately 156 unionized firefighters. These employees are split between the Suppression Division, which responds to emergencies, and the Fire Prevention Division, which conducts investigations and enforces the City's fire code. The IAFF is the exclusive bargaining representative for a unit of Firefighters, Lieutenants, Captains, and Battalion Chiefs in the Department.

Firefighters in the Department's Suppression Division have traditionally worked 24-hour shifts. Under the parties' prior collective bargaining agreement, which covered the period of July 1, 2012 to June 30, 2016 (the '2016 CBA'), these firefighters were scheduled to work every fourth day, i.e., one full day working followed by three full days off (a '24/72 schedule'). In conjunction with the 24/72 schedule's four-day cycle, the Department maintained four platoons of firefighters, with each platoon comprising 35 firefighters. The 2016 CBA required each platoon to have a minimum of 34 firefighters.

Due to training, sick leave, vacation, or other absences, platoons frequently fell below the minimum-staffing requirement. If there were five or fewer vacancies at the start of a 24-hour shift, the Department would fill the vacancies by having a firefighter work overtime.10 If there were more than five vacancies, the Department would take an engine out of service for the shift, a practice known as 'rolling bypass.' Rolling bypass has been the subject of much public scrutiny, due to its effect, or potential effect, on the health and safety of firefighters and residents.

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After being appointed Chief of the Department in 2017, Michael Donohue investigated alternatives to reduce or eliminate rolling bypass. The City hired consultants to analyze alternative platoon and shift structures that would better meet the minimum-staffing requirements. After considering various options, Chief Donahue concluded that the Department should move from a four-platoon system to a three-platoon system. To implement a three-platoon system, Chief Donahue proposed replacing the 24/72 schedule with a 24/48 schedule, whereby firefighters would work one full day followed by two full days off. The plan also contemplated the addition of 17 non-work days, or 'Kelly Days,' to reduce annual compensable hours to approximately 2,500. Chief Donahue selected the 24/48 schedule in part because it 'would be the easiest shift to transition into,' due to the firefighters already working 24-hour shifts."

Legal Lesson Learned: Collective Bargaining Agreements should contain clear and precise language on work schedule, Kelly Days, and minimum manning.

Note: See June 30, 2021 article: "Wilmington firefighters union wins Chancery Court appeal in battle over shift change."

July 2, 2021 article: "Wilmington firefighters union wins Chancery Court appeal in battle over shift change."

Chap. 18 – Legislation

8/4/2021

CHEMICAL SAFETY & EMERGENCY RESPONDERS (9/18/2021)

UC SEMINAR: Free, watch live feed on: https://youtu.be/qpG1wIwYvaA
Sat. Sept. 18, 2021 (9 am – 11:30 am). Limited space, if wish to attend in person, RSVP Prof. Lawrence Bennett, Esq., Program Chair, Fire Science & Emergency Management, UC lawrence.bennett@uc.edu (Cell 513-470-2744).

LOCATION: Greater Cincinnati HAZMAT Unit, 1881 E Crescentville Road, Cincinnati, OH 45246: https://www.gchmu.org/response-vehicles.html

8:30 am PRE-SEMINAR TOUR: HAZMAT VEHICLES / EQUIPMENT: B.J. Jetter, Ph.D., UC Adjunct Prof., Greater Cincinnati HAZMAT Unit: jetterbj@cinci.rr.com ; along with Brian Canteel, bgcanteel@gmail.com and Dennis Waldbillig:denniswaldbillig@gmail.com

9 am: SEMINAR: WELCOME – Dean John Weidner, UC College of Engineering & Applied Science: john.weidner@uc.edu

CHEMICAL COMPANIES / BEST PRACTICES WITH EMERGENCY RESPONDERS

- Andrew Law –DuBois Chemical (Cinn), VP: andrew.law@duboischemicals.com / SHARONVILLE FD: https://www.sharonville.org/127/Fire-EMS
- Rob Paxton – Shepherd Chemical - Global EHS & Sustainability (Cinn): rpaxton@shepchem.com / NORWOOD FD: https://norwoodohiofire.wixsite.com/nfd-website
- Jeffrey Cummings, Airgas Great Lakes – Safety Manager (Akron): jeff.cummings@airgas.com; Kathleen Hiltner, Airgas Liquide Company (Detroit): kathleen.hiltner@airgas.com
- Carolyn Grogan, Arcadis U.S (Columbus); Carolyn.Grogan@arcadis.com
- Al Cowie, Regional Health & Safety Manager, Univar Solutions; al.cowie@UnivarSolutions.com
- Rick Ginn, Praxair/Linde; hrginn@aol.com

SUBJECT MATTER EXPERTS

- Richard Maier, Special Agent, FBI Cincinnati (WMD Coordinator / Special Events) - ramaier@fbi.gov

- Doug Witsken, LEPC Coordinator, Hamilton County Emergency Management & Homeland Security Agency: doug.witsken@hamiltoncountyohio.gov

UC PROFS:

ONLINE COURSE: FST 4086 – MANAGERIAL ISSUES IN HAZARDOUS MATERIALS - Spring 1 (1/10/2022 – 2/27/2022): Randy Hanifen / BJ Jetter

UC Adjunct Prof. Randall W. Hanifen, Ph.D.
Asst. Chief- Operations, West Chester Fire
Randall@hanifen.org

UC Adjunct Prof. B.J. Jetter, Ph.D.
Greater Cincinnati HAZMAT Unit
jetterbj@cinci.rr.com

- Steve Kelly: Fire Chief, Miami Township Fire Department (UC Fire Science Adjunct Professor – team teaches online course: FST 3021 - TERRORISM & HOMELAND SECURITY) - skelly80669@gmail.com

- Rob Warfel: Chief of Police/Director of Public Safety, Xavier University; Retired Special Agent, FBI; (UC Fire Science Adjunct Professor – team teaches online course: FST 3021 - TERRORISM & HOMELAND SECURITY) - rwarfel@hotmail.com

1 pm: CHEMICAL PLANT TOUR – FOR UC STUDENTS

DuBois Chemicals plant, 3630 E Kemper Rd, Cincinnati, OH 45241 - Host: Andrew Law, DuBois Chemical; 554-4209. RSVP: Prof. Lawrence Bennett: lawrence.bennett@uc.edu.

UC INTERNSHIPS: Kimberly Demko, UC Assistant Prof / Career Education – Student Internships kimberly.demko@uc.edu; Cell 513-258-7114.

UC CREDIT OPTION: Enroll in 1-credit, FST 4088, "Fire Science Portfolio." UC Adjunct Prof: Robert Krause: Battalion Chief, Toledo FD: bobkrause@buckeye-express.com. Cell 419-705-2437.