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Feb. 2020 – FIRE & EMS LAW Newsletter

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EMS REPORT WRITING / LEGAL LESSONS LEARNED: Prof. Bennett doing two seminars, March 12, 2020, Ohio BWC Safety Congress, Columbus, OH.

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File: Chap. 1, American Legal System

CA: HOUSE EXPLOSION – HASHISH OIL – AFTER FIRE OUT, HAZMAT CAPT. / PD LATER SEARCHED WITHOUT WARRANT

On Jan. 28, 2020, in United States of America v. Joseph Jay Spadafore, the U.S. Court of Appeals for the 9th Circuit (San Francisco) held (3 to 0, unpublished decision) that trial judge properly denied his motion to suppress evidence; it was reasonable for a fire department Captain and police officers to conduct the later search the home without a search warrant, due to presence of hazardous and volatile materials.

> "[E]xigent circumstances involving the explosion of volatile materials used for manufacturing hashish oil justified the search of the residence by fire department personnel and law enforcement officers. During the initial search for potential victims of the explosion, first responders observed 'glassware, tubing, jars, and

other equipment that resembled a drug lab.' Later in the night, a fire captain with the 'hazardous materials unit' accompanied law enforcement officers, while wearing 'air monitoring devices . . . in order to check the air quality and confirm the nature of the lab inside the home, particularly whether it involved hazardous materials that could pose a danger to life, property, or the environment.' Although the fire had been extinguished, it was reasonable for fire department personnel and law enforcement officers to search the property due to the explosion and the presence of other hazardous and volatile materials."

Facts:

"Appellant Joseph Jay Spadafore (Spadafore) appeals his conviction for maintaining a drug-involved premises in violation of 21 U.S.C. § 856(a)(1). Spadafore contends that the district court erred in denying his motion to suppress because the warrantless entry into the residence by fire department personnel and law enforcement officers was not justified by exigent circumstances.

***

During the initial search for potential victims of the explosion, first responders observed 'glassware, tubing, jars, and other equipment that resembled a drug lab.' Later in the night, a fire captain with the 'hazardous materials unit' accompanied law enforcement officers, while wearing "air monitoring devices . . . in order to check the air quality and confirm the nature of the lab inside the home, particularly whether it involved hazardous materials that could pose a danger to life, property, or the environment.'"

Holding:

"Although the fire had been extinguished, it was reasonable for fire department personnel and law enforcement officers to search the property due to the explosion and the presence of other hazardous and volatile materials. See United States v. Martin, 781 F.2d671, 674-75 (9th Cir. 1985) (holding that law enforcement officer's search was justified by exigent circumstances '[i]n light of the potential danger of additional explosions or fire' and the need 'to determine the cause of the explosion and to ensure that additional explosions or fire would not occur"); see also Michigan v.Tyler, 436 U.S. 499, 510 (1978) (articulating that 'officials need no warrant to remain in a building for a reasonable time to investigate the cause of a blaze after it has been extinguished") (footnote reference omitted)."

Legal Lessons Learned: Great decision; remember to keep a firefighter at the scene while waiting for HAZMAT, fire investigator, or other specialized resources to arrive.

File: Chap. 2, Firefighter Safety

NY: FF SOLICITING FUNDS - HOMEOWNER AT DOOR WTH FIREARM – ARRESTED – MALICIOUS PROS. CASE DISMISSED

On Jan. 28, 2020, in Carl T. Semencic v. The County of Nassau, et al., U.S. District Court Judge Sandra J. Feuerstein granted defense motion for summary judgment, and dismissed lawsuit by the homeowner arrested for menacing the firefighters.

"There are no factual allegations to plausibly suggest that Defendants lacked reasonable cause to believe that Semencic had menaced Maloney with a weapon in violation of New York law. Plaintiff was charged by information with menacing in the second degree, which provides that '[a] person is guilty of menacing in the second degree when. . . He or she intentionally places or attempts to place another person in reasonable fear of physical injury, serious physical injury or death by displaying a deadly weapon, dangerous instrument or what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm. . …' N.Y. PENAL LAW § 120.14. Semencic's own version of the events, in

which he concedes his display of the gun, coupled with [firefighter] Maloney's assertion in his statement that he was 'in fear of his life,' essentially establishes a menacing charge. *** [P]ointing a gun at and tapping that gun against a 'Do Not Knock No Peddlers' sign and saying 'Go Away' can, given what guns are designed to do, be perceived as an attempt to instill the requisite fear that injury will ensue if the sign and the command are not obeyed. [Emphasis by Judge Feuerstein.]"

Facts:

"The FSMFD [Franklin Square and Munson Fire Department] is a firefighting agency in Nassau County. Defendants Maloney and Fineo are employed by the FSMFD as firefighters. John Doe #2 is also employed by the FSMFD as a 'management level firefighter' and has supervisory authority over Maloney and Fineo. Compl. ¶35. Semencic is a resident of West Hempstead, New York. He lawfully owns several handguns and long arms, and has a restricted carry handgun license issued by Nassau County.

[Plaintiff alleges following in his complaint.] On the evening of July 19, 2016 at approximately 8:00 p.m., Maloney and Fineo were conducting a door-to-door soliciting campaign in Semencic's neighborhood on behalf of the FSMFD. Semencic has posted a sign on his front storm door that reads "DO NOT KNOCK. NO PEDDLERS." Maloney approached Semencic's house, "intentionally and purposefully" ignored the sign, and "loudly and repeatedly banged" on Semencic's front door. Compl. ¶46. At the time, Fineo was nearby, soliciting neighbors.

At the time Maloney knocked, Semencic had just finished working in his office and was heading towards his bedroom carrying an unloaded Glock pistol that he intended to secure in his nightstand for the night. He opened his front door and saw Maloney wearing his firefighter's uniform and standing behind the storm door. When he opened the front door, Semencic, who is right-handed and shoots exclusively with his right hand, was holding the pistol in his left hand 'with the barrel pointed down.' Compl. ¶54. Semencic then 'pointed at the sign on his front storm door with his left hand and, in a clearly annoyed voice, told Maloney 'go away.' He then abruptly and forcefully closed his front door.' *Id.*

Semencic claims he never pointed the firearm at Maloney and did not step outside the house. After shutting the door, Semencic secured the firearm in his bedroom nightstand and proceeded to the den at the rear of the house to watch television with his wife.

The complaint alleges, upon information and belief, that Maloney "became fearful that his actions would expose him to liability" and therefore enlisted help from Fineo and John Doe #2. Compl. ¶56. The three firefighters concocted a narrative that was 'false, untrue, and was intended solely to wrongfully cover-up and avoid liability for their misconduct and wrongfully foist all liability for their own misdeeds' upon Semencic. *Id*. The complaint does not include any allegations elaborating on the purported misdeeds committed by Defendants.

The alleged false narrative concocted by Defendants was that:

> Semencic had answered Maloney's knock in an angry fashion on the evening of July 19, 2016; that after answering his door Semencic then left the inside of his home and approached Maloney on his doorstep in a menacing fashion and with gun in hand; that Semencic then pointed his gun at Maloney and threatened Maloney with harm; and that Semencic's actions caused Maloney to flee the Semencic property in fear for his life. Compl. ¶57. Maloney, Fineo, and John Doe #2 reported this false narrative to the Nassau County Police Department. Defendant police officers Magnuson, McGrory, and Doe #1 (collectively, the "Defendant Officers") responded to the call.
>
> Shortly thereafter, the police arrived, knocked on the door, and as Semencic began to open the front door, several police officers, led by the Defendant Officers, forced their way into the home without Semecic's consent. Semencic, dressed in a t-shirt and shorts, was unarmed, behaving peacefully and offering no resistance, yet was forced against his kitchen counter, violently grabbed and turned around, and handcuffed roughly behind his back. Semencic was removed from the home in handcuffs in full few of his watching neighbors. After placing Semencic in the back of a squad car, the officers

returned to the home to conduct a warrantless search for weapons. The Defendant officers ultimately removed all guns from the home, including many secured in gun safes.
***
On May 21, 2018, the remaining claim for menacing was dismissed on Semencic's motion to dismiss pursuant to CPL §30.30(1) for failure to comply with speedy trial time limits. *See* Order ("5/21/18 Order"), Panico Decl., Ex. B. The complaint alleges that the criminal proceedings were "terminated in his favor, *to wit:* all criminal charges against Mr. Semencic were dismissed on the motions of [his] defense attorney." Compl. ¶96."

Holding:

"To establish a malicious prosecution claim under New York law, a plaintiff must establish: (1) commencement of a criminal proceeding; (2) that was terminated in plaintiff's favor; (3) that it lacked probable cause; and (4) that it was brought with actual malice. *See Cantalino v. Danner,96* N.Y.2d 391, 394, 754 N.E.2d 164, 729 N.Y.S.2d 405 (2001). 'A failure to establish any one of those elements results in the defeat of the plaintiff's cause of action.' *Baker v. City of New York,* 44 A.D.3d 977, 979, 845 N.Y.S.2d 799 (2d Dep't 2007). Semencic has failed to adequately plead the first element of a malicious prosecution claim as to the Defendants and thus the claim fails."

Legal Lessons Learned: Suggestion – conduct "door to door" solicitations in pairs, in uniform, and be extremely caution where the homeowner has posted Do Not Knock or similar signs. See article on the arrest, "West Hempstead man menaced fire volunteer with gun, police say" (July 20, 2016).

File: Chap. 2, Firefighter Safety

LA: OFFICER INJURED - "BLACK LIVES" PROTEST – SUING PROTEST LEADER – TOUGH CASE TO WIN / FIREMAN'S RULE

On Jan. 28, 2020, in Officer John Doe v. Deray McKesson; Black Lives Matter, the U.S. Court of Appeals for 5th Circuit (New Orleans), declined to hear the appeal en banc (by all 16 Circuit Court judges (on a tie vote of 8 to 8). Dec. 16, 2019 decision by 3-judge panel held (2 to 1) that the police officer's lawsuit against the protest organizer,

Deray McKesson, would be reinstated and remanded to trial judge. In the Dec. 16, 2020 decision, Circuit Judge E. Grady Loll wrote:

"We first note that this case comes before us from a dismissal on the pleadings alone. In this context, we find that Officer Doe has plausibly alleged that Mckesson breached his duty of reasonable care in the course of organizing and leading the Baton Rouge demonstration. The complaint alleges that Mckesson planned to block a public highway as part of the protest. And the complaint specifically alleges that Mckesson was in charge of the protests and was seen and heard giving orders throughout the day and night of the protests. Blocking a public highway is a criminal act under Louisiana law. See La. Rev. Stat. Ann. § 14:97. Indeed, the complaint alleges that Mckesson himself was arrested during the demonstration. It was patently foreseeable that the Baton Rouge police would be required to respond to the demonstration by clearing the highway and, when necessary, making arrests. Given the intentional lawlessness of this aspect of the demonstration, Mckesson should have known that leading the demonstrators onto a busy highway was likely to provoke a confrontation between police and the mass of demonstrators, yet he ignored the foreseeable danger to officers, bystanders, and demonstrators, and notwithstanding, did so anyway."

Facts [from Dec. 16, 2019 decision]:

"On July 9, 2016, a protest illegally blocked a public highway in front of the Baton Rouge Police Department headquarters… This demonstration was one in a string of protests across the country, often associated with Black Lives Matter, concerning police practices. The Baton Rouge Police Department prepared by organizing a front line of officers in riot gear. These officers were ordered to stand in front of other officers prepared to make arrests. Officer Doe was one of the officers ordered to make arrests. DeRay Mckesson, associated with Black Lives Matter, was the prime leader and an organizer of the protest.

In the presence of Mckesson, some protesters began throwing objects at the police officers. Specifically, protestors began to throw full water bottles, which had been stolen from a nearby convenience store. The dismissed complaint further alleges that Mckesson did nothing to prevent the violence or to calm the crowd, and, indeed, alleges that Mckesson 'incited the violence on behalf of [Black Lives Matter].' The complaint specifically alleges that Mckesson led the protestors to block the public highway. The police officers began making arrests of those blocking the highway and participating in the violence.

At some point, an unidentified individual picked up a piece of concrete or a similar rock-like object and threw it at the officers making arrests. The object struck Officer Doe's face. Officer Doe was knocked to the ground and incapacitated. Officer Doe's injuries included loss of teeth, a jaw injury, a brain injury, a head injury, lost wages, 'and other compensable losses.'

***

The district court dismissed Officer Doe's claims on the pleadings under Federal Rule of Civil Procedure 12(b)(6), and denied his motion to amend his complaint as futile."

Holding [by 3-judge panel, vote of 2 to 1, on Dec. 16, 2019]:

"Because we conclude that the district court erred in dismissing the case against Mckesson on the basis of the pleadings, we REMAND for further proceedings relative to Mckesson. We further hold that the district court properly dismissed the claims against Black Lives Matter.

***

In sum, we hold that Officer Doe has not adequately alleged that Mckesson was vicariously liable for the conduct of the unknown assailant or that Mckesson entered into a civil conspiracy with the purpose of injuring Officer Doe. We do find, however, that Officer Doe adequately alleged that Mckesson is liable in negligence for organizing and leading the Baton Rouge demonstration to illegally occupy a highway."

Dissent [by Circuit Judge Don R. Willett]:

"Officer John Doe was honoring his oath to serve and protect the people of Baton Rouge when an unidentified violent protestor hurled a rock-like object at his face. Officer Doe risked his life to keep his community safe that day— same as every other day he put on the uniform. He deserves justice. Unquestionably, Officer Doe can sue the rock thrower. But I am unconvinced he can sue the protest leader."

Legal Lessons Learned: On remand, the police officer has an "uphill battle" to overcome the Professional Rescuer Doctrine [also known as the Fireman's Rule]. See dissent by Circuit Judge James C. Ho, in the Jan. 28, 2020 decision of 5th Circuit (on tie vote of 8 to 8) to not rehear the case en banc.

"Police officers and firefighters dedicate their lives to protecting others, often putting themselves in harm's way. These are difficult and dangerous jobs, and citizens owe a debt of gratitude to those who are willing and

able to perform them. What's more, police officers and firefighters assume the risk that they may bissent e injured in the line of duty. So they are not allowed to recover damages from those responsible for their injuries, under a common law rule known as the professional rescuer doctrine.

***

Civil disobedience enjoys a rich tradition in our nation's history. But there is a difference between civil disobedience—and civil disobedience without consequence… Citizens may protest. But by protesting, the citizen does not suddenly gain immunity to violate traffic rules or other laws that the rest of us are required to follow. The First Amendment protects protest, not trespass. That said, this lawsuit should not proceed for an entirely different reason—the professional rescuer doctrine. I trust the district court will faithfully apply that doctrine if and when Mckesson invokes it, and dismiss the suit on remand, just as it did before."
See also the ALCU's petition requesting U.S. Supreme Court to hear the case.

File: Chap. 2, Firefighter Safety

TX: FF / BAPTIST MINISTER – OBJECTED TO TETANUS VACCINATION – DECLINED INSPECTOR JOB - FIRED

On Jan. 9, 2020, in Brett Horvath v. City of Leander, Texas, the U.S. Court of Appeals for the 5th Circuit (New Orleans), held (3 to 0) that U.S. District Court properly granted the city's motion for summary judgment. The firefighter was offered transfer from 24/48 hour driver / pump operator, to 40-hour code enforcement position; he rejected this since he ran construction company while off duty.

"In 2016, the Fire Department began requiring TDAP [Tetanus, Diphtheria, Pertussis Vaccine] vaccinations, to which Horvath objected on religious grounds. He was given a choice between two accommodations: transfer to a code enforcement job that did not require a vaccination, or wear a respirator mask during his shifts, keep a log of his temperature, and submit to additional medical testing. He did not accept either accommodation and was fired by Fire Chief Bill Gardner for insubordination.

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The City argues that its legitimate, non-discriminatory reason for Horvath's termination was his defiance of a direct order by failing to select an accommodation to the TDAP vaccine policy. The district court found that 'Horvath was terminated not for engaging in protected activity by opposing a discriminatory practice in a letter, but for failing to comply with a directive that conflicted with his religious beliefs.' We agree."

Facts:

"Brett Horvath is an ordained Baptist minister and objects to vaccination as a tenet of his religion. He was hired as a firefighter by the City of Leander Fire Department on April 7, 2012. In 2014, the Department adopted an infection control plan that directed fire department personnel to receive flu vaccines. Horvath sought an exemption from the directive on religious grounds, and the exemption was approved by Chief Gardner on the condition that Horvath use increased isolation, cleaning, and personal protective equipment to prevent spreading the flu virus to himself, co-workers, or patients with whom he may come into contact as a first responder.

In 2015, Horvath was promoted from firefighter to driver/pump operator, which involved driving fire personnel to the scene of an emergency, plus general firefighter duties such as responding to rescue and fire

suppression scenes and performing first responder duties for medical and non-medical emergencies. In 2015, as driver/pump operator, Horvath sought and received another exemption from the flu vaccine directive.

In 2016, the City mandated that all personnel receive a TDAP vaccine, which immunizes from tetanus, diphtheria, and pertussis or whooping cough. On January 14 and 20, 2016, Horvath sought an exemption from the directive on religious grounds. After months of discussions, on March 17, 2016, the City finalized its accommodation proposal and gave Horvath two options—he could be reassigned to the position of code enforcement officer, which offered the same pay and benefits and did not require a vaccine, and the City would cover the cost of training; or he could remain in his current position if he agreed to wear personal protective equipment, including a respirator, at all times while on duty, submit to testing for possible diseases when his health condition justified, and keep a log of his temperature. The City gave Horvath until March 24, 2016 to decide.

On March 21, Horvath declined the code enforcement job and suggested an alternative accommodation that would allow him to remain a driver/pump operator. He agreed with all of the City's requirements except the requirement that he wear a respirator at all times; he instead proposed to wear it when encountering patients who were coughing or had a history of communicable illness. Chief Gardner refused to renegotiate and sent a letter to Horvath that day, repeating the original proposal and giving Horvath until March 28 to decide whether he 'agree[d] to the accommodations as presented or [would] receive the vaccines.'

***

[O]n March 29, Chief Gardner terminated Horvath's employment for violating the Code of Conduct."

Holding:

"Title VII makes it unlawful for an employer to discriminate against an employee on the basis of religion. 42 U.S.C. § 2000e-2(a)(1). 'An employer has the statutory obligation to make reasonable accommodations for the religious observances of its employees, but it is not required to incur undue hardship.' Weber v. Roadway Exp., Inc., 199 F.3d 270, 263 (5th Cir. 2000). 'Title VII does not restrict an employer to only those means of accommodation that are preferred by the employee.' Bruff v. N. Miss. Health Servs., Inc., 244 F.3d 495, 501 (5th Cir. 2001). Once an employer has established that it offered a reasonable accommodation, even if that alternative is not the employee's preference, it has satisfied its obligation under Title VII as a matter of law. Id. The employer's offer of a reasonable accommodation triggers an accompanying duty for the employee: 'An employee has a duty to cooperate in achieving accommodation of his or her religious beliefs, and must be flexible in achieving that end.' Id. at 503

***

Horvath argues, however, that fact questions exist as to whether the accommodation was reasonable because he believes the code enforcement officer position is the least desirable position in the department because of its duties and hours…. He also argues that the position was unreasonable because the schedule would prevent his continuing his secondary employment running a construction company, which would reduce his total income by half. Neither of these arguments is convincing."

Legal Lessons Learned: The FD offered a reasonable accommodation.

LA: ENGINE EMER. RUN – FROM LEFT LANE, MADE SHARP RIGHT TURN, COLLISION – GROSS NEGLIGENCE - NO IMMUNITY

On Jan. 8, 2020, in Louis Ridgel v. Mitchell Chevalier, St. Bernard Parish Fire Department, et al., the LA Court of Appeals, Fourth Circuit, held (3 to 0) that the trial judge properly found that the firefighter's sharp right turn, even if had lights and sirens on, amounted to "gross negligence" and therefore the states' immunity statute did not apply.

> "The trial court found, however, that Mr. Chevalier [FF driver] should have kept a proper lookout for other motorists on the road, specifically because he was making a right turn from the left lane. Further, the trial court determined that the evidence showed that Mr. Chevalier intended to make a quick right turn from the left lane onto West Judge Perez Drive, but did not ensure it was safe to make that right turn. As such, the trial court determined that Mr. Chevalier's actions constituted gross negligence despite the immunity established by La. R.S. 32:24. We agree.

Facts:

> "On October 29, 2011, Mr. Ridgeland Mr. Chevalier were involved in an automobile accident. Mr. Chevalier was operating a fire truck [2007 KME] in the course and scope of his employment with SBFD [St. Bernard FD]. The parties do not dispute that the accident occurred at the intersection of West Judge Perez Drive and Alexander Avenue in St. Bernard Parish. West Judge Perez Drive is a roadway with two travel lanes that are unidirectional, and Alexander Avenue is a side street off West Judge Perez Drive with one lane. Mr. Chevalier, along with Norman Ellis ('Captain Ellis'), a captain with SBFD, were responding to an emergency call when the accident occurred. Captain Ellis was in the passenger seat of the fire truck driven by Mr. Chevalier on the day of the accident.
>
> ***
>
> Mr. Chevalier testified that he was hired as a firefighter for St. Bernard Parish in August 2010 and became a certified engineer two months prior to the accident in August 2011. He explained that a certified engineer can drive a fire truck.
>
> ***
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> He testified he traveled to the next block, crossed over the railroad tracks, looked into his rearview mirror, and put on his 'blinker' to signal he was turning right on Alexander Avenue. Mr. Chevalier stated that, when he looked in his rearview mirror, he saw a car approaching the railroad tracks behind him in the right lane that appeared to be slowing down, but saw no other cars. He then proceeded to turn on Alexander Avenue. Mr. Chevalier testified he expected the car behind him to slow down because the fire truck had its emergency sirens and lights on. Additionally, Mr. Chevalier noted that the fire truck has a cautionary sign on the back of it that reads, '[s]tay back 500 feet.'
>
> ***
>
> Mr. Ridgel testified that he was driving westbound in the left lane on West Judge Perez Drive, approaching the railroad tracks, when the fire truck driven by Mr. Chevalier passed him. He testified the fire truck then pulled into the left lane and almost immediately made a right turn. Mr. Ridgel stated that he pulled into the right lane because the fire truck got so close to his vehicle that he was afraid that he might rear-end it, so he slowed down. He testified that he was originally driving about twenty-five (25) miles per hour and slowed down to twenty (20) miles per hour. Further, Mr. Ridgel testified that he pulled to the side of the road as far as he could, but the fire truck still hit his vehicle. He stated that he could not get over enough to avoid the collision because he would have driven his car into a ditch. Mr. Ridgel testified he had no opportunity to

yield because Mr. Chevalier pulled in front of him and immediately slowed down, preparing to turn. Mr. Ridgel further testified Mr. Chevalier's actions caused him to pull over to the right in an effort to avoid hitting the rear of the fire truck.

***

After the collision occurred, he testified that Captain Ellis got out of the fire truck to see if he was okay and apologized, saying that Mr. Chevalier was a 'young driver and was inexperienced.' He testified that the right rear wheel well of the fire truck hit his left bumper and front quarter panel. Mr. Ridgel testified that he paid a total of $2,551.00 to repair the damages to his car."

Holding:

"Appellants argue that the trial court erred in concluding the mere negligence of Mr. Chevalier [fire truck driver] was gross negligence under the emergency responder statute, La. R.S. 32:24. Further, they argue the trial court should have made a factual determination as to whether the fire truck's emergency lights and sirens were on prior to and at the time of the accident. Appellants also argue the trial court erred in failing to apply the doctrine of comparative fault. We find Appellants' arguments lack merit. Because Mr. Chevalier failed to keep a proper lookout and made a right turn from the left lane, the trial court determined gross negligence."

Legal Lessons Learned: Share these facts with your FD and discuss what steps could have been taken by both the FF driver and the Captain to avoid the collision. FYI: the plaintiff claimed personal injury and was awarded total of $143,074 in damages.

File: Chap. 6, Employment Litigation

IL: HOUSE FIRE - FF FELL BACKWARDS, INJURED HER BACK – AWARDED LINE-OF-DUTY PENSION – CITY APPEAL DENIED

On Jan. 27, 2020, in City of Peoria v. The Firefighters Pension Fund of the City of Peoria and Angela Allen, the Appellate Court of Illinois, Third District, held (3 to 0) upheld the decision of the Board of Trustees of the pension fund to award line-of-duty death benefits. The city sought to reverse the Trustees, arguing the firefighter had a psychological disorder not caused by her fall.

"In reaching that conclusion, we reject the City's assertion that the Pension Board somehow erred by finding that Allen was disabled due to her psychological conditions when Allen's specific allegation in her disability pension application was that she was disabled due to a vestibular/ocular motor disorder. Although Allen listed her condition in the application as a vestibular/ocular motor disorder, many of the symptoms that Allen also listed in the application as being from a vestibular disorder were the same symptoms that Allen was found to be suffering from as a result of her psychological disorders. Thus, we believe that Allen sufficiently alleged the nature of her disability in her disability pension application. Indeed, the City has made no argument on appeal that it was surprised by the evidence presented or that the manner in which Allen's condition was described in the application somehow deprived the City of a fair opportunity to prepare for the hearing before the Pension Board."

Facts:

"Allen worked for the City as a firefighter for over 25 years and earned the rank of captain. On July 18, 2015, Allen was on duty and was fighting a house fire when she slipped and fell backward on a flight of stairs and was injured. There was no other person in the immediate area at the time, and no one else saw

Allen's accident occur. Allen completed her shift and went home and did not immediately seek medical attention for her injuries. Two days later, when Allen was back at work, her battalion chief ordered her to go to the hospital. Allen never returned to full unrestricted firefighter duties after that time.

***

During the early morning hours of July 18, 2015, Allen and other members of the fire department responded to a house fire. Allen's engine was the second unit to arrive on the scene. While working at that location, Allen was pulling hose lines around the back of the house and had gone up and down an outside wooden stairwell several times. She was wearing full fire gear—a helmet, pants, coat, gloves, and an air pack on her back At one point while Allen was on the stairwell, she started down the steps, slipped, fell backward onto her butt and back, and saw both of her feet go above her head. Allen did not know how she landed or how she got up.

***

Allen worked for the remainder of her shift. After the fire, she had to write a report and it took her a long time to do so, even though she wrote reports all the time. Allen could not figure out why she was having trouble putting words together correctly and remembering things but just assumed again that she was really tired. After her shift had ended, Allen went home for her normal two days off of work. She did not remember driving home, being home for those two days, or driving back to work at the firehouse after her days off had ended.

On July 20, 2015, while Allen was back at work, she had a dazed, odd feeling and was having back pain. The battalion chief told Allen to go to the hospital. Allen was irritated by the battalion chief's command but did not realize at the time that she was failing to remember things that had happened after the fall. Allen went to the emergency room for treatment.

***

Over the course of the next year, Allen sought treatment for a number of medical problems, including head, neck, back, shoulder, and arm pain; weakness in her left thumb; vertigo; dizziness; lack of balance; nausea; headaches; cognitive problems; vision problems; and sensitivity to light and noises. She saw several different doctors; had numerous tests, x-rays, scans, and evaluations; and participated in physical, speech, occupational, and vision therapies.

In August 2016, Allen filed an application with the Pension Board for a line-of-duty disability pension. Allen stated in her application that she was disabled from performing her duties as a firefighter due to the 'Vestibular/Ocular Motor Disorder' she had sustained as a result of the July 2015 accident. Allen stated further in her application that the symptoms (of a vestibular disorder) were numerous and included such things as: vertigo, dizziness, nausea, imbalance, trouble focusing or tracking objects with eyes, blurry vision, poor depth perception, sensitivity to loud noises or the environment, and ringing in the ears. As noted above, the City was allowed to intervene in the Pension Board proceedings.

***

From the middle of 2016 through the date of the Pension Board hearing, Allen's condition improved, but she was still at only about 60% of the person she had been before the accident."

Holding:

> Turning to the merits, we note that the provisions governing the pensions of firefighters must be liberally construed in favor of the applicant. Roszak, 376 Ill. App. 3d at 139. For a municipal firefighter to obtain a line-of-duty disability pension, the firefighter must prove that: (1) he is disabled; and (2) his disability was caused by sickness, accident or injury incurred in or resulting from the performance of an act of duty or from the cumulative effects of acts of duty. See 40 ILCS 5/4-110 (cities with 500,000 inhabitants or less), 6-151 (cities with more than 500,000 inhabitants) (West 2016); Roszak, 376 Ill. App. 3d at 139. To obtain such benefits, a firefighter need not prove that his duty related activities were the sole or primary cause of the disability, but rather, must only prove that his duty related activities were a contributing or exacerbating factor. Village of Oak Park v. Village of Oak Park Firefighters Pension Board, 362 Ill. App. 3d 357, 371 (2005).
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> [T]he City asserts that Allen's application should have been denied because Allen failed to prove both that she was disabled and that her disability was caused by the July 2015 accident (in the line of duty). In making that assertion, the City points out that Allen alleged in her application that she was disabled due to the vestibular/ocular motor disorder she sustained as a result of the accident, not because of any psychological disorder, as the Pension Board ultimately found. In addition, the City asserts further that under the applicable law, the Pension Board could not make a finding that Allen was disabled because the evidence presented at the hearing established that a reasonable treatment alternative existed—cognitive behavioral therapy—that could return Allen to full service in the fire department.
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> After reviewing the record in the present case and applying the legal principles set forth above, we conclude that the Pension Board's findings—that Allen was disabled and that her disability was caused in the line of duty—were well-supported by the evidence."

Legal Lessons Learned: Under Illinois statute and court precedents, pension applications by firefighters must be "liberally construed" in favor of the firefighter.

File: Chap. 6, Employment Litigation

IL: PARAMEDIC LIFTING WEIGHTS – CLAIMED RIGHT FOOT INJURY – LATER VIDEOTAPED WORKING OUT, WALKING OK – CLAIM DENIED

On Dec. 27, 2019, in Brian Isenhardt v. Illinois Workers' Compensation Commission, the Appellate Court of Illinois, First District / Workers' Compensation Commission Division, held (5 to 0) that the Commission had properly denied the firefighter's claim.

> "The Village also called Erik Ekstrom, a private investigator hired to investigate the claimant. Ekstrom testified that, during his surveillance on January 13, 2015, he observed the claimant walking with a normal gait, taking out the trash, and performing chest exercises at the gym. According to Ekstrom, on January 15, 2015, he observed the claimant walking with a usual gait without the assistance of crutches on his entrance and exit from the gym. He also observed the claimant on the treadmill, lifting 50 to 70 pound weights above his head, while simultaneously lexing both ankles and standing on his "tippy toes," without appearing to be in pain. Ekstrom recorded video during his surveillance, and a DVD of that video was admitted into evidence.

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The Commission found the claimant's testimony not credible and found his 'subjective complaints' of pain 'questionable' based on his ankle and foot MRIs, which did not reveal any acute pathology, as well as the testimonies of both [HR employee] Majda and Eriksom, who observed the claimant, subsequent to November 8, 2014, weightlifting and walking normally without assistance or apparent pain."

Facts:

"The claimant, Brian Isenhart, appeals from an order of the circuit court of Cook County that confirmed a decision of the Workers' Compensation Commission (Commission), denying him benefits under the Illinois Workers' Compensation Act (Act) (820 ILCS 305/1 et seq. (West 2014)) for injuries he is alleged to have sustained on November 8, 2014, while in the employ of the Village of Matteson (the Village).

***

The following factual recitation is taken from the evidence adduced at the arbitration hearings held on January 27, 2016, February 25, 2016, and March 21, 2016.

***

The claimant has a medical history that is relevant to this appeal. On September 6, 2013, while stepping off of a fire truck, the claimant injured his right foot. Specifically, the injury was to his right first metatarsophalangeal joint of his big toe. After receiving treatment for this injury, the claimant returned to full duty work on December 17, 2013. Between December 17, 2013, and November 8, 2014, the claimant had no problems with his right foot, toe, or ankle and had no difficulty performing his work duties.

The claimant testified that, beginning in September 26, 2004, he was employed as a full-time Village firefighter paramedic. The claimant's employment contract requires that he engage in regular "workouts." On November 8, 2014, he was lifting weights alone, during regular work hours, in an on-site gym at the fire station. While performing a "military push press" (a maneuver in which he lifted a bar loaded with weight into a neutral position, bent at the knee into a squat, and then pushed the bar upwards above his shoulders into a standing position) he felt a sharp pain in his right ankle and foot. According to the claimant, he loaded the bar with 70 to 80 pounds of weight and, when he pushed it above his shoulders from the squat, his foot "gave out," and he dropped the weight. The claimant stated that he experienced pain and swelling in his right ankle and foot and was unable to put any weight on his foot.

The claimant immediately reported the accident to his supervisor, and they both prepared accident reports. The claimant's supervisor then directed him to an urgent care facility, Ingalls Family Care Center, where he was examined, x-rays were taken, and he was given pain medication and crutches.

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On February 9, 2015, and June 8, 2015, at the Village's request, the claimant underwent independent medical examinations (IMEs) with Dr. Armen Kelikian, an orthopedic surgeon who specializes in foot and ankle orthopedic surgery. Dr. Kelikian initially misunderstood the events leading up to the claimant's injury, conflating the November 8, 2014 accident with the claimant's previous and unrelated September 2013 accident where he injured his big toe while stepping off a truck. However, Dr. Kelikian's medical opinions were related to the November 8, 2014 incident.

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Dr. Kelikian testified in his evidence deposition that, based on his review of the claimant's medical records and patient history, he does not believe there was an injury as there was no indication of major or minor trauma, just subjective complaints of symptoms.

***

The Village also called Erik Ekstrom, a private investigator hired to investigate the claimant. Ekstrom testified that, during his surveillance on January 13, 2015, he observed the claimant walking with a normal gait, taking out the trash, and performing chest exercises at the gym. According to Ekstrom, on January 15, 2015, he observed the claimant walking with a usual gait without the assistance of crutches on his entrance and exit from the gym. He also observed the claimant on the treadmill, lifting 50 to 70 pound weights above his head, while simultaneously flexing both ankles and standing on his "tippy toes," without appearing to be in pain. Ekstrom recorded video during his surveillance, and a DVD of that video was admitted into evidence. However, a copy of the DVD is not a part of the record on appeal.

On July 13, 2015, Dr. Burgess released the claimant for light duty work with the following restrictions: lifting no greater than 15 pounds, no running, jumping, squatting, kneeling, or ladder climbing.

On July 20, 2015, the Village made light duty work available to the claimant for the first time. The claimant testified that he worked 40 hours a week for two weeks, performing office work. This assignment required a significant amount of walking, causing pain in his right ankle and foot, requiring him to use crutches again. In response to the claimant's complaints, Dr. Burgess modified his work restrictions to 15 hours of light duty work per week, which he began on August 7, 2015.

***

Following hearings on January 27, 2016, February 25, 2016, and March 21, 2016, the arbitrator found that the claimant sustained an accidental injury arising out of and in the course of his employment with the Village, and that his current condition of ill-being, requiring arthroscopic right ankle surgery, is causally related to his work accident. The arbitrator determined that the claimant's medical services were reasonable and necessary and ordered the Village to authorize inwriting, and pay for, both his arthroscopic right ankle surgery and 'all reasonable pre and post-surgical testing and care.' The arbitrator awarded the claimant: 36 1/7 weeks of temporary total disability (TTD) benefits, under section 8(b) of the Act (820 ILCS 305/8(b) (West 2012)), for the period from November 8, 2014, through July 19, 2015; 32 4/7 weeks of temporary partial disability (TPD) benefits, under section 8(a) of the Act (820 ILCS 305/8(a) (West 2012)), for the period from August 7, 2015, through March 21, 2016; and $15,153.87 for reasonable and necessary medical services under section 8(a) of the Act (820 ILCS 305/8(a) (West 2012)).

Additionally, the arbitrator awarded the Village a credit against the TTD benefits award, in the amount of $24,240.52, under section 8(j)(2) of the Act (820 ILCS 305/8(j)(2) (West 2012)).

***

The Village and the claimant sought review of the arbitrator's decision before the Commission. The Commission, with one commissioner partially concurring and partially dissenting, reversed the decision of the arbitrator, finding that: the claimant failed to prove that his accident arose out of his employment with the Village; the claimant failed to prove a causal connection between the accident and his current condition of ill-being….

Holding:

> "It was the function of the Commission to resolve the conflict in medical testimony, and we will not substitute our judgment or reweigh the evidence because a different inference could be drawn from the evidence. O'Dette,79 Ill. 2d at 253. Dr. Kelikian's causation opinions as well as the medical records are more than sufficient to support the conclusions reached by the Commission in making its causation determination. Accordingly, the Commission's decision denying the claimant benefits and prospective medical treatment under the Act based on his condition of ill-being not being causally related to a work-related accident is not against the manifest weight of the evidence."

Legal Lessons Learned: The private investigator's video, and the report of the independent medical examiner, and testimony by HR employee, all led to denial of the claim.

File: Chap. 7, Sexual Harassment

GA: PRIVATE AMBULANCE – MGR'S OCCASIONAL SEXUAL COMMENTS EMT - WORKED OUT TOGETHER – LAWSUIT DISMISSED

On Jan. 16, 2020, in D'Marius Allen v. AmbuiStat, LLC, the U.S. Court of Appeals for the 11th Circuit (Atlanta) upheld the U.S. District Court's grant of summary judgment for the private ambulance company.

> "At issue in this case is the fourth element -- whether the harassment was severe or pervasive. As we have explained, 'Title VII is not a civility code, and not all profane or sexual language or conduct will constitute discrimination in the terms and conditions of employment.' *** Here, Allen points to five isolated comments. These sporadic comments, spread over four months, can hardly be described as frequent. Further, the comments appear to have been said in a joking manner, and in the overarching context of Allen being friendly with Santos (or working out together in a gym). Indeed, Allen admitted she was 'friends outside of work' with Santos and Rita.
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> In short, Allen's pervasiveness argument fails to pass muster. Plainly, Santos engaged in unsavory and unpleasant conduct. However, as we have emphasized, this type of boorish behavior, with this kind of frequency, is insufficient to constitute pervasiveness for a sexual harassment action under Title VII. After reviewing Allen's claims, and comparing them against those in which this Court has rejected claims of pervasive harassment, we are required to come to the same conclusion."

Facts:

> "Appellee Ambu-Stat, LLC ('Ambu-Stat') is a provider of ambulatory services, primarily focused on transporting patients to and from appointments. Ambu-Stat is co-owned by Rita Ortiz (51%) and her husband, Santos Ortiz (49%). Rita is the executive manager and handles day-to-day operations. Santos 'generally' does not intervene in daily matters, instead working in the field, but Allen stated he 'maintains input' in company operations.
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> ***
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> On April 17, 2015, Ambu-Stat hired Allen as an emergency medical technician. Allen claims sporadic sexual harassment during her time at Ambu-Stat, all of which we take as true. For starters, Allen says Santos made several comments about her appearance. On Allen's first day of work, Santos told her she was 'really pretty.'

On another occasion, responding to Allen's comments about her own weight, Santos told Allen she was 'fine as hell' and not to worry. Allen testified she was not offended by this comment.

Santos also made comments about Allen's appearance that were more graphic: one time, Santos told Allen that she had a body like his ex-girlfriend, but better, with wider hips. And on another occasion, while moving a patient, Santos said, '[Y]ou got to watch that stuff on the table with that big old butt or you're going to knock it down trying to move her.' Allen adds that Santos generally spoke with co-workers about how attractive he found Allen, although she does not provide any specific examples of these statements.

***

Allen also claims that Santos made three crude sexual references. The first or second time Santos and Allen worked together, a song came on the radio containing the lyrics 'eating booty like groceries.' Santos asked Allen, '[D]oes your boyfriend eat that thang?' Allen replied that her boyfriend did not and did not know how to do so. Santos answered, 'I could teach him.'

Another time, while working out at a gym, Allen recommended chocolate milk to help Santos with muscle soreness. A few hours later, Santos texted Allen that he loved chocolate milk, along with images of 'tongue' emojis. This happened the same day as the comment Santos made about his ex-girlfriend.

When working out together at the gym on another occasion, Santos pointed out Allen's groin area, which was wet with sweat, and commented, 'Damn, that thing get wet like that!'

***

Three months after Allen started working at Ambu-Stat, on July 30, 2015, she was called into Rita's office for a meeting. Rita, Santos, and Allen were present, though Santos left at some point. Allen testified that the meeting began with Rita accusing her of having an affair and discussing her sex life with Santos. Allen claims Rita accused her of telling Santos "that [Allen's] boyfriend was boring in bed," which Allen denied. Allen explained that during the meeting, she told Rita that 'most of the conversation that was started was by [Santos].' Allen also said she was having suicidal thoughts at some point during the meeting. Rita concluded the meeting by warning Allen that it was inappropriate to discuss her personal problems with Santos, because he was her employer.

One week later, on August 6, 2015, Rita issued a disciplinary Employee Correction Form to Allen for having had an "inappropriate conversation" with Santos while on duty. The form stated that 'having such conversations while on duty with co-workers (or especially with my husband) is extremely inappropriate and unacceptable.'

***

In reply, Allen wrote a note to Rita on the back of the form. [It included]

> I enjoy working here & I'm in no place to be involved in any sexual harassment or marital issues that can easily be avoided. When I'm off, I don't wear anything disrespectful to myself, my relationship, or anyone else's. I don't come here to show off any assets. I've only come to this office out of uniform twice & I came directly to you & interacted with no one else. I'm not these 'bitches' or 'hoes' that like to deal with attached men. I don't want or need that karma in my life….

***

Rita proceeded to terminate Allen on August 10. She claimed Allen exhibited behavioral issues and provided 'contradictory information' at the July 30th meeting and in her subsequent note.

Holding:

"We need no scale to reach this conclusion; we are weighing nothing. The note is unambiguously an extended apology, along with a promise from Allen that this type of incident would not happen again. Taking the evidence in a light most favorable to Allen, we do not believe any reasonable jury could find that Allen's comments at the July 30th meeting or in her August 6th note amount to conduct in opposition to an unlawful employment practice."

Legal Lessons Learned: The manager's comments to the EMT were clearly inappropriate; if the EMT did not admit to being "friends" and working out together, this lawsuit might have proceeded to trial.

File: Chap.7, Sexual Harassment

KS: FEMALE FIRE INSPECTOR - NEW SCBAs / EXCUSED FROM SCBA TRAINING – RESIGNED - NOT HOSTILE WORKPLACE

On Jan. 14, 2020, in Amy Bermudez v. City of Topeka, Kansas, U.S. District Court Judge Holly L. Teeter, U.S. District Court for the District of Kansas, granted the City's motion for summary judgment and dismissed the lawsuit.

"The Airpack training incident involved Bermudez asking to be excused from the confidence course, the training chief excusing her, and someone else then making some mild comments to Conway [another female Inspector who didn't take curse]. Within a week or two, the TFD Twitter account posted a picture of Martin [Fire Marshal; plaintiff's supervisor] with the caption, 'No one is immune from training.' But the tweet featured Martin and did not mention Bermudez. The Court finds that this conduct, even when considered collectively, is not sufficiently severe or pervasive that it would dissuade a reasonable worker from engaging in protected activity…. Both incidents were very tame and neither was even outwardly directed at Bermudez. A remark that someone should do firefighter training to consider themselves a fire inspector and then tweeting that no one is immune from training is, at worst, rude or mildly passive aggressive. But it does not objectively rise to the level of conduct that would dissuade a reasonable employee from engaging in protected conduct…. It is well established that Title VII is not 'a general civility code for the American workplace.' Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006) (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998)). Nor is it the Court's role 'to mandate that certain individuals work on their interpersonal skills and cease engaging in inter-departmental personality conflicts.' Somoza v. Univ. of Denver, 513 F.3d 1206, 1218 (10th Cir. 2008).

Facts:

"The TFD hired Bermudez as a firefighter in 1992. As a firefighter, Bermudez was in a 'suppression' position, meaning her duties included going to and putting out fires…. In 1999, Bermudez's title was Fire Inspector I. By the time she left the TFD in 2017, she was a Fire Inspector III…. A fire inspector is a 'specialty' or 'prevention' position at the TFD. Her duties included inspecting buildings and fire-code compliance…. As a fire inspector, Bermudez reported to the fire marshal, Michael Martin. Martin became the fire marshal in 2014.

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In January 2017, Bermudez inspected St. Gregory Suites, which is managed by Lew McGinnis…. McGinnis later complained to Martin that Bermudez acted rude and angry and yelled during the inspection…. Although it is not clear when McGinnis made the verbal complaint to Martin, at some point after, Martin asked McGinnis to submit his complaint in writing…. Martin also told McGinnis that, although Bermudez can be 'curt' at times, fire safety is taken very seriously…. Although Bermudez admitted she can be 'direct and blunt' at times, she considered it harassment that Martin told McGinnis that she can be 'curt.' …. Another inspector was later reassigned to inspect McGinnis's property.

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In March 2017, the owner of the Best Western Topeka Inn and Suites complained to Martin that Bermudez had made racist remarks about Best Western's staff…. The complaint was made on the owner's own initiative, and the owner requested that a new inspector be assigned…. A subsequent investigation by the City of the Best Western complaint did not substantiate any discrimination by Bermudez…. Bermudez was not disciplined for either the St. Gregory or Best Western incidents.

***

She has not been demoted, passed over for a promotion, put on probation, given a performance improvement plan, had her pay reduced, or been assigned to significantly different duties since February 2014, when Martin was promoted over her.

***

In September 2017, the TFD acquired new self-contained breathing equipment ('Airpack'), which required training for all TFD employees…. The Airpack training consisted of a classroom segment and an outside 'confidence course' in full firefighting gear…. Bermudez and another female fire inspector, Michelle Conway, asked to be excused from the confidence course. Conway had a medical condition, and Bermudez asked because she had not been provided suppression training in her 18 years as a fire inspector…. Although Bermudez thought she could have completed the confidence course, she felt she should not have to do it because she was not given time to exercise during the work day since she became an inspector….

At the Airpack training, the training chief told Bermudez and Conway they could observe rather than participate in the confidence course…. But he did not immediately tell the training officers that Bermudez and Conway were excused, which Bermudez believed amounted to 'setting them up.'

After Conway told some other firefighters at the training that she was just observing the confidence course, one of the training officers made a 'huff' noise…. Conway then asked if anyone had a problem with her not doing the training, and someone responded 'yeah, you guys should be doing this and consider this your training.'…. Conway then left the training and Bermudez went with her….

Bermudez did not hear any comments made to Conway, but Conway told her about them later…. Bermudez was later told that someone said they should consider this their training, and another person said that 'if you are not going to do this training, you can consider yourself an Inspector and not a Fire Inspector.' …. After Bermudez and Conway told the training chief that other firefighters had disagreed with their non-participation, the training chief offered to tell the others that Bermudez and Conway were excused…

Bermudez was not disciplined for not completing the Airpack confidence course… An HR representative later investigated the comment made to Conway but found no violation of City policy.

***

[Fire Marshal] Martin completed the Airpack training…. Martin posted on the TFD's Twitter account a picture of himself wearing a tie and the Airpack equipment, and captioned it, 'No one is immune from training on the new air packs #TrainingInATie.' … The tweet came at least a week after Bermudez and Conway attended the Airpack training…. Martin testified that his intent was to make fun of himself for having done the Airpack training while wearing a tie, and that the statement 'no one is immune' was meant to refer to him being on senior TFD staff. He testified he was not thinking about Bermudez or Conway… Bermudez believes that the tweet was directed at her and Conway because it said no one was immune from training, and they did not do the training…. HR investigated the tweet and found no violation of City policy.

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On December 1, 2017, Bermudez submitted a resignation letter, citing intolerable working conditions.Id.at 18. On December 4, 2017, Bermudez was put on paid administrative leave for the rest of her two-week notice period so that she could be paid but not have to face working conditions she deemed intolerable…. Although she had resigned due to 'intolerable' working conditions, Bermudez considered it unfair that she did not get to 'finish contacts she had made with people and inspections.'"

Holding:

"[P]etty slights, minor annoyances, and simple lack of good manners' do not deter employees from pursuing their rights under Title VII. White, 548 U.S. at 68.Even construing all inferences in Bermudez's favor, the actionable conduct she complains of falls into the category of petty slights, and no reasonable jury could find otherwise. Accordingly, the Court finds that no reasonable jury could find for Bermudez on her claim of retaliatory harassment."

Legal Lessons Learned: Plaintiff failed to prove that no "reasonable person" in her position would have felt compelled to resign. See article on this decision: "Former Kan. fire inspector loses discrimination lawsuit," Jan. 21, 2020.

File: Chap. 7, Sexual Harassment

IL: CHICAGO FD – PARAMEDIC PHYSICAL FITNESS TESTS – 100% MALES, ONLY 79% FEMALES – LAWSUIT TO PROCEED

On Jan. 14, 2020, in Jennifer Livingston, et al. v. City of Chicago, U.S. District Court Judge Sara L. Ellis, U.S. District Court, Northern District of Illinois, Eastern Division, denied the City's motion to dismiss. Twelve (12) female candidates for Firefighter Paramedic positions filed the lawsuit; 8 had timely filed EEOC charges within 300 days and received "Right To Sue" letters.

"The City moves to dismiss Bain, Ruch, Youngren, and Venegas (the 'Non-Filing Plaintiffs') because they have not exhausted their administrative remedies, as required by Title VII. Because the Non-Filing Plaintiffs can rely on the single-filing rule to bring their claims based on the charges filed by other plaintiffs in this case, the Court denies the City's motion to dismiss.

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To bring a Title VII suit, a plaintiff must have exhausted her administrative remedies by filing a timely EEOC charge and receiving a right to sue letter. Allen v. City of Chicago, 828 F. Supp. 543, 555 (N.D. Ill. 1993). Certain exceptions to this rule exist: under the single-filing rule or "piggybacking" doctrine, "an

individual who has not exhausted his administrative options may join a lawsuit filed by another individual who has administratively exhausted." Simpson v. Cook County Sheriff's Office, No. 18-cv -553, 2018 WL 3753362, at *2 (N.D. Ill. Aug. 8, 2018); see also Anderson v. Montgomery Ward & Co., 852 F.2d 1008, 1017–18 (7th Cir. 1988)."

Facts:

"This is not the City's first time defending against litigation for sex discrimination in its process for hiring Fire Paramedics, and a brief history on past litigation provides useful context for understanding Plaintiffs' claims…. In 2000, the City added a requirement that Fire Paramedic candidates pass a physical test before they could proceed to the Training Academy. The City used the physical test this way for over a decade, until multiple women who were disqualified from being Fire Paramedics because of this test sued the City alleging discrimination under Title VII—the Seventh Circuit ultimately found that the study that formed the basis for imposing the physical test was unreliable and invalid. See Ernst v. City of Chicago, 837 F.3d 788, 802 (7th Cir. 2016). During this litigation, in 2014, the City stopped using the original physical test and began using a new test, referred to in the complaint as the 'PPAT.' All Plaintiffs passed the PPAT and made it into the Academy.

However, at the time it began administering the PPAT, the City also added additional physical testing requirements that it administered during the Academy and required candidates to pass before graduating from the Academy. The City imposes these new physical requirements primarily through two tests: a 'Lifting and Moving Sequence' and a 'Step Test.' In 2014 and 2015, 100 percent of men who took these tests passed, while only 79 percent of women passed."

Holding:

"The Filing Plaintiffs put the City on notice that the Step Test requirement was discriminatory, and this claim is based on exactly that conduct. Thus, Youngren [and the other non-filing plaintiffs] may rely on the single-filing rule to proceed with her claim."

Legal Lessons Learned: Lawsuit may proceed; physical ability tests that have an "adverse impact" on female applicants have been subject of litigation, including U.S. Department of Justice cases. See EEOC review of litigation involving physical agility tests: "Recruitment & Hiring Gender Disparities in Public Safety Occupations" (June 2018), [pages 12-13].

"Once employers could no longer segregate women into peripheral jobs, they began using screening tests for public safety occupations. Initially, height and weight restrictions were used in some public safety jobs to screen applicants, because it was thought that taller and heavier people were more able to perform the presumed physically demanding duties of these jobs. In 1977, the Supreme Court addressed this issue when it rejected an Alabama prison facility's height and weight restriction because it led to an unjustified disproportionate exclusion, or a 'disparate impact', on women. [Dothard v. Rawlinson, 433 U.S.321(1977).] When height and weight restrictions thus fell by the wayside, they were replaced by physical ability tests (PATs) to qualify applicants for public safety positions…. PATs were gender-neutral, requiring the same performance for men and women. This still led to a disparate impact on women who had comparable physical fitness levels as qualified men, but could not reach the required threshold of agender-neutral test.

[Footnote 17]: In cases involving a state or local government's use of PATs to screen law enforcement applicants, the Department of Justice (DOJ), not the EEOC, has authority to bring any lawsuit on behalf of the government…. The DOJ has challenged PATs as discriminatory against women. See,e.g., Lanning v. Southeastern Penn. Transp. Auth.,181 F.3d 478 (3dCir.1999); United States v. Massachusetts, 781 F.Supp.2d 1(D.Mass.2011) (challenging PAT that has disparate impact against women for prison guard jobs); United States v. City of Erie, 411F.Supp.2d 524 (W.D.Pa.2005)(finding for plaintiff DOJ that unitary PAT for

police officers created a disparate impact and the defendant failed to prove that requiring a unitary test time was sufficiently job-related."

File: Chap. 8, Race Discrimination

GA: KNEE SURGERY – FF NOT ALLOWED BACK TO WORK – LAWSUIT DISMISSED SINCE DIDN'T FILE IN 90 DAYS OF EEOC LETTER

On Jan. 23, 2020, in Derek Lee Colson v. City of Thomasville, et al., U.S. District Court Senior Judge Hugh Lawson, U.S. District Court for Middle District of Georgia, Valdosta Division, granted defendants motion for summary judgment and dismissed his lawsuit for failure to file within 90 days of the EEOC's Right To Sue letter.

> "The undisputed evidence is that the EEOC mailed a Dismissal and Notice of Rights to Plaintiff on October 26, 2017. (Doc. 23-3). There is no evidence in the record beyond Plaintiff's unsupported statement that the original notice was not delivered. Accepting this statement alone without further explanation would permit Plaintiff to enjoy a 'manipulable, open-ended time extension,' which the Eleventh Circuit has opined would 'render the statutory minimum meaningless.' *** Plaintiff did not file his Complaint until August 21, 2018 – 296 later. Plaintiff's Complaint is therefore time-barred."

Facts:

> "Plaintiff Derek Lee Colson formerly worked as a firefighter with Thomasville Fire Rescue. He filed this pro se lawsuit pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. ('Title VII'), alleging that Defendants City of Thomasville, Thomasville Fire Rescue, and Christopher K. Bowman discriminated against him on the basis of his race when they did not permit Plaintiff to resume his work duties after being cleared to work by the Worker's Compensation doctor. Plaintiff claims that Defendants' refusal to allow him to return to work was in retaliation for another discrimination lawsuit Plaintiff filed against Defendants.
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> ***
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> Colson filed a charge of discrimination with the Equal Employment Opportunity Commission ('EEOC') on April 20, 2016, alleging that his employer discriminated against him on the basis of his race in violation of Title VII. (Doc. 22-3, ¶ 3). The EEOC assigned Colson's charge to Investigator Sharon Robertson….Sometime in 2017, LaTonya Nix Wiley, an attorney who represented Colson during the appeal of his prior lawsuit, contacted the EEOC to inquire about the status of Colson's charge.
>
> Ms. Robertson thereafter completed her investigation of Colson's allegations of discrimination….Based on a finding of 'no cause,' on October 26, 2017, the EEOC issued Colson a Notice of Suit Rights, which was mailed to Colson by United States Mail that same date….
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> ***
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> Colson filed his pro se Complaint in this Court on August 21, 2018. (Doc. 1). In his original Complaint, Colson alleged that he received his right to sue letter on May 23, 2018. (Doc. 1, p. 5). The notice, which Colson attached to his Complaint, however, is dated October 26, 2017."

Holding:

> "'Under Title VII, in cases where the EEOC does not file suit or obtain a conciliation agreement, the EEOC 'shall so notify the person aggrieved and within 90 days after the giving of such notice a civil action may be

brought against the respondent named in the charge.' Zillyette v. Capital One Fin. Corp., 7 9 F.3d 1337, 1339 (11th Cir. 1999) (quoting 42 U.S.C. § 2000e-5(f)(1)). The plaintiff bears the initial burden of establishing that he filed his complaint within 90 days of receiving the right to sue letter from the EEOC.

***

But there is no bright-line rule for determining when a complainant has received notice of a right to sue…. Instead, the Eleventh Circuit has 'imposed upon complainants some minimum responsibility . . . for an orderly and expeditious resolution of their claims, and we have expressed concern over enabling complainants to enjoy a manipulable open-ended time extension which could render the statutory minimum meaningless.'…. (quoting Zillyette, 179 F.3d at 1340). Accordingly, in this Circuit, the 90-day limitations period shall be analyzed, on a case-by-case basis to fashion a fair and reasonable rule for the circumstances of each case, one that would require plaintiffs to 'on a case-by-case basis to fashion a fair and reasonable rule for the circumstances of each case, one that would require plaintiffs to assume some minimum responsibility . . . without conditioning a claimant's right to sue . . . on fortuitous circumstances or events beyond his control.'

***

For the reasons discussed herein, the Court GRANTS Defendant s' Motion for Summary Judgment…. This case is hereby dismissed with prejudice.

Legal Lessoned Learned: Title VII requires lawsuit to be filed within 90 days of EEOC "Right To Sue" letter; if don't have an attorney, need to make sure EEOC has your correct address, and periodically check on status of EEOC investigation.

File: Chap. 9, ADA

GA: PARAMEDIC WITH MS – TEACHER / LAB ASSIS. – 3 DAYS SICK, COLLEGE REMOVED FULL SEMESTER – DOJ SETTLEMENT / BOJ BLOG

Jan. 27, 2020: DoJ BLOG about settlement, about the Nov. 7, 2019 settlement: United States v. Lanier Technical College: U.S. District Court, Northern District of Georgia (Atlanta).

"From 2009-2012, in addition to working as a full-time paramedic, Ms. Queen worked evening shifts as a part-time EMT lab assistant at Lanier Technical College, a unit of the Technical College System of Georgia. She loved teaching and hoped to someday become a full-time instructor. One former colleague described Ms. Queen as a 'superstar' lab assistant whom 'students loved.' But after Ms. Queen took three days of sick leave due to her MS, the college removed her from the teaching schedule for an entire school semester, thus reducing her hours and pay to zero. As alleged by the Justice Department in a complaint filed in federal district court in November 2019, the college's actions effectively terminated Ms. Queen's employment on the basis of her disability, in violation of Title I of the ADA."

Nov. 7, 2019 Settlement Press Release:

"The agreement resolves the Department's complaint alleging that the college terminated an employee, who has multiple sclerosis, on the basis of her disability after years of service to the college. The complaint further alleges that, after the employee took three days of sick leave one summer, the college removed her from the teaching schedule for an entire school semester, thus reducing her hours and pay to zero, due to her multiple sclerosis."

Facts: [From January 27, 2020, U.S. Department of Justice Blog]:

> "Mary Queen is a mother, a wife, a daughter, a teacher, a community volunteer worker, and a decorated paramedic, among other things. She has taught first aide to a Girl Scouts troop, spent time volunteering in a nursing home, and received multiple commendations for saving people's lives in her work as a paramedic. In 2013, Ms. Queen was nominated as the sole representative from her region for Georgia Paramedic of the Year, having been selected from among hundreds of paramedics and EMTs in her region. Georgia Paramedic of the Year is awarded annually to a paramedic or EMT who has made significant contributions to emergency medical services and gone above-and-beyond the call of duty. Ms. Queen was a runner-up for the statewide award.
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> From her own telling of it, Ms. Queen did all of this not in spite of her multiple sclerosis (MS), but because of it. In January 2011, while sitting at the fire station waiting for the next emergency call to come in, Ms. Queen got a call from her neurologist telling her she has MS. She was 25-years-old. 'Every day since has been a struggle and a fight,' says Ms. Queen. She is quick to add, 'My MS has become my inspiration and the reason I get up every morning to help others.'
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> Ms. Queen acknowledges that she has been through a lot of challenges in her life. She discusses most of them very matter-of-factly. But she still tears up when she discusses her termination from Lanier, and her phone call with her program director and former instructor in which he made her feel incompetent because of her disability.
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> On November 7, 2019, the Department resolved its lawsuit against Lanier Technical College for discriminating against Ms. Queen. Under the agreement, the college will revise its policies to ensure compliance with the ADA, implement new policies to ensure it does not discriminate on the basis of disability in its scheduling practices, train staff on the ADA, and file periodic reports with the Department on implementation of the agreement. The college also paid $53,000 in back pay and damages to Ms. Queen.
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> When informed of the resolution, Ms. Queen got quiet. She was deeply proud of herself for seeing it through and standing up for what was right. She says she hopes that her story inspires others."

Holding [from Nov. 4, 2019 Settlement Agreement:]

> 6. "Complainant is an individual with a disability within the meaning of 42 U.S.C. § 12102 and 29 C.F.R. § 1630.2, because she has multiple sclerosis (MS), a physical impairment that substantially limits one or more major life activities, including neurological function and the operation of the central nervous system, which are major bodily functions; and/or because she was regarded as having such an impairment.
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> 9. Specifically, the United States alleges that Defendant removed Complainant from the work schedule for an entire school semester, thus reducing her hours and compensation to zero, because of her multiple sclerosis. In doing so, the United States alleges that Defendant terminated Complainant's employment because of her disability.
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15. Within seven (7) days of the Effective Date of this Agreement, Defendant shall offer Complainant a total monetary award of $53,000, which includes:

a. A monetary award of $8,000, which is designated as back pay. This monetary amount shall be subject to any applicable federal, state, and local taxes, in addition to other payroll tax withholding deductions, and Defendant shall issue an IRS Form W-2 to Complainant for this amount. Defendant shall separately pay all federal, state, and local taxes due on the monetary award, *i.e.*, the employer's payments shall not be deducted from the monetary award to Complainant.

b. A monetary award in the amount of $45,000, which is designated as compensatory damages. This amount shall not be subject to withholding deductions, and Defendant shall issue an IRS Form 1099 to Complainant for this amount."

Legal Lessons Learned: U.S. Department of Justice aggressively enforces the ADA, including this lawsuit on behalf of a paramedic and teacher.

File: Chap. 11, FLSA

KY: 428 FLIGHT MEDICS, RNS, PILOTS - OVERTIME AFTER 120 HOURS – CLASS ACTION - $2,950,000 SETTLEMENT

On Jan. 21, 2020, in Jason Peck v. Air Evac EMS, Inc., d/b/a Air Evac Lifeteam, U.S. District Court Chief Judge Danny C. Reeves, U.S. District Court, Eastern District of Kentucky, Central Division (Lexington), approved the class action settlement, including attorney fees.

> "The parties previously agreed to a gross settlement fund of $3,000,000.00, including up to $800,000.000 in attorney's fees and costs and a $15,000.00 incentive for Peck. The parties later filed a motion to amend the settlement seeking $750,000.00 in attorney's fees and a gross settlement fund of $2,950,000.00… The Court granted the motion to amend the settlement to reduce the amount of attorney's fees. The proposed class includes 428 'current and former flight nurses, flight paramedics, and pilots employed by [Air Evac] in the Commonwealth of Kentucky at any time from October 25, 2013 through July 17, 2019.' …. The parties explained that individual settlement payments were calculated by reviewing Air Evac's payroll and timecard records to establish the amount of unpaid overtime for each class member assuming that the claims were true."

Facts:

> "Peck is a former flight nurse employed by Defendant Air Evac EMS, Inc. ('Air Evac'). He filed a class action on behalf of former flight nurses, flight paramedics, and pilots employed by Air Evac for overtime compensation dating from October 25, 2013, to July 17, 2019. Before March 2014, Air Evac required that an individual work one hundred twenty hours per pay period before receiving overtime pay. Air Evac modified the policy in March 2015 to lower the threshold to eighty-four hours per pay period before being eligible for overtime compensation. Air Evac then changed its policy in July 2018 to pay all flight nurses, paramedics, and pilots overtime for all hours worked in excess of forty hours per week. Peck filed this lawsuit alleging that the previous overtime policy violates the Kentucky Wage and Hour Act ('KWHA')."

Holding:

> "After a final fairness hearing is held, the Court must determine whether the settlement is fair, reasonable, and adequate. Fed. R. Civ. P. 23(e). As was mentioned in the Court's Memorandum Opinion and Order preliminarily approving the settlement, Rule 23(e) now sets forth specific factors to determine whether a settlement is 'fair, reasonable, and adequate.' Additionally, the Sixth Circuit has developed specific factors to determine whether a settlement is 'fair, reasonable, and adequate.'
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First, the class representative and class counsel have adequately represented the class. The parties' attorneys are experienced class action litigators and they utilized a mediator in conducting arm-length negotiations. Further, the attorneys reviewed a significant amount of time and payroll data in determining the amount owed to members of the class.

Second, the proposal was negotiated at arm's length. The parties engaged in extensive negotiations with the assistance of an experienced mediator. Further, both parties engaged their own experts to calculate the amount of overtime owed. Additionally, the parties discussed the strengths and weaknesses of their claims and defenses before determining that settlement was the best option.
Third, the settlement is adequate because it includes full payment of overtime for each of the potential class members. Additionally, there are always risks to litigation, and there is a lack of binding appellate authority on whether the Airline Deregulation Act preempts the KWHA which adds an additional level of risk in continuing litigation. The amount of attorney's fees and costs is within a reasonable range in a common fund fee award. The amount of attorney's fees requested is about 25% of the total settlement fund, which is between the normal 20% to 30% range. *See Gooch v. Life Investors Ins. Co. of America*, 672 F.3d 402, 426 (6th Cir. 2012). The attorney's fees will not reduce the amount each putative class member will receive. Also, there are no side agreements apart from the settlement itself."

Legal Lessons Learned: Overtime claims can result in very large settlements; if in doubt about overtime eligibility, contact U.S. Department of Labor, Wage & Hour Division.

File: Chap. 11, FLSA

CA: THREE FF CLAIMED NOT PAID CORRECT "REGULAR RATE OF PAY" FOR 6 PAY PERIODS – CITY PROVED IT WAS ACTUALLY OVERPAYING

On Jan. 15, 2020, in Darren Wallace v. City of San Jose, the U.S. Court of Appeals for the 9th Circuit (San Francisco) held (3 to 0) that the U.S. District Court judge properly granted summary judgement for the city. Court decided case without even needing to schedule oral argument.

"Under 29 U.S.C. § 207(k), public agencies employing firefighters may adopt a 28-day work period for purposes of calculating FLSA overtime pay. FLSA requires overtime pay of 1.5times the regular rate of pay for every hour above 212 hours that a firefighter works in a 28-daywork period. See id.; 29 C.F.R. § 553.230. The City has adopted a 28-day pay period for its firefighters and pays them biweekly. It pays firefighters a base hourly rate for 224 hours per work period, regardless of whether they actually work a full 224 hours. Furthermore, when a firefighter works hours outside of his or her regularly scheduled shifts, the City pays 'contractual overtime' of 1.5 times his or her base hourly rate for each additional hour worked. The City's 'contractual overtime' payments are distinct from FLSA overtime pay, and the firefighters are entitled to FLSA overtime pay for each hour worked over the 212-hour threshold…. Each work period, the City calculates what is owed to its firefighters under FLSA. If the amount the City paid a firefighter is less than required under FLSA, it adds a FLSA overtime adjustment to the firefighter's paycheck at the end of the work period. If the amount the City paid is more than required under FLSA, no adjustment is made."

Facts:

"Darren Wallace, Keith Hart, and Mark Leeds ('Appellants') are firefighters employed by the City of San Jose ('the City'). They sued the City for alleged wage violations…. They collectively allege that the City miscalculated its FLSA overtime liability and in turn, underpaid them during six work periods. The district court granted summary judgment for the City.

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The City submitted declarations and paystubs for each of the six work periods in issue. The parties do not dispute the total hours each appellant worked or the total compensation each received during each work period.

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Under 29 U.S.C. § 207(k), public agencies employing firefighters may adopt a 28-day work period for purposes of calculating FLSA overtime pay. FLSA requires overtime pay of 1.5times the regular rate of pay for every hour above 212 hours that a firefighter works in a 28-daywork period. See id.; 29 C.F.R. § 553.230.

The City has adopted a 28-day pay period for its firefighters and pays them biweekly. It pays firefighters a base hourly rate for 224 hours per work period, regardless of whether they actually work a full 224 hours. Furthermore, when a firefighter works hours outside of his or her regularly scheduled shifts, the City pays 'contractual overtime' of 1.5 times his or her base hourly rate for each additional hour worked.

The City's "contractual overtime" payments are distinct from FLSA overtime pay, and the firefighters are entitled to FLSA overtime pay for each hour worked over the 212-hour threshold.

> Footnote 1: The City also pays firefighters 'premium payments' or ('add-ons'), which are various extra payments offered as work incentives or based on additional skills and trainings. Finally, the City pays certain 'other payments' that do not qualify as premium payments under FLSA.]

Each work period, the City calculates what is owed to its firefighters under FLSA. If the amount the City paid a firefighter is less than required under FLSA, it adds a FLSA overtime adjustment to the firefighter's paycheck at the end of the work period. If the amount the City paid is more than required under FLSA, no adjustment is made."

Holding:

"[A]ppellants allege that the City owed them additional FLSA overtime pay in each pay period because (1) it miscalculates the FLSA regular rate of pay, and (2) it takes an improper 'credit' against its FLSA liability.

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FLSA creates a statutory floor for overtime pay. See29 U.S.C. § 207. If an employee's actual pay exceeds what the FLSA would require, an employer has no additional FLSA liability. See29 U.S.C. § 216(b) (providing that an employer who violates FLSA minimum overtime provisions 'shall be liable...in the amount of...*unpaid* overtime compensation' (emphasis added)).

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The parties are at odds over the total remuneration and total hours that should be used to calculate appellants' regular rates of pay. We do not reach the dispute regarding the proper regular rate of pay in this case, because the City has conclusively demonstrated that it paid appellants more than was required under FLSA, even when appellants' proffered regular rate of pay is used. Accordingly, we agree with the district court that there is no genuine dispute of material fact as to the City's FLSA liability."

Legal Lessons Learned: If city proves it is paying more than required under FLSA, then courts will grant summary judgment.

TN: COMBATIVE PATIENT – PD RESTRAINED PATIENT - EMS USED SUCCINYLCHOLINE – QUALIFIED IMMUNITY, FOLLOWED PROTOCOL

On Jan. 21, 2020, in Estate of Dustin Barnwell v. Mitchell Grigsby, et al., the U.S. Court of Appeals for the Sixth Circuit (Cincinnati, OH) held 3 to 0 that the U.S. District Court judge, after three days of trial before a jury, properly dismissed the lawsuit against police and paramedics.

> "After three days of trial, the district court found that the defendants' entitlement to qualified immunity resolved the ultimate issue in the case: whether administration of succinylcholine to Barnwell constituted constitutionally-impermissible excessive force. The district court properly viewed the evidence in the light most favorable to Gilmore and found that there was no legally sufficient basis fora reasonable jury to find for Gilmore on the ultimate issue in the case."

Facts:

> "On November 11, 2011, Dustin Barnwell took eight prescription muscle relaxant pills and lost consciousness. Barnwell's girlfriend, Shasta Gilmore, called 911 to report that Barnwell was possibly overdosing and trying to fight her. Two police officers and four paramedics responded to the call. The officers held Barnwell down while the paramedics treated him. Pursuant to their intubation protocols, the paramedics administered a series of drugs, including a paralytic called succinylcholine. After the paramedics intubated him, Barnwell was transported to the hospital and died soon after.
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> On November 11, 2011, Barnwell, Gilmore, and their daughter visited Barnwell's friend, Aaron Sweat, around 4:30 or 5:00 p.m. Sweat gave Barnwell Flexeril pills (cyclobenzaprine hydrochloride), a prescription muscle relaxant. Barnwell took the pills and later collapsed on his couch, having lost consciousness. When Gilmore could not wake Barnwell, she grew concerned that he had overdosed. Gilmore contacted her mother, Cherry Turner, and Sweat for help. According to Sweat, Barnwell started kicking him and became combative when Sweat tried to wake him. Turner confirmed as much in her signed statement to the police, noting that Barnwell was kicking and trying to bite them.
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> A few minutes after 8:00 p.m., Gilmore called 911. She told the dispatcher that Barnwell had taken Flexeril. Gilmore emphasized Barnwell's combative behavior to the dispatcher and noted that he kept trying to fight her.
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> Officers Mitch Grigsby and Richard Stooksbury were the first of the defendants to respond. Gilmore informed Grigsby and Stooksbury that Barnwell had obtained eight Flexeril pills earlier that day and passed out around 7:00 p.m. She warned them both that Barnwell was very combative. Stooksbury tried to wake Barnwell verbally and, when that failed, by shaking his foot.
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> The parties recount what happened next differently. Grigsby and Stooksbury attested that Barnwell woke up and immediately started kicking Stooksbury. The officers tried to control Barnwell using 'soft-arm techniques' on his arms and legs…. Barnwell continued to be combative, tried to bite the officers and Turner, and refused to tell them what drugs he took. After Barnwell cycled in and out of consciousness several times, Stooksbury and Grigsby put Barnwell on the floor facedown and held him there until the paramedics arrived.
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Gilmore, on the other hand, testified that the two officers were pushing Barnwell down on the couch and slamming his legs down each time he tried to sit up or move. According to Gilmore, one of the officers grabbed Barnwell's arm and threatened to break it if Barnwell tried to bite him. She recalls Grigsby and Stooksbury being so rough that she asked them to 'please stop before [they] kill him.' …. The officers then flipped Barnwell off the couch and pinned him to the floor. According to Gilmore, Barnwell did not try to bite, kick, or punch anyone during this time. Despite her 911 call stating Barnwell was combative, Gilmore later backtracked, claiming that she 'miscommunicated' Barnwell's combativeness…. In Turner's courtroom testimony, she also denied seeing Barnwell try to bite, kick, spit on, or injure the officers in any way. Her initial statement to the police in 2011, however, told a different story.

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Around the time that the officers moved Barnwell to the floor, paramedics David Randle and Mike Myers arrived. Based on Barnwell's 'very combative' condition and the need to treat him, Randle and Myers asked the officers to handcuff Barnwell…. Shortly thereafter, two more paramedics, Robert Cooker and Mark Carter, joined the fray. The paramedics observed that Barnwell had a highly elevated blood pressure and heart rate and seemingly could not control his movements, including banging his head against the floor. Barnwell's breathing was also irregular.

Based on their assessment of Barnwell's condition and what they had discerned from Gilmore, the paramedics' diagnosis was that Barnwell was suffering from an overdose or cerebral hemorrhage. The paramedics then decided 'to place an IV so that [they] could administer medications intended to control [Barnwell's] involuntary movements . . . by causing paralysis and loss of reflexes.' They needed to control Barnwell's movements in order to intubate him to assist with his breathing and heart function. It was at this point that Gilmore recalls Stooksbury turning to her and saying 'We're about to knock him out.'

The officers then instructed Gilmore and Turner to go outside while the paramedics continued to treat Barnwell. The paramedics began the intubation sequence. The Roane County Rapid Sequence Paralysis and Intubation ('RSI') Protocol's 'Assessments and Indications' call for RSI on patients who are '[s]everely combative' or those for whom '[all] standard attempts to establish an airway have failed.' … The RSI Protocol involves the administration of multiple drugs for sedation and paralysis, including succinylcholine. Succinylcholine works to paralyze the muscles, including the lungs and diaphragm. A patient who is administered succinylcholine requires assistive ventilations.

To perform the RSI, Randle established an IV line, and Cooker administered four drugs in sequence, including 150 milligrams of succinylcholine. Once they achieved paralysis, Randle and Cooker intubated Barnwell—that is, they placed a tube in his trachea to assist with breathing.

By this time, the officers had removed the handcuffs. Barnwell went into cardiac arrest. The paramedics administered another drug to counter the loss of heart function and started CPR. Randle and Cooker continued to provide CPR while transporting Barnwell to the hospital. During transport, they noticed a brown fluid in the endotracheal tube. The paramedics then removed the tube, placed an oral airway, and manually ventilated Barnwell. When they arrived at the hospital, an emergency room doctor took over. Thirty minutes later, Barnwell died.

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Gilmore, on behalf of Barnwell's estate, sued the paramedics, officers, and Roane County, Tennessee. Her complaint alleged federal claims under 42 U.S.C. §§ 1983and 1985, health care liability claims, and state-law battery claims."

Holding:

> "After three days of trial, the district court found that the defendants' entitlement to qualified immunity resolved the ultimate issue in the case: whether administration of succinylcholine to Barnwell constituted constitutionally-impermissible excessive force. The district court properly viewed the evidence in the light most favorable to Gilmore and found that there was no legally sufficient basis fora reasonable jury to find for Gilmore on the ultimate issue in the case. Therefore, we find no violation of Gilmore's Seventh Amendment right to trial by jury."

Legal Lessons Learned: Thoroughly document details about the combative patient, and protocol on meds administered was followed.

File: Chap. 16, Discipline

TX: OFF-DUTY FF SLAPPED 70+ YEAR OLD, COMPLAINED FF'S KIDS BLOCKING VIEW – HEARING OFFICER REVERSED TERMINATION

On Jan. 23, 2020, in City of Fort Worth v. Shea O'Neill, Court of Appeals for Second Appellate District of Texas at Fort Worth (vote 3 to 0), rejected the City's appeal from the Hearing Officer's finding that firefighters due process rights were violated when FD internal affairs failed to conduct an adequate internal investigation. Case remanded to trial court, however, on whether Hearing Officer improperly conducted Internet search about medication victim uses [aspirin and Lipitor] that could cause nosebleed.

> "In support of its appellate issue, the City first asserts that the hearing examiner's decision was procured by unlawful means because she relied on evidence not presented at the hearing—specifically, her independent Internet research on the side effects of aspirin and Lipitor, both of which Woods testified to taking daily. According to the hearing examiner's research, both medications can cause 'unusual bleeding,' and Lipitor can 'specifically cause nosebleed.'"

Facts:

> "The Fort Worth Fire Department indefinitely suspended [terminated] firefighter Shea O'Neill from his job with the department.
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> > [Footnote 1]. O'Neill was also arrested and charged with injury to the elderly, a felony offense. *See* Tex. Penal Code Ann. § 22.04. The case was tried in June 2016, ending with a hung jury.
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> In April 2015, O'Neill attended a football scrimmage at Texas Christian University with his seven-year-old twin sons and their eight-year-old friend. At the time, O'Neill was in his early 40s and on occupational leave from the fire department because of a work-related injury to his left shoulder.
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> James Woods, a retiree in his late 70s, and his wife were also at the scrimmage. The Woodses claimed that the children were blocking their view of the game; eventually, Woods stood up, approached the boys, and shouted and cursed at them. O'Neill stepped in and confronted Woods. O'Neill then struck Woods with his left hand, and Woods fell to his knees. Woods sustained facial injuries, several cracked and broken teeth, and a bloody nose.
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> After learning about and investigating the incident, the fire chief found that O'Neill had violated several fire-department rules and regulations and indefinitely suspended him (that is, terminated his employment) in July

2015. Among other findings, the chief found by a preponderance of the evidence that O'Neill ‘sucker punched’ Woods while Woods was seated; O'Neill's hitting Woods was unjustified; O'Neill hit Woods hard enough to bloody his nose and "chip and crack" his teeth; the strike left Woods with a swollen face, headaches, memory loss, and medical and dental costs; and O'Neill was untruthful during the investigation in claiming that he struck Woods to defend the children.

O'Neill appealed the fire chief's indefinite-suspension decision to a hearing examiner, who held a two-day evidentiary hearing in December 2016. In May 2017, she issued a 45-page decision in which she found that the evidence did not ‘support findings or conclusions that it was more probable than not that [O'Neill] received due process in the [Fort Worth Fire Department] Professional Standards investigation or that he was untruthful in his statements to Professional Standards.’ She further found that the evidence did not support the fire chief's conclusions that O'Neill was untruthful in claiming that ‘the physical contact was in the defense of his children’; that O'Neill struck Woods after Woods sat down and looked away; and that the ‘slap’ was of sufficient force to knock Woods to his knees or cause Woods's injuries. Based on her findings, the hearing examiner granted O'Neill's appeal and reinstated him with back pay and benefits.

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The hearing examiner ultimately concluded that the slap was defensive and that the evidence did not support the fire chief's finding that the slap's force knocked Woods to his knees and caused his injuries. In reaching these conclusions, the examiner determined in the ‘Analysis’ section of her opinion that Woods was standing when O'Neill struck him with a backhanded slap, which the examiner determined was a defensive move, not a ‘straight-on, in the face “sucker punch” as the [c]hief concluded.’ The examiner went on to state that ‘[t]he form of the slap’ supported O'Neill's claim that he was trying to ‘remove his children from potential harm’ and that a backhanded slap with O'Neill's injured left arm was ‘compelling evidence’ that the slap was a ‘defensive measure.’

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The examiner goes on to conclude that it was ‘highly improbable’ that the slap cracked or broke Woods's teeth. She further concluded that it was ‘more probable than not that Woods's injuries were minor.’ After falling to his knees, Woods was immediately back on his feet and threatening O'Neill. Woods had only a ‘slight nosebleed,’ bruising to the left side of his face, and no noticeable swelling. He was able to stand for 30 minutes while waiting for the ambulance. Woods's injuries were triaged in the emergency room three hours later, and he had no broken bones or brain trauma. He was discharged without treatment for swelling and without pain medication.

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In support of its appellate issue, the City first asserts that the hearing examiner's decision was procured by unlawful means because she relied on evidence not presented at the hearing—specifically, her independent Internet research on the side effects of aspirin and Lipitor, both of which Woods testified to taking daily. According to the hearing examiner's research, both medications can cause ‘unusual bleeding,’ and Lipitor can ‘specifically cause nosebleed.’

Holding:

‘In her written decision, the hearing examiner evaluated whether the fire department afforded O'Neill the requisite due process during the disciplinary process. She determined that the department did not fully investigate the facts and allegations and did not give O'Neill an adequate opportunity to respond to the allegations. The hearing examiner concluded that ‘[t]he total and seemingly intentional failure of [Fort Worth

Fire Department] Professional Standards to afford [O'Neill] his due[-]process rights is sufficient on its own to grant the appeal and overturn the indefinite suspension entirely.'

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[T]he City contends that the hearing examiner exceeded her jurisdiction by concluding that her determination that the fire department's investigation violated O'Neill's due-process rights compelled her to reinstate O'Neill. We disagree.

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The City [also] contends that the hearing examiner's Internet research suggests that she determined that the medication—as opposed to O'Neill's striking Woods—could have caused the bleeding. This conclusion, the City argues, undergirded the hearing examiner's final determination that O'Neill's striking Woods was defensive rather than offensive.

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The City's argument hinges on a single sentence in the 'Testimony at the Appeal Hearing' section of the hearing examiner's opinion: 'Woods admitted that he took aspirin every day, as well as Lipitor, both of which may cause unusual bleeding; Lipitor may also specifically cause nosebleed. See PubMed Health, www.ncbi.nim.nih.gov/pubmedhealth/blog/2015/US National Library of Medicine, side effects of these medications.'

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Having sustained the City's issue in part, we reverse the trial court's order granting O'Neill's plea to the jurisdiction on the City's procured-by-unlawful-means claim and remand that claim to the trial court for further proceedings. We affirm the remainder of the trial court's order.

> [Footnote 7.] City asserts that if we reverse the trial court's order granting O'Neill's plea to the jurisdiction, 'it would also be appropriate for [us] to find that it is within the trial court's discretion to review the merits and render a decision.' That issue is not before us in this appeal, and so any decision now would be an improper advisory opinion."

Legal Lessons Learned: Courts are very reluctant to overturn decision of a Civil Service hearing officer, who has conducted the hearings and personally observe the witnesses.