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OCTOBER 2021 – FIRE & EMS LAW Newsletter

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE.]

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- **GIVING BACK – SCHOLARSHIP FUND.** Professor Bennett & his wife have been contributing for several years to the Bennett Family Scholarship Fund for UC Fire Science students. The UC Foundation has kindly established a link where others who have enjoyed his monthly Fire & EMS Law newsletters since 2018 might contribute. Click here to donate the Bennett Family Scholarship Fund
  Professor Bennett has announced my retirement, effective 5/1/2022, but plans to return as Emeritus Prof. and continue to teach Political & Legal Foundations and also continue to write Fire & EMS Law newsletters.

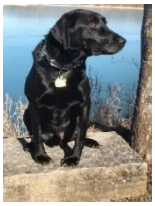
- **TERRORISM & HOMELAND SECURITY.** Prof. Bennett has been appointed to the FESHE [Fire & EMS Higher Education] Board; hopefully this UC course will hopefully soon be a "model" FESHE course taught by universities and colleges in the National Fire Academy recognized program. See these two resources.

  10/4/2021: CHEMICAL FACILITY ANTI-TERRORISM STANDARDS – DuBois Chemical Company: YouTube video of Larry Bennett interview of Andrew Law, VP of DuBois Chemical Co.

  9/18/2021: Seminar: CHEMICAL SAFETY & EMERGENCY RESPONDERS: View detailed information of 2021 Chemical Safety Seminar

- **MENTAL HEALTH:** See 10/2021 Video / Term Paper by one of our students - Peer Support and Columbus Division of Fire

- **PET THERAPY RESPONSE TEAM.** Prof. Bennett serves on the Tri-State Peer Support Team. He is now forming a Pet Therapy Response Team, including his 6-year-old Lab, FRYE, to be dispatched by Hamilton County 911.



Frye Bennett

EIGHT (8) NEW CASES REVIEWED

File: Chap. 1

NY: FDNY FIRE INSPECTOR – RIGHT TO "GO PUBLIC" ABOUT WHAT HE BELIEVES IS FALSE REPORT - FF LODD / MOVIE FILMED – LAWSUIT REINSTATED

On Oct. 6, 2021, in Scott P. Specht v. The City of New York, Thomas Kane, and John David Lynn, the U.S. Court of Appeals for Second Circuit (New Yok City), held (3 to 0) that the retired fire marshal's lawsuit for First Amendment retaliation is reinstated.

> "Appellant Scott P. Specht, employed as a New York City fire marshal, alleges that after he refused to file a false report concerning the circumstances of a fire he was investigating and publicly discussed misconduct on the part of his supervisors, he was the subject of retaliation. *** "He concluded that the movie crew had improperly installed high-intensity lighting and had drilled holes in the wall, floors, and ceilings of the basement of the brownstone and that this work had caused the fire. Specht alleges that about three weeks into his investigation, [Chief Fire Marshal Thomas] Kane and [Assistant Chief Fire Marshal John David] Lynn convened a meeting at FDNY headquarters where they demanded that he prematurely terminate his work and ordered him to file a final report concluding that a flue connected to the boiler caused the fire."

Facts:

When the lawsuit was originally dismissed in 2020, the New York Daily News reported (Dec. 18, 2020):

> "Scott Specht was lead fire marshal looking into the cause of the March 22, 2018 blaze that killed firefighter Michael Davidson in a 100-year-old building on St. Nicholas Ave. near W. 149th St. The building was being used as a movie set for the Edward Norton and Alec Baldwin movie 'Motherless Brooklyn.' Davidson, 37, was overcome by toxic smoke when he ran out of air, trapped inside the cluttered basement. *** Specht had alleged that senior officials in the Bureau of Fire Investigation tried to coerce him into agreeing that a malfunction in the boiler flue caused the blaze, the lawsuit claimed. *** Specht has said though he initially agreed with the findings, he changed his mind after learning more about alterations to the former St. Nick's jazz club in the building basement, and lighting used by the movie company."

Legal Lesson Learned: Fire Inspectors are protected from retaliation under the First Amendment when their speech deals with a matter of "public concern."

> Note: See this March 24, 2018 TV video on death of FDNY FF Michael Davidson

File: Chap. 2

WI: AIR CARE HELICOPTER CRASH – ALL KILLED – PILOT MAY HAVE FALLEN ASLEEP – LAWSUIT MAY PROCEED

On Oct. 8, 2021, in Lindsey Ward, Personal Pepresentative of Estate of Klint Mitchell, et al. v. Air Methods Corporation, et al., U.S. District Court Judge William M. Conley, Western District

of Wisconsin, denied the defense motion to dismiss, holding that there is evidence of pilot fatigue.

> "Plaintiffs allege that Air Methods knew, or should have known, that Caruso would be too fatigued to transport patients and the medical team safely, and it should now be held liable for Mr. Mitchell's death…. Accordingly, plaintiff's claim for wrongful death based on defendant's alleged negligent entrustment states a claim and will not be dismissed at the pleading stage either."

Facts:

> "On April 26, 2018, a helicopter ambulance owned and operated by defendant Air Methods Corporation crashed in Hazelhurst, Wisconsin. Among the three people killed in the crash was critical care flight nurse Klint Mitchell.
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> Air Methods is a helicopter operator that provides emergency medical services. Married couple Rico and Lisa Caruso were both employed by Air Methods as helicopter pilots. On the afternoon of April 25, 2018, the Carusos returned to their home in Watersmeet, Michigan, after a weeklong vacation in Florida with their two infant daughters. The day after their return, the Carusos were scheduled for back-to-back shifts, with Lisa Caruso's shift set for 5:00 a.m. until 5:00 p.m. on April 26, 2018, and Rico Caruso's shift set for 5:00 pm on April 26, 2018, until 5:00 a.m. the next day.
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> Rico arrived for his shift early, around 4:15 p.m. He successfully piloted three flights and departed on his fourth of the night at 9:07 p.m. from the Dane County Regional Airport in Madison, Wisconsin. At the time, there were no clouds, winds were calm, and visibility was ten miles. Beginning around 10:15 p.m., Rico began exhibiting signs of fatigue. At 10:43 p.m. and 12 seconds, the artificial horizon indicator on the helicopter showed the initiation of a right bank, after which the roll rate increased rapidly, the helicopter completely inverted, and began to pitch down. At 10:43 p.m. and 28 seconds, the helicopter struck a 70 foot tall tree and crashed to the ground. Flight nurse Klint Mitchell and paramedic Gregory Rosenthal were killed in the crash along with Rico Caruso.
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> An autopsy of Caruso neither suggested that he suffered from any medical condition nor that it was a cause of the crash. Rather, plaintiffs allege that the crash was caused by Caruso falling asleep."

Legal Lesson Learned: Fatigue can be a serious factor, not only for pilots, but also fire & EMS personnel.

Chap. 4 – Incident Command, incl. Training, Drones, High Tech

Chap. 5 – Emergency Vehicle Operations

File: Chap. 6, Employment Litigation

OH: CLEVELAND LOCAL 93 – PUBLIC RECORDS - CHIEF'S E-MAILS - FOUR DOC. WERE NOT "ATTY-CLIENT PRIVILEGED"

On Oct. 7, 2021, in Association of Cleveland Fire Fighters IAFF Local 93 v. City of Cleveland, Department of Law, 2021 Ohio 3602 (Ohio App. 2021), the Court of Appeals of Ohio, 8th District, Cuyahoga County, held (3 to 0) that the four e-mails marked "Attorney-Client Privileged" relative to an early morning fire that had occurred in the city on January 26, 2020 were in fact, after in camera review, not privileged. The Ohio Court of Claims granted Local 93's public-records request for emails that city of Cleveland Fire Chief Angelo Calvillo ('Chief Calvillo' or 'the Chief') sent, received, and was copied on from January 26, 2020, through February 5, 2020, including four marked "Attorney-Client Privileged."

> "Upon review, the first three subject emails did not fall squarely within the attorney-client privilege. They did not seek any kind of legal advice. For example, the one email naming Menzalora as the primary recipient related to a scheduling matter.
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> The fourth email that was from Chief Calvillo to the Assistant Chief, Division of Fire, is the trickiest. Although Menzalora was copied on the email, the greeting of the email was solely to the Assistant Chief, and the body asked only for the Assistant Chiefs review of a document…. Further, the header in the subject line of the emails that they were 'Attorney-Client privilege' do not make them so. The content of the emails has to involve attorney-client-privileged information, and our de novo review shows that they did not contain privileged information.
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> ***
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> Upon review, we decline to award attorney fees to Local 93. The record does not demonstrate that the city 'obviously filed the appeal with the intent to either delay compliance with the Court of Claims' order from which the appeal is taken for no reasonable cause or [to] unduly harass' Local 93."

Facts:

> "On October 5, 2020, the city notified Local 93 that it had identified documents responsive to its request and that Local 93 could view the records through the city's document management system, GovQA. The records consisted of two audio files; 153 pages of emails with redactions for medical information and motor-vehicle license information; and four emails that were completely redacted based on the attorney-client

privilege, with an attached redaction log. The four redacted emails are the subject matter of this appeal.

***

The city's claim of attorney-client privilege was rooted in emails involving William Menzalora ('Menzalora'), who, at all relevant times, was the city's Chief Assistant Director of Law, Division of Public Safety. Three of the four emails at issue were sent on January 26, 2020, and the fourth was sent the following day, January 27. All four emails were relative to an early morning fire that had occurred in the city on January 26, 2020.

***

In *Leslie*, [105 Ohio St.3d 262, 2005-Ohio-1508, 824 N.E.2d 990] the Supreme Court of Ohio set forth an eight-part test for the attorney-client privilege, stating:

> Under the attorney-client privilege, '(1) [w]here legal advice of any kind is sought (2) from a professional legal adviser in his [or her] capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his [or her] instance permanently protected (7) from disclosure by himself [, herself,] or by the legal adviser, (8) unless the protection is waived….' Except under circumstances not relevant here, only the client can waive the privilege."

Legal Lesson Learned: The burden is on the City to prove the documents meet the Attorney-Client Privilege. Judges [or in Ohio, Special Masters with Ohio Court of Claims] will normally conduct an in camera review of the documents claimed to be privileged, and then seal the documents for review by Court of Appeals.

Chap. 7, Sexual Harassment

NY: FDNY "CALENDAR GIRL" – LAWSUIT DISMISSED – NO PROOF OF DISCRIMINATION BY HER FEMALE SUPERVISOR

On September 21, 2021, in Margot Loth v. City of New York, U.S. District Court Judge George B. Daniels granted the City's motion for summary judgment. In 2019, plaintiff was featured in the NYFD's "Calendar of Heroes."

> "With regards to the 'calendar girl' moniker, Plaintiff [EMT] argues that Tiberi's [Captain Donna Lynn Hannon Tiberi] 'inherent reference to [Plaintiffs] gender' and the fact that the comment was used in a 'disparaging' manner, is sufficient to give rise to an inference of discrimination. (Pl.'s Opp. 19.) However, the mere fact that Plaintiffs gender was mentioned is insufficient to establish an inference of discrimination…. Therefore, Plaintiff has failed to plausibly allege that Tiberi's reference to Plaintiff as 'calendar girl' supports an inference of discriminatory animus."

Facts:

> "Plaintiff began working for Defendant as an EMT on February 14, 2011…. In October 2013, Plaintiff accepted a position as a Hazardous Materials instructor…. In February of

2014, Plaintiff began accepting overtime assignments to drive FDNY chiefs…. In May of 2014, Plaintiff returned to a regular tour on a truck…. Plaintiff started working at the FDNY Station 47 in Far Rockaway in October 2015.
***
Plaintiff alleges that from 2018 through 2020, Captain Donna Lynn Hannon Tiberi committed various acts of discrimination and retaliation against Plaintiff. In March 2018, Tiberi issued Plaintiff and her male partner a Warned and Admonished notice arising from an unspecified work incident the night before…. As Plaintiff and her partner left Tiberi's office, Tiberi followed them out of her office and called Plaintiff 'disrespectful' and a 'terrible person.
'
***
The Verified Complaint alleges, in relevant part, that on December 19, 2019 Plaintiff attended a BITS investigation meeting. (VC ¶ 53.) At the meeting, the parties discussed the open BITS cases against Plaintiff (*Id.* ¶ 53) The disciplinary charges discussed included: (1) Plaintiff's failure to report for duty on November 4, 2018; (2) Plaintiff's failure to monitor radio frequency while on tour with her partner on December 12, 2018, failing to return to the station on time at the end of her tour, and being found by other crew members sent out to look for Plaintiff "in a reclined position"; and (3) Plaintiff's failure to cancel or report for a prescheduled overtime shift on January 6, 2019. (Charging Document 3.) To resolve the open BITS cases, Plaintiff "signed a stipulation to have three days of annual leave removed to have her AWOL charge from January 6, 2019 charge dropped and proceed with her progression into medic school." (*Id.*) The agreement also included language waiving Plaintiff's right to sue regarding the charges resolved by the agreement, and language stating that the agreement had been entered into "knowingly, intentionally, without coercion, duress or undue influence...[.]" (Stipulation Agreement).

***
The allegations plead do not show that the terms and conditions of her employment materially changed based on discriminatory acts alleged.

***
Defendants' motion to dismiss the Verified Complaint, (ECF No. 16), is GRANTED. The Clerk of Court is directed to close the motion and the case accordingly."

Legal Lesson Learned: Plaintiff failed to prove her employment was "materially change: based on discipline imposed by her Supervisor.

Note: See the Oct. 4, 2021 article, "Judge dismisses federal gender discrimination suit of FDNY EMT who posed for calendar." In a prior posting on the FDNY Foundation's Facebook page, Loth spoke about her reasons for posing for the calendar. 'I know some very strong and beautiful women from the previous calendars, and they were such an inspiration to me,' she said. 'We are a force to be reckoned with in this department. We are comfortable with our skills, strong, confident, and we look out for each other. We are opening doors and breaking glass ceilings, and I am proud to be a part of it.'

Google search will show plaintiff's calendar photo.

File: Chap. 8, Race Discrimination

MI: FF OF ARAB DISSENT – IMAGES OF CAMEL / SLURS - HOSTILE WORK ATMOSPHERE – LAWSUIT REINSTATED

On Sept. 16, 2021, in Richard Cadoura v. Flat Rock Fire Department, et al., the State of Michigan Court of Appeals, held (3 to 0), in an unpublished decision, that trial court judge improperly dismissed the lawsuit because of "simple teasing" during the firefighter's 15 months of probation with the fire department. The Court of Appeals strongly disagreed.

> "In this case, plaintiff presented evidence sufficient to create a genuine issue of material fact regarding whether there was an intimidating, hostile, and offensive work environment. There was documentary evidence of the text message with an image of a camel, the questioning of plaintiff's parentage in regard to his son, the 'sand n****r' slur, the playing of Arabic music over the firetruck's PA system on multiple occasions, the beheaded camel figurine with an American flag stuck in it, and the references to towels being used for cleaning and not to wear on one's head. In conjunction with that evidence, there was plaintiff's testimony regarding his work conditions and his claimed mistreatment and harassment by full-timers and by Sergeant Rose, as well as his testimony that AFC Hammond and Fire Chief Vack did nothing to address or alleviate the toxic environment. We conclude that the trial court erred by determining as a matter of law that there was no hostile work environment."

Facts:

> "Plaintiff describes himself as an Arab American—he is an American citizen of Palestinian and Middle-Eastern descent. Plaintiff, a licensed and seasoned paramedic, began working as a firefighter for the fire department in December 2016, and he was terminated during the early evening hours of March 23, 2018.
>
> There was evidence that plaintiff failed to complete a probationary training program despite several reminders and opportunities to do so and that he had also acted in an insubordinate manner toward Sergeant John Rose the night before and morning of the day of his firing. The probationary-program failure and the two acts of insubordination were the reasons given by Assistant Fire Chief (AFC) Mark Hammond for plaintiff's termination.
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> ***
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> Plaintiff testified that during his 15-month tenure with the fire department, a firefighter sent a group text message of an image of a camel with a caption stating, 'This is how [plaintiff] responds to the call backs.' This same firefighter also questioned the parentage of plaintiff's son because of the child's darker skin tone. Additionally, according to plaintiff, the firefighter referred to plaintiff as a 'sand n****r.' On at least five occasions when plaintiff was driving the firetruck for his training time, Arabic music was blasted over the firetruck's PA system by a coworker. Plaintiff testified that AFC Hammond

witnessed the conduct regarding Arabic music, laughed about it, pulled out his cell phone and recorded it, and shared it on social media. Another firefighter gave plaintiff a camel figurine that plaintiff placed in his station mailbox, and a week or two later plaintiff found the figurine with its head and legs chopped off and an American flag sticking out of it. Plaintiff further testified that when he washed towels for his unit, his coworkers told him that towels were for cleaning and not to wear on one's head. Plaintiff also indicated that a fellow firefighter informed plaintiff that the firetruck was not a camel.

***

The trial court concluded that the circumstances did not 'ris[e] to a level of a hostile work environment.' The court explained:

'Simple teasing, offhand comments, and isolated incidents unless extremely serious will not amount to discriminatory charges in the terms and conditions of the employment. . . .

.

Plaintiff does put forth incidents troubling, teasing and his testimony establishes, his own testimony establishes that it did not amount to a change in terms and conditions of this employment.

And Plaintiff from the music playing and the gift and a text of a camel doesn't rise to a level under the standard put forth in the applicable statutory and court precedent to show a hostile environment and no adverse employment action based on race.'

***

We conclude that the trial court erred by determining as a matter of law that there was no hostile work environment."

Legal Lesson Learned: Firefighters must understand that their acts of "simple teasing" can be very harmful, and officers have an obligation to prevent a hostile work atmosphere.

Chap. 9 – Americans With Disabilities Act

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

Chap. 11 – Fair Labor Standards Act, incl. Equal Pay Act

Chap. 12 – Drug-Free Workplace

File: Chap. 13

NY: DEF. STRUCK EMT WITH CLOSED FIST – FELONY PLED DOWN DISORDERLY – DEF. MUST GET COVID VACCINATION

On Oct. 6, 2021, in The People of State of New York v. D.R., Criminal Court of the City of New York, Bronx County (Judge Jeffrey M. Zimmerman) issued a written opinion confirming his order that the defendant get a COVID vaccination as a condition of his accepting plea of guilty and conditional discharge from any imprisonment. Defendant was originally charged with a Class C felony, then offered plea to lesser Class D felony, then offered plea to misdemeanor, and then finally to a non-criminal Disorderly Conduct [which he accepted]. Judge agreed, but only if he produced proof of COVID vaccination.

> "The defendant was charged with assaulting an EMS worker, thus placing his own interests and aggressions above those of public safety employees and society as a whole. As this Court made clear at sentencing, by mandating proof of vaccination, it was giving the defendant the opportunity to engage in an activity that would do exactly the opposite, allowing him to experience the sense of community and well-being that comes with doing something that benefits others (tr at 7). There is absolutely nothing punitive about the condition, since the vaccine has been demonstrated to be safe and effective by the FDA, and by the real-life trial of hundreds of millions of doses administered around the world…. Footnote 4: "It goes without saying that the Court would not have imposed this condition had the defendant pointed to any medical conditions he had that made the vaccine unsafe for him. He did not do so."

Facts:

> Plea bargain:
> "The Court asked the People why the offer had changed from a felonious assault to a violation, and why the People believed the violation was an appropriate offer. They responded that 'there was [sic] minimal injuries,' that 'the defendant has a limited criminal history,' and that 'the complaining witness was ok with this disposition' (tr at 4). The Court pointed out that the minimal injury and the defendant's record were both known to the People when they were insisting on the felony plea (Id.). The People's only response was that the victim 'became OK with this offer' (tr at 5).
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> Footnote 1. For those readers practicing in other jurisdictions in the State, this 'offer keeps getting better" progression might seem unusual. Not so in the Bronx. In the Hall of Justice, prosecutors frequently don't make their 'best offer' up front, and the defense bar knows that defendants have a good chance of getting a more generous offer as time goes on. This uniquely inefficient Bronx Tale increases the arraignment-to-disposition time of hundreds of cases that are left to wither and die in the 'F' parts like so many un-watered plants, resulting in unnecessary court appearances for defense attorneys, defendants, court staff, judges and the ADA's themselves."

Legal Lesson Learned: The plea deal offered reflects the reality of how numerous criminal cases are handled in a very busy Bronx court. Requiring a COVID vaccination is a novel way for a Court to accept a plea deal.

File: Chap. 15 – CISM / PEER SUPPORT

PA: PET THERAPY DOG – IN COURT TO COMFORT 13-YEAR-OLD AUSTIC CHILD – WITNESS TO A MURDER

On September 22, 2021, in Commonwealth of Pennsylvania v. Sheron Jalen Purnell, the Supreme Court of Pennsylvania (Middle District) held (7 to 0) that judge properly allowed the comfort dog in the courtroom, and upheld jury verdict of guilty of third-degree murder and sentence of 20.5 to 47 years of imprisonment.

> "We granted allowance of appeal in this matter to consider the appropriate test to apply to a trial court's determination concerning whether a witness in a criminal case may utilize a 'comfort dog' for support during his or her trial testimony. We hold that a trial court should balance the degree to which the accommodation will assist the witness in testifying in a truthful manner against any possible prejudice to the defendant's right to a fair trial. Here, the trial court allowed a witness to testify with the assistance of a comfort dog, and the Superior Court concluded that the trial court did not abuse its discretion in this regard. For the reasons stated below, we agree with the Superior Court and, therefore, affirm that court's judgment.
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> The court noted that: (1) its legal reasoning for allowing the dog to be present could be found on the record; (2) the dog was situated under the witness box prior to the jury entering the courtroom and could not be seen by the jury, and (3) it provided instructions to the jury concerning the presence of the dog."

Facts:

> "On October 3, 2016, Kevin Jalbert ('Victim') was shot seven times in Coatesville, Pennsylvania, and died as the result of the shooting. Several persons witnessed the incident, including Justin Griest and A.H.
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> > Footnote 1: A.H. was 13 years old at the time of the shooting.
>
> Pertinent to the instant appeal, the Commonwealth requested that a 'comfort dog' be present during A.H.'s trial testimony.… The motion explained that a sheriff's deputy would transport the comfort dog, Melody, to the court and that the dog would enter the courtroom before the jury's entrance.
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> On November 19, 2018, the trial court held a hearing on several motions, including those described above. During the course of that hearing, it was revealed the A.H. is autistic…. In addition to explaining its motion regarding the comfort dog, the Commonwealth noted that the dog was trained for the purpose of accompanying witnesses in court.
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> The trial court further explained that the dog would be hidden under the witness stand but that it nonetheless was likely that the jury would notice the dog. Id. at 6. The court announced the manner in which it would manage the situation as follows:

> Therefore, the plan will be for the sheriff handler assigned to Melody out of the presence of the jury to walk into the courtroom with the witness, with Melody, they'll be situated together on the witness stand. The witness will not be called to the stand. She'll be in the stand when the jury arrives in the courtroom, just like Mr. Griest was for a different reason yesterday. So the jury has participated in that circumstance where a witness has already been on the stand when they come into the courtroom. And the sheriff handler will stand to the side of the witness box, just like we've had numerous uniformed sheriffs in this courtroom throughout the trial, so that won't be of any particular note to the jury, I wouldn't think. And if I understand from the sheriff handler that Melody if she gets excited has a pretty strong tail wag, so it wouldn't surprise me if there was some tail banging on the jury box, and I'll just simply make a reference to Melody that - I'm not sure what I'll say - glad to know she's still alive or something to that effect.

CONCLUSION
For the reasons explained above, we conclude that trial courts have the discretion to permit a witness to testify with the assistance of a comfort dog. In exercising that discretion, courts should balance the degree to which the accommodation will assist the witness in testifying in a truthful manner against any possible prejudice to the defendant's right to a fair trial and employ means to mitigate any such prejudice."

Legal Lesson Learned: Great decision! Dogs can also comfort emergency responders.
See article: "Comfort Dogs Allowed For Some During Criminal Trials, PA Supreme Court Rules (9/22/2021)."

File: Chap. 16, Discipline

VA: FF FIRED AFTER ARREST D.C. – RALLY AGAINST TRUMP – FIRE CHIEF DIDN'T HOLD PRE-TERMINATION HEARING

On Sept. 30, 2021, in Rosa Roncales v. Anthony McDowell, et al., United States District Court Judge Harnah Lauck, Eastern District of Virginia, denied the Fire Chief's motion for summary judgment; while he met with her on day of her termination, he didn't offer her a pre-termination hearing. After her arrest, she was interviewed by County of Henrico Division of Fire officers on three occasions, who after talking with a D.C. Police detective, asked her whether she had a gas mask in her back pack, and whether she covered up the back pack labels with black tape to avoid identification.

> "The parties do not contest that Fire Chief McDowell failed to provide Roncales with a pre-termination hearing. And because Roncales presents evidence sufficient for a jury to reasonably find that Fire Chief McDowell's statements [in termination letter and memo to County Manager about her lack of honesty] deprived her of a liberty interest, any such deprivation therefore occurred 'without due process of law….' Because Roncales's right

to a pre-termination hearing was clearly established at the time of his actions, Fire Chief McDowell is not entitled to qualified immunity on Roncales's due process claim."

Facts:

"On January 20, 2017, Roncales and her domestic partner, Emeline Phipps, participated in a large political march and rally in Washington, D.C. in opposition to the inauguration of Donald Trump…. Roncales spent 37 hours in jail following her arrest…. The D.C. Metropolitan Police Department later dismissed with prejudice the criminal charges against Roncales.

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The dispute in this case centers on Roncales's statements during the January 30, February 7, and April 4 interrogations. For instance, the parties dispute whether Roncales was truthful when she denied having a 'gas mask' with her at the march…. Roncales argues that she originally did not include the respirators among the items she carried in her backpack because she could not recall whether the respirators were in her backpack or Phipps's backpack…. She also declares that she truthfully said she did not have a gas mask because she had a respirator, which differs from a 'gas mask.'

Also, the parties disagree as to whether Roncales acted deceitfully in failing to tell investigators that she had covered logos on her clothing…. Defendants argue that Roncales did not inform the investigators that she covered logos on her clothing or intermittently covered her face with a scarf…. Roncales contends that she informed the investigators that she chose her clothing to match a 'uniform' and remain anonymous, and that she was never asked about covering her face and therefore was not untruthful in omitting this information.'

***

The record shows that Fire Chief McDowell made two statements sufficiently stigmatizing to support a Fourteenth Amendment claim. First, in the Termination Letter, Fire Chief McDowell informed Roncales that he had terminated her employment because of her perceived 'material omissions and failure to be forthcoming during the investigation.' Second, Fire Chief McDowell sent an email to County Manager John Vithoulkas, County Attorney Lee Ann Anderson, and Human Resources Director Paula Reid on April 4, 2017, saying that Roncales was terminated because she 'admitted to being dishonest during the investigation,' 'made other statements that confirmed she violated the public trust and her oath of office,' and 'tarnished the reputation of this organization."

Legal Lesson Learned: Provide a pre-termination hearing, record the session so there is recorded evidence of any admissions.

Note: See TV video on two fires that occurred on Jan. 26, 2020. "59-year-old woman loses life after house goes up in flames on Cleveland's West Side, 3 adults and 4 children safely out."

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

Chap. 18 – Legislation